



JAMES K. RUBLE SEMINAR

Ruble Graduate Seminar

IA&B of PA MD DE
March 8-9, 2022

James K. Ruble Seminar

Ruble Graduate Seminar

March 08-09,2022 • IA&B of PA MD & DE Webinar

Tuesday, March 8, 2022

7:45 AM - 8:00 AM

Join Webinar

8:00 AM - 12:00 PM

Section 1

Personal Lines Troubles and Solutions
Steven Lyon

8:00 AM - 12:00 PM

Section 2

Commercial Property Concepts Your Client Will Be Glad You Understand
Cathy Trischan

12:00 PM – 1:15 PM

Lunch

1:15 PM – 5:15 PM

Section 3

Projecting Ethics into a Competitive Advantage
Steven Lyon

1:15 PM – 5:15 PM

Section 4

Commercial Liability Endorsements To Watch Out For
Cathy Trischan

Wednesday, March 9, 2022

7:45 AM - 8:00 AM

Join Webinar

8:00 AM - 12:00 PM

Section 5

Policy Formation, Interpretation & Indemnity Principles
Craig Stanovich

12:00 PM - 1:15 PM

Lunch

1:15 PM – 5:15 PM

Section 6

Employment-Related Practices Insurance
Craig Stanovich

Faculty

Steven Lyon, CIC, CRM, CPCU, ARM, AAI, CRIS
Lyon Consulting Services, LLC

Cathy Trischan, CIC, CRM, CPCU, ARM, AAI, AU, CRIS, MLIS, TRIP
E&K Insurance Group

Craig Stanovich, CIC, CRM, CPCU, AU
Austin & Stanovich Risk Managers, LLC

Educational Consultant

Dan Lawyer, CIC, CSRM, CPCU

JAMES K. RUBLE SEMINAR
Ruble Graduate Seminar
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5 — POLICY FORMATION, INTERPRETATION & INDEMNITY PRINCIPLES

6 — EMPLOYMENT-RELATED PRACTICES INSURANCE



A Letter from William J. Hold, President/CEO

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Let's take the first step.

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



James K. Ruble Seminar

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Section 1

Personal Lines Troubles and Solutions

RUBLE GRADUATE SEMINAR



PERSONAL LINES TROUBLES and SOLUTIONS

April 2019

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Legal Disclaimer

The information provided and statements made in this seminar / panel discussion are for informational purposes and is not intended as legal or other professional advice. Please procure the appropriate legal or other professional advice and services to address your individual circumstances. There is no representation, guaranty or warranty made as to the sufficiency or accuracy of the information provided. Any legal cases discussed or cited, may or may not be enforceable and/or valid in your jurisdiction. The opinions and views expressed by the instructor or panel members do not necessarily reflect the opinions and views of any sponsor.

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 than 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?

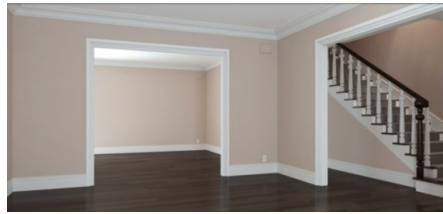
B. "Insured" as used in this Part means: PP 00 01 (0918)

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



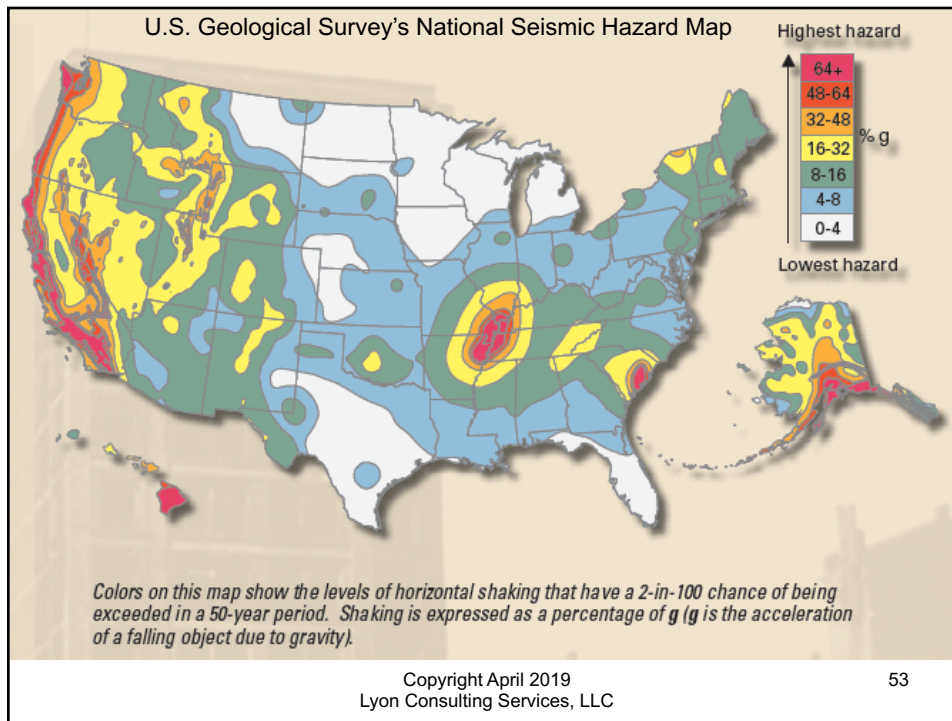
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- **Earthquakes have occurred in 39 states since 1900, and about 90% of Americans live in areas considered seismically active. Yet only a small percentage of people purchase earthquake insurance.**

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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"> Alabama Colorado Connecticut Delaware Georgia Maine Maryland Massachusetts Mississippi New Hampshire New Jersey New York North Carolina Ohio Oklahoma Pennsylvania Rhode Island Texas Vermont Virginia West Virginia 	<ul style="list-style-type: none"> American Samoa Arizona Arkansas Illinois Indiana Kentucky Missouri New Mexico Puerto Rico South Carolina Tennessee Utah 	<ul style="list-style-type: none"> Alaska California Commonwealth of Northern Mariana Islands Guam Hawaii Idaho Montana Nevada Oregon Virgin Islands Washington Wyoming
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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.

Source: AIR Worldwide Corporation.
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POLICY NUMBER:

HOMEOWNERS
HO 04 54 05 11

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EARTHQUAKE

SCHEDULE

Earthquake Deductible Percentage Amount:

Exterior Masonry Veneer Exclusion 1.

☐ Check here only if this exclusion does not apply.

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section I – Property Coverages

The following is added:

1. 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.

2. 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:

- (1) Caused by;
- (2) Resulting from;
- (3) 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:

1. We will pay only that part of the total of all loss payable under all Section I – Property Coverages, except:

- a. Coverage D; and
- b. The Additional Coverages; that exceeds the earthquake deductible described in Paragraph B.2.

2. The dollar amount of the earthquake deductible is determined by multiplying either the:

- a. Coverage A; or
- b. 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:

1. Earthquake; or
2. 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.

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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.

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“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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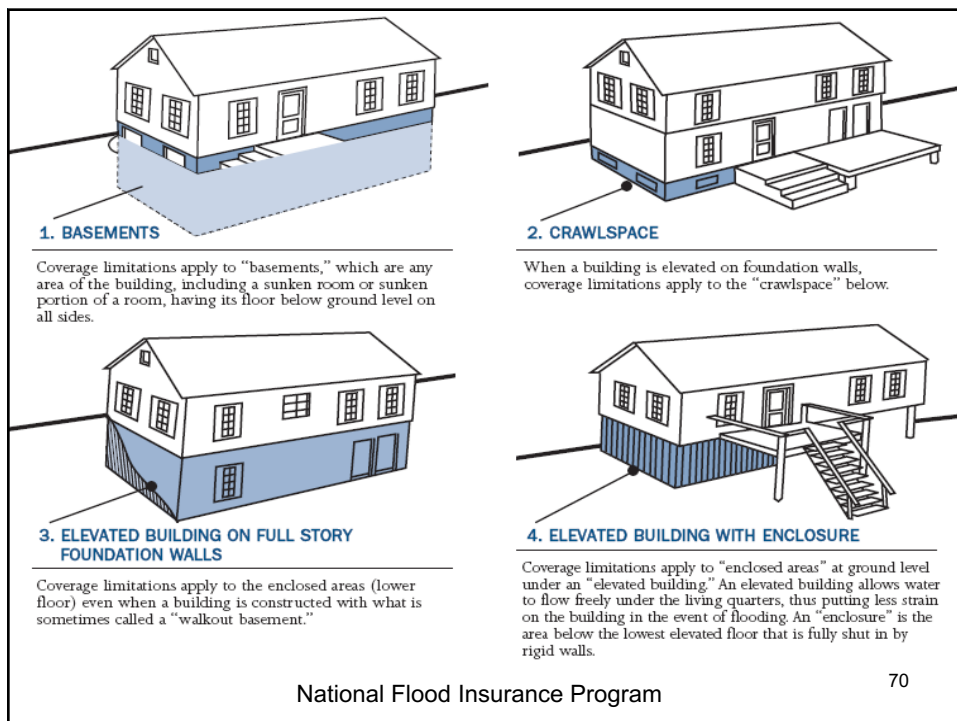
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Three Types of Buildings

- 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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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 *	<u>\$ 84,000 (20%)</u>

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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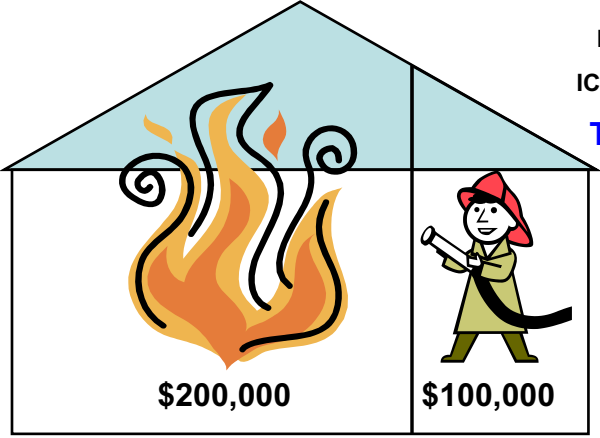
BUILDING ORDINANCE and LAW COVERAGE

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



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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

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)

EXCLUSIONS

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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	<p>POLICY NUMBER: PERSONAL AUTO PP 03 06 09 18</p> <p>THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.</p> <p>EXTENDED NON-OWNED COVERAGE – VEHICLES FURNISHED OR AVAILABLE FOR REGULAR USE</p> <p>SCHEDULE</p> <p><small>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.</small></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 style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Extended Non-owned Coverage</th> <th style="text-align: right;">Premium</th> </tr> </thead> <tbody> <tr> <td>Liability</td> <td style="text-align: right;">\$</td> </tr> <tr> <td>Medical Payments</td> <td style="text-align: right;">\$</td> </tr> <tr> <td>Total Premium</td> <td style="text-align: right;">\$</td> </tr> </tbody> </table> <p><small>Information required to complete this Schedule, if not shown above, will be shown in the Declarations.</small></p> <div style="display: flex; justify-content: space-between; font-size: small;"> <div style="width: 48%;"> <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>I. Extended Non-owned Coverage</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>II. Part A – Liability Coverage</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> </div> <div style="width: 48%;"> <p>B. We will provide Liability Coverage for any vehicle, other than "your covered auto", which is furnished or available for the regular use of the named individual.</p> <p>III. Part B – Medical Payments Coverage</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> </div> </div>	Extended Non-owned Coverage	Premium	Liability	\$	Medical Payments	\$	Total Premium	\$	
Extended Non-owned Coverage	Premium									
Liability	\$									
Medical Payments	\$									
Total Premium	\$									
	<p>PP 03 06 09 18 © Insurance Services Office, Inc., 2017 Page 1 of 1</p>									

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.

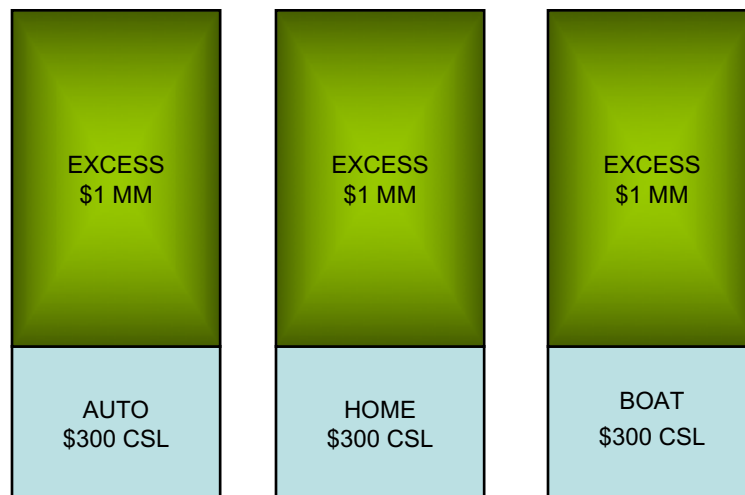
Important Basic Policy Definitions:

- **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



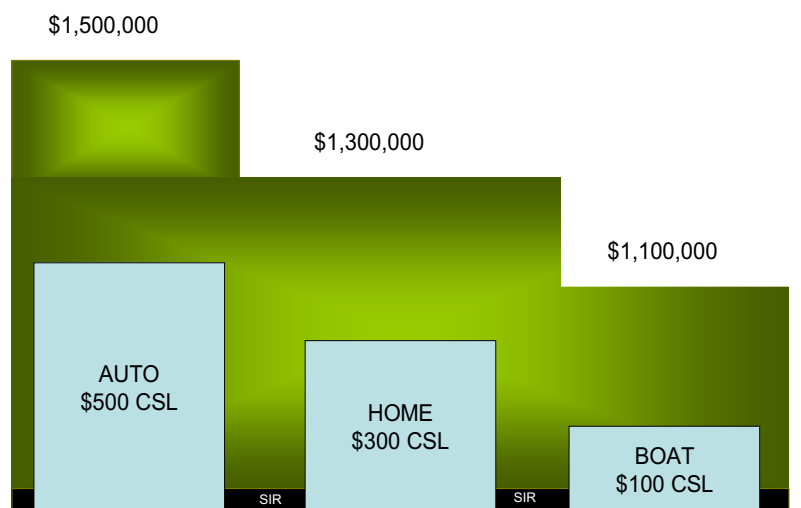
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True Personal Umbrella Policy

- 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



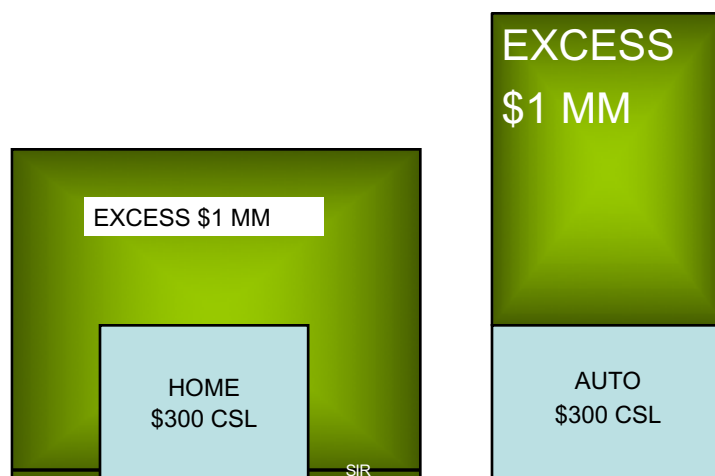
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“Hybrid” Personal Liability Policy

- 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)

EXCESS
\$1 M

\$500 CSL

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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:	\$250,000 Bodily injury each person \$500,000 Bodily injury each accident \$ 25,000 Property damage each accident \$300,000 each accident
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 charts 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. You 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-UM:
 - 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)



James K. Ruble Seminar

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Section 2

Commercial Property Concepts Your Client Will Be Glad You Understand

Commercial Property Concepts Your Client Will Be Glad You Understand

Catherine Trischan, CPCU, CIC, CRM, ARM, AU, AAI, CRIS, MLIS, TRIP
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Valuation

Valuation

Common Valuation Methods

- Replacement Cost
- Actual Cash Value
- Selling Price
- Functional Valuation

Coinsurance

- Limit chosen must satisfy coinsurance at the time of loss
- Agreed Value suspends coinsurance

Replacement Cost

- The cost to repair/replace the damaged property with property/materials of like kind and quality in today's dollars - There is no deduction for depreciation.
- Replacement Cost \neq Reconstruction Cost
 - Rebuilding something is usually more costly than building it new.
 - The policy pays to repair/rebuild the damaged part of a building/structure.
 - Setting aside the issue of depreciation, the policy pays to return the damaged part of a building/structure to its pre-loss condition.

Replacement Cost

Building and Personal Property Coverage Form CP 00 10 10 12

We will not pay on a replacement cost basis for any loss or damage:

(1) Until the lost or damaged property is actually repaired or replaced; and

(2) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage.

Replacement Cost

What if the insured doesn't have the money to repair or replace the property? Does the insurer have to pay RC?

No - Tamco Corp. v. Federal Ins. Co. of New York

The insured could only recover the depreciation holdback amount upon compliance with the rebuilding and replacement condition expressed in the policy. Until that time, explained the court, the insurer was only obligated to pay the actual cash value.

Yes - Coblentz et ux. V. Oklahoma Farm Bureau Mt. Ins. Co

Insurer, by means of this condition precedent placed Plaintiffs, who lacked the financial wherewithal to replace the property, in a legal "Catch 22." Because Plaintiffs lacked the resources to provide for the loss (which was the purpose of their insurance contract), Insurer was able to compel them to accept the lower actual cash value of the property instead of the full replacement value coverage they expected and for which they paid.

Coinsurance

$$\frac{\text{Limit of Insurance}}{\text{Value of Property at Time of Loss} \times \text{Coinsurance Percentage}} \times \text{Loss}$$

a/k/a

$$\frac{\text{Did}}{\text{Should}} \times \text{Loss}$$

Agreed Value suspends coinsurance. The insurer expects that the limit chosen is correct before agreeing to include Agreed Value.

Do BOPs have coinsurance?

Technically No, but.....

- (b) If, at the time of loss, the Limit of Insurance applicable to the lost or damaged property is less than 80% of the full replacement cost of the property immediately before the loss, we will pay the greater of the following amounts, but not more than the Limit of Insurance that applies to the property:
- (i) The actual cash value of the lost or damaged property; or
 - (ii) A proportion of the cost to repair or replace the lost or damaged property, after application of the deductible and without deduction for depreciation. This proportion will equal the ratio of the applicable Limit of Insurance to 80% of the full replacement cost of the property.

Example

The full replacement cost of property which suffers a total loss is \$100,000. The property is insured for \$70,000. 80% of the full replacement cost of the property immediately before the loss is \$80,000 (\$100,000 x .80 = \$80,000). A partial loss of \$25,000 is sustained. The amount of recovery is determined as follows:

Amount of recovery

$$\$70,000 \div \$80,000 = .875$$

$$.875 \times \$25,000 = \$21,875$$

BP 00 03 07 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

REMOVAL OF INSURANCE-TO-VALUE PROVISION

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS COVERAGE FORM

Paragraph **E.5.d. Loss Payment** Property Loss Condition in **Section I – Property** is amended as follows:

A. Paragraph d.(1)(a) is replaced by the following:

(1) At replacement cost without deduction for depreciation, subject to the following:

(a) We will pay the cost to repair or replace, after application of the deductible and without deduction for depreciation, but not more than the least of the following amounts:

(i) The Limit of Insurance under Section I – Property that applies to the lost or damaged property;

(ii) The cost to replace, on the same premises, the lost or damaged property with other property:

i. Of comparable material and quality; and

ii. Used for the same purpose; or

(iii) The amount that you actually spend that is necessary to repair or replace the lost or damaged property.

If a building is rebuilt at a new premises, the cost is limited to the cost which would have been incurred had the building been built at the original premises.

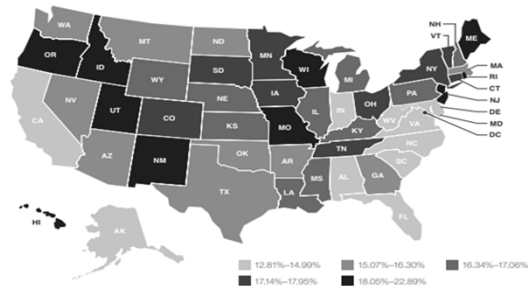
B. Paragraph d.(1)(b) does not apply.

What if values change during the term?

Historic lumber price surge boosts overall reconstruction costs

Total reconstruction costs, including materials and retail labor, rose 16.7% from July 2020 to July 2021, doubling the increase from the April 2020 to April 2021 period, when costs rose 8.1%. Lumber is still the primary factor driving reconstruction costs upward, as prices rose 162.7% year over year. This, too, is double the already historic pace noted in April when prices rose 84.7% between 2020 and 2021. Quarterly costs were up 8.8%, a steep increase from the 1.2% gain in the prior quarter.

Reconstruction costs increased in all states. Idaho, Hawaii, and Maine had the biggest increases at 22.9%, 20.2%, and 19.3%, respectively. Florida had the lowest change at 12.8%. The states mirrored the overall national trend, with the rate of price changes growing by leaps.



Changes in reconstruction costs by state.

States are grouped in quintiles; each range/color in the legend includes 20% of the total number of states.

*All rates, percentages, increases, decreases, etc., are calculated as percentage changes from July 2020 to July 2021, unless otherwise noted.



Changing Values

Inflation Guard

- An optional coverage in CP 00 10 10 12

OPTIONAL COVERAGES Applicable Only When Entries Are Made In The Schedule Below							
Prem. Bldg.		Agreed Value			Replacement Cost (X)		
No.	No.	Expiration Date	Cov.	Amount	Building	Pers. Prop.	Including "Stock"
Inflation Guard (%) *Monthly Limit Of					Maximum Period	*Extended Period	
Bldg.	Pers. Prop.	Indemnity (Fraction)			Of Indemnity (X)	Of Indemnity (Days)	
4%	4%						
*Applies to Business Income Only							

Inflation Guard

Policy effective dates: 1/1/21-22
 Building limit: \$1,000,000
 Inflation guard: 4%
 Date of Loss: 7/1/21
 Number of days since inception: 182
 Limit available $\$1,000,000 \times .04 \times 182/365$
 $= \$1,020,000$

Cost Increases after a Disaster

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 04 09 10 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

INCREASE IN REBUILDING EXPENSES FOLLOWING DISASTER (ADDITIONAL EXPENSE COVERAGE ON ANNUAL AGGREGATE BASIS)

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM

SCHEDULE

Premises Number	Building Number	Additional Expense Coverage Percentage
		%
		%
		%

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

CP 04 09 10 12

Trigger:

- The event that caused the covered loss:
 - Results in declaration of a state of disaster by federal or state authorities, or
 - Occurs in close temporal proximity to the event that resulted in declaration of disaster by federal or state authorities
- Cost to repair or replace damaged property must have increased as a result of the disaster – limit of insurance is inadequate as a result.
- Insured must elect to repair or replace the building to get the additional dollars.

CP 04 09 10 12

The Highlights:

- Percentage on the endorsement is applied to the building limit (adjusted if needed to reflect any coinsurance penalty.)
- In determining compliance with the policy's coinsurance or similar requirement, the increase in expenses attributable to the disaster will be disregarded.
- If insured completed any improvements which increase the RC of the building by 5% or more, the insured must have notified the insurer within 30 days of completion.

Look for Carrier Enhancements

BUILDING EXTENDED REPLACEMENT COST

This endorsement modifies insurance provided under the following:

SPECIAL PROPERTY COVERAGE FORM

Except as otherwise stated in this endorsement, the terms and conditions of the Policy apply.

A. Paragraph 1. of Section C., **LIMITS OF INSURANCE**, is deleted and replaced with the following:

1. For Buildings, if the amount of loss of or damage to a Building in any one occurrence exceeds the Limit of Insurance stated in the Declarations, we will increase the Limit of Insurance to equal the current replacement cost of the Building, subject to a maximum of 125% of the Limit of Insurance stated in the Declarations.

For Business Personal Property, the most we will pay for loss or damage in any one occurrence is the applicable Limit of Insurance shown in the Declarations.

B. The following condition is added to Section F., **PROPERTY GENERAL CONDITIONS**:

Building Extended Replacement Cost Conditions

- a. If we increase the Building Limit of Insurance as outlined in Paragraph C.1., we will adjust the premium for the applicable Building from the time of loss or damage for the remainder of the policy period based on the increased Limit of Insurance.
- b. With respect to the Building Limit-Automatic Increase provision in Paragraph C.2., the date on which the loss or damage occurred will be considered to be the date of a policy change amending the Building limit. This applies regardless of whether the policy change has been processed.
- c. You must notify us within 30 days of completion of construction of any additions, improvements or enlargements which increase the replacement cost of a Building by more than 5%.
- d. If you don't notify us as required by Paragraph c. above, we will apply a penalty equal to the percentage that the replacement cost of the unreported construction bears to the total replacement cost of the Building.
- e. If you elect not to repair or replace the Building after loss or damage, we will pay no more than the actual cash value at the time of loss or damage.

But the bank says I have to carry.....

State Over-Insurance Laws

Example - Florida 626.621 (7)

Grounds for discretionary refusal, suspension, or revocation of agent's, adjuster's, customer representative's, service representative's, or managing general agent's license or appointment. The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, adjuster, customer representative, service representative, or managing general agent, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

(7) Willful over insurance of any property or health insurance risk

But the bank says I have to carry.....

State Over-Insurance Laws

Example - Florida 690-167.009

Mortgage Fire Insurance Requirements Limited

No mortgage lender shall, in connection with any application for a mortgage loan in this state which is secured by a mortgage on residential real estate located in this state, require any prospective mortgagor to obtain by purchase or otherwise a fire insurance policy in excess of the replacement value of the covered premises as a condition for granting such a mortgage.

But the bank says I have to carry.....

State Over-Insurance Laws

Example - NJ Administrative Code 3:1-13.1

(c) No lender shall, in connection with any application for a loan secured by a mortgage on real property located in New Jersey, require any mortgagor to obtain by purchase or otherwise a fire insurance policy in excess of the replacement value of the covered premises as permitted under N.J.S.A. 17:36-5.19 as a condition for granting such mortgage loan.

What if there is something special
about the building?



Murals

- Is the paint covered?
- Is the cost of the artist's time covered?
- If the mural is covered, is it a work of art?
- Is the mural on the National Register of Historic Places?

CP 00 10 10 12

Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Valuation Loss Condition of this Coverage Form.

b. This Optional Coverage does not apply to:

... (3) Works of art, antiques or rare articles, including etchings, pictures, statuary, marbles, bronzes, porcelains and bric-a-brac;

Consider specialized coverage for this exposure.

What is Actual Cash Value?

How does the Building and Personal Property Coverage Form (CP 00 10 10 12) define Actual Cash Value?

It Doesn't!

What is Actual Cash Value?

What most of us learned:

$ACV = \text{Replacement Cost} - \text{Depreciation}$

My refrigerator has a useful life of 10 years.

Five years ago, I purchased my refrigerator for \$3,000.

Today, I can purchase that same refrigerator for \$2,000.

What is the RC of the refrigerator?

\$2,000

What is the ACV of the refrigerator?

\$1,000 (\$2,000 RC - \$1,000 depreciation)

What is Actual Cash Value?

Other Possible Definitions

Fair Market Value

- The difference between the fair market value of the property before and after the loss
- “the amount which in all probability would be arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy.”

Butler v. Aetna Ins. Co. of Hartford, 256 N.W. 214 (ND 1934).

What is Actual Cash Value?

Other Possible Definitions

Broad Evidence Rule

May consider factors such as: market value, RC, physical depreciation, original cost, useful life factors, condition of the property, location, use, intended use, assessed value, offer to sell value, offers to purchase amounts

What is Actual Cash Value?

Some states have helped

Example - Nebraska (IL 01 22 09 07)

"The following is added to any provision that uses the term actual cash value: In our determination of the actual cash value of Covered Property at the time of loss, an adjustment will be made for factors such as depreciation, deterioration and obsolescence."

Example - Pennsylvania (IL 01 66 09 07)

"Actual cash value is calculated as the amount it would cost to repair or replace covered property, at the time of loss or damage, with material of like kind and quality, subject to a deduction for deterioration, depreciation and obsolescence. Actual cash value applies to valuation of covered property regardless of whether that property has sustained partial or total loss or damage. The actual cash value of the lost or damaged property may be significantly less than its replacement cost."

What is Actual Cash Value? Some states have helped

Example - Washington (IL 01 57 07 02)

The term actual cash value means:

- a. When the damage to property is economically repairable, actual cash value means the cost of repairing the damage, less reasonable deduction for wear and tear, deterioration and obsolescence.*
- b. When the loss or damage to property creates a total loss, actual cash value means the market value of property in a used condition equal to that of the destroyed property, if reasonably available on the used market.*
- c. Otherwise, actual cash value means the market value of new, identical or nearly identical property less reasonable deduction for wear and tear, deterioration and obsolescence.*

What is Depreciated?

Estimate to replace a roof damaged in a windstorm - \$25,500

- \$10,000 labor
- \$10,000 materials
- \$4,000 overhead and profit
- \$1,500 tax

Roof has a useful life of 30 years and is 15 years old. What is the ACV of the Roof?

It Depends

Labor Can be Depreciated

Basham v. United Servs. Auto. Ass'n, Civil Action No. 16-cv-03057-RBJ, 2017 U.S. Dist. LEXIS 118729 (D. Colo. 2017)

"[c]overed property, such as a roof, is often the product of both materials and labor. Accordingly, repair and replacement costs comprise the cost of materials (e.g., shingles and nails), and the cost of labor (e.g., roofing contractors). Both the cost of materials and the cost of labor are therefore subject to a depreciation deduction."

Graves v. American Family Mut. Ins. Co., 686 F. App'x 536 (10th Cir. 2017)

"if American Family could depreciate only the cost of materials in determining the actual cash value of Graves' loss, she [the insured] would receive a windfall based on labor costs she never incurred."

Labor Cannot be Depreciated

Adams v. Cameron Mut. Ins. Co., No. CV-13-456, 2014 Ark. LEXIS 10 (2014)

Supreme Court of Arkansas held that the term "actual cash value" was ambiguous, and, therefore, the insurer could not depreciate labor.

Note: In *Shelter Mut. Ins. Co. v. Goodner*, 2015 Ark. 460, 477 S.W.3d 512 (2015), the same court held that the insurer could depreciate labor. That policy expressly provided that "when calculating depreciation, we will include depreciation of the materials, labor, and the tax."

Labor Cannot be Depreciated

Riggins v. American Family Mut. Ins. Co., 106 F. Supp. 3d 1039 (W.D. Mo. 2015)

The policy defined ACV as the cost "to repair or replace property with property of like kind and quality less depreciation for physical deterioration and obsolescence."

Court said "phrase 'for physical deterioration and obsolescence' limits the type [of] depreciation that may be factored into a calculation of 'actual cash value.'" Labor isn't subject to physical deterioration so can't be depreciated.

Some Labor Can be Depreciated

Branch v. Farmers Ins. Co., 311 F.3d 1241 (10th Cir. 2002),

Damages in Question:

- The cost to tear off damaged shingles – Not subject to depreciation
- The labor cost of installing shingles – Subject to depreciation

Depreciation of Sales Tax

CA Ins. Code § 2051(b)(2).

in the "case of a partial loss to the structure, a deduction for physical depreciation shall apply only to components of a structure that are normally subject to repair and replacement during the useful life of that structure."

Johnson v. Hartford Cas. Ins. Co., No. 15-cv-04138-WHO, 2017 U.S. Dist. LEXIS 77482 (N.D. Cal. 2017)

"The sales tax is distinct from the physical items and not subject to 'depreciation' or deduction

What can be depreciated?

Things to Consider:

- What does the policy language say?
- If the policy doesn't specifically allow for labor to be depreciated, are there court decisions in the state?
- If labor can be depreciated, will pure labor items also be depreciated?
 - e.g. Debris removal vs. labor to replace siding
- Are there any state insurance department regulations?

Valued Policy Laws

- In the event of a total loss, the amount of insurance shall be considered the true value of the insured property.
 - In other words – The limit of insurance is paid.
- In most states with valued policy laws, the law applies only to real property.
- The valued policy law may apply only to certain types of real property.
- The valued policy law may apply only to damage by certain perils.

Valued Policy Laws

Example - Florida (627.702)

- Property subject to valued policy law: Any building, structure, mobile home, or manufactured building.
- Perils subject to valued policy law: All perils covered by the policy.
- Other comments/special provisions: Insured may waive valued coverage on mobile home by signing disclosure form accepting ACV or replacement coverage instead. Law applies to multiple policies only if disclosed to insurer; does not apply to completed value builders risk, blanket insurance, or insurance on appurtenant structures with no dollar amount specifically applicable. Insurer may replace property in lieu of payment (except on valued policies on mobile homes) but must return premium on the insurance in excess of the amount paid to replace.

Valued Policy Laws

Example - Texas (Ins. Code 862.053)

- Property subject to valued policy law: All except personal property.
- Perils subject to valued policy law: Fire.
- Other comments/special provisions: A property insurance policy on a totaled building is a “liquidated demand” against the insurer for the full amount of the policy.

What do we pay for?



“But if we just replace the damaged siding, the building won’t look right” says your insured.

What Does the Policy Say?

Building and Personal Property Coverage Form (CP 00 10 10 12)

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

What Does the Policy Say?

Building and Personal Property Coverage Form (CP 00 10 10 12)

4. Loss Payment

a. In the event of loss or damage covered by this Coverage Form, at our option, we will either:

- (1)** Pay the value of lost or damaged property;
- (2)** Pay the cost of repairing or replacing the lost or damaged property, subject to **b.** below;
- (3)** Take all or any part of the property at an agreed or appraised value; or
- (4)** Repair, rebuild or replace the property with other property of like kind and quality, subject to **b.** below.

We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

Note: **b.** below address Ordinance or Law

What Does the Policy Say?

Building and Personal Property Coverage Form (CP 00 10 10 12)

Replacement Cost Optional Coverage

e. We will not pay more for loss or damage on a replacement cost basis than the least of (1), (2) or (3), subject to f. below:

(1) The Limit of Insurance applicable to the lost or damaged property;

(2) The cost to replace the lost or damaged property with other property:

(a) Of comparable material and quality; and

(b) Used for the same purpose; or

(3) The amount actually spent that is necessary to repair or replace the lost or damaged property.

If a building is rebuilt at a new premises, the cost described in e.(2) above is limited to the cost which would have been incurred if the building had been rebuilt at the original premises.

Note: f. below addresses Ordinance or Law

NAIC - UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT PRACTICES MODEL REGULATION

Section 9. Standards for Prompt, Fair and Equitable Settlements Applicable to Fire and Extended Coverage Type Policies with Replacement Cost Coverage

A. When the policy provides for the adjustment and settlement of first party losses based on replacement cost, the following shall apply:

(1) When a loss requires repair or replacement of an item or part, any consequential physical damage incurred in making such repair or replacement not otherwise excluded by the policy, shall be included in the loss. The insured shall not have to pay for betterment nor any other cost except for the applicable deductible.

(2) When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace all items in the area so as to conform to a reasonably uniform appearance. This applies to interior and exterior losses. The insured shall not bear any cost over the applicable deductible, if any.

The Matching Issue

Fla. Stat. Ann. § 626.9744

626.9744 Claim settlement practices relating to property insurance.— Unless otherwise provided by the policy, when a homeowner’s insurance policy provides for the adjustment and settlement of first-party losses based on repair or replacement cost, the following requirements apply:

.....

(2) When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas. In determining the extent of the repairs or replacement of items in adjoining areas, the insurer may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.

.....

The Matching Issue

Wisconsin

Farmers Auto. Ins. Ass’n v. Union Pac. Ry. Co., 768 N.W.2d 596 (Wis. 2009)

“Of like kind and quality” does not mean identical match. If a policy calls for “like kind and quality,” this means something that is reasonably comparable

The Matching Issue

Iowa

Iowa Admin. Code § 191-15.44 (507B)- Standards for determining replacement cost and actual cost values

When a loss requires replacement of items and the replaced items do not match in quality, color or size, the insurer shall replace as much of the item as is necessary to result in a reasonably uniform appearance within the same line of sight. This subrule applies to interior and exterior losses. Exceptions may be made on a case-by-case basis...

The Matching Issue

Watch for insurer language restricting coverage

The Following is Added to E. Property Loss Conditions:

9. Undamaged material We will not pay to repair or replace undamaged material due to mismatch between undamaged material and new material used to repair or replace damaged material. We do not cover the loss in value to any property due to mismatch between undamaged material and new material used to repair or replace damaged material.

Selling Price

Building and Personal Property Coverage Form (CP 00 10 10 12)

7. Valuation

"Stock" you have sold but not delivered at the selling price less discounts and expenses you otherwise would have had.

"Stock" means merchandise held in storage or for sale, raw materials and in-process or finished goods, including supplies used in their packing or shipping.

COMMERCIAL PROPERTY
CP 99 30 06 95

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

MANUFACTURER'S SELLING PRICE FINISHED "STOCK" ONLY

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY

The following is added to the VALUATION Loss Condition:

We will determine the value of finished "stock" you manufacture, in the event of loss or damage, at:

- A.** The selling price, as if no loss or damage occurred;
- B.** Less discounts and expenses you otherwise would have had.

Functional Valuation



Functional Valuation

Functional Building Valuation – CP 04 38 09 17

- Provides means to insure a building to reflect use and not construction
- For use when an insured wouldn't or couldn't replace the building as it is
- Allows the insured to carry a lower limit of coverage if the intention is to replace the building with a less costly structure that is functionally equivalent to the existing one
- Coinsurance does not apply.

Functional Valuation

Functional Building Valuation – CP 04 38 09 17

Total loss – Payment will be for the cost to replace the damaged building with a less costly building that is functionally equivalent to the damaged building.

Partial loss – Payment will be for the cost to repair or replace the damaged portion of the building with less costly material, if available, in the architectural style that existed before the loss or damage occurred.

Functional Valuation

Functional Building Valuation – CP 04 38 09 17

If property isn't replaced, the policy pays the lesser of

- 1) Limit of insurance
- 2) Market value, exclusive of land, at the time of the loss (BEWARE!!)
- 3) Cost to repair or replace, with less costly material in the same architectural style that existed before the loss, less an allowance for depreciation

Functional Valuation

Functional Building Valuation – CP 04 38 09 17

- Ordinance or Law coverage is automatically built into this endorsement.
- Ordinance or Law issues must be considered when setting limits as no additional limits for Ordinance or Law are included.
- Post-Loss Ordinance or Law Option available.
- ISO rate factor of 1.30 applies to Functional Building Valuation.

Functional Valuation

Functional Building Valuation – CP 04 38 09 17 – from ISO CLM

a. Assume the following:

- (1)** The building to be insured is an old, fully equipped factory building, with a replacement cost of \$2,000,000, which the insured uses as a warehouse.
- (2)** The insured could build a new building to be used for the same purpose for \$1,000,000.
- (3)** Substantial damage to the building (50% destruction) will trigger a local ordinance and the entire building will have to be destroyed.
- (4)** Estimated cost of demolition of 50% of the building (undamaged portion) is \$30,000.
- (5)** Additional cost to install sprinklers to comply with a local ordinance is \$200,000.

Functional Valuation

Functional Building Valuation – CP 04 38 09 17 – from ISO CLM

b. For purposes of illustration, the following is a possible way to develop the Functional Building Valuation Limit of Insurance.

To provide coverage for

- (1)** The cost to replace the existing building with a building that is functionally equivalent ... \$1,000,000
- (2)** Cost to demolish the undamaged part of the existing building after loss occurs ... \$30,000
- (3)** Additional cost to comply with ordinance ... \$200,000.

Functional Building Valuation Limit of Insurance would be \$1,230,000 (\$1,000,000 + \$30,000 + \$200,000).

Debris Removal/Pollutant Cleanup and Removal

Building and Personal Property Coverage Form
Debris Removal – Additional Coverage
CP 00 10 10 12

- *We will pay your expense to remove debris of Covered Property and other debris that is on the described premises, which such debris is caused by or results from a Covered Cause of Loss that occurs during the policy period.*
- Expenses must be reported within 180 days of the loss.
- Does not apply to costs to extract pollutants or remediate polluted land or water

Debris Removal – doesn't apply to

- Insured's property or PPO in insured's possession if not covered under the policy
- Landlord's property unless insured is covering the property as required in a contract
- Debris of "Property Not Covered"
- Property of others of type that wouldn't be Covered Property (e.g. trees)
- Deposits of mud or earth

Building And Personal Property Coverage Form
CP 00 10 10 12

2. Property Not Covered

Covered Property does not include: (partial list)

- d. Bridges, roadways, walks, patios or other paved surfaces;*
- g. Foundations of buildings, structures, machinery or boilers if their foundations are below:
 - (1) The lowest basement floor; or*
 - (2) The surface of the ground, if there is no basement;**
- j. Bulkheads, pilings, piers, wharves or docks;*
- l. Retaining walls that are not part of a building;*
- m. Underground pipes, flues or drains;*
- 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.**

Note: Exceptions apply

CP 00 10 10 12

©Insurance Services Office, Inc., 2011 Page 2&3 of 16

Building And Personal Property Coverage Form
CP 00 10 10 12

2. Property Not Covered

Covered Property does not include: (partial list)

- q. The following property while outside of buildings:
 - (1) Grain, hay, straw or other crops;*
 - (2) Fences, radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers, trees, shrubs or plants (other than trees, shrubs or plants which are "stock" or are part of a vegetated roof), all except as provided in the Coverage Extensions.**

CP 00 10 10 12

©Insurance Services Office, Inc., 2011 Page 2&3 of 16

Debris Removal Sublimit

CP 00 10 10 12

- 25% x (amount paid for direct damage + deductible)
- An additional \$25,000 is available if needed.
- \$5,000 limit applies to remove the debris of others if no Covered Property has been damaged.

Claim #1 – Risk and Policy Information

The premises of a local tire distributor was severely damaged in a hurricane. The business was insured on a Commercial Property Policy as follows. There are no additional endorsements that would impact coverage. Debris removal costs were very high because the building has an asbestos roof.

RC of Building	\$1,000,000
RC of Business Personal Property	\$ 500,000
Building limit	\$ 900,000 at 80% coins.
Business Personal Property limit	\$ 450,000 at 80% coins.
Deductible	\$ 1,000
Special Form Coverage	

Claim #1 – Loss Information

Building damage	\$ 400,000
BPP damage	\$ 100,000
Debris Removal costs – Building	\$ 300,000
Debris Removal costs – BPP	\$ 10,000

Debris Removal Claim #1

Has Coinsurance been satisfied? YES

Direct Damage Paid \$499,000

Debris Removal Sublimit $25\% (\$499,000 + \$1,000) = \$125,000$

$\$499,000 + \$125,000 + \$25,000 = \$649,000$

Remaining \$160,000 of debris removal is not paid.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 04 15 10 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DEBRIS REMOVAL ADDITIONAL INSURANCE

This endorsement modifies insurance provided under the following:

BUILDERS RISK COVERAGE FORM
BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY
TOBACCO SALES WAREHOUSES COVERAGE FORM

SCHEDULE

Premises Number	Building Number	Debris Removal Amount	Additional Premium
		\$	\$
		\$	\$
		\$	\$

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

The additional amount of \$25,000 for debris removal in the **Debris Removal Additional Coverages** section is replaced by the higher amount shown in the Schedule.

Watch out for carrier specific exclusions!

ASBESTOS EXCLUSION

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE PART
BUSINESSOWNERS COVERAGE PART
CAUSES OF LOSS — BASIC FORM
CAUSES OF LOSS — BROAD FORM
CAUSES OF LOSS — SPECIAL FORM
COMMERCIAL GENERAL LIABILITY COVERAGE PART
AUTO DEALERS COVERAGE PART
MOTOR CARRIER COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
PRODUCT/COMPLETED OPERATIONS LIABILITY COVERAGE PART

1. It is agreed that this insurance does not apply to any loss or damage relating to the actual, alleged, or threatened presence of, or exposure to, "asbestos," including inhalation, ingestion, irritation, absorption or other similar physical exposure to "asbestos." Such presence of, or exposure to, "asbestos" includes, but is not limited to:
 - a. structures or manufacturing processes containing "asbestos";
 - b. the disposal of "asbestos" or goods, products or materials containing "asbestos";
 - c. the storing or presence of "asbestos" or goods, products or materials containing "asbestos"; or
 - d. the removal of "asbestos" from any goods, products, materials, structures or manufacturing processes,whether or not such "asbestos" is airborne.
2. We shall have no obligation under this coverage part:
 - a. to investigate, settle or defend any claim or "suit" against any "insured" alleging actual or threatened injury or damage of any nature or kind to persons or property which arises out of or would not have occurred but for the presence of, or exposure to, "asbestos"; or
 - b. to pay any damages, judgments, settlements, losses, costs or expenses of any kind or nature that may be awarded or incurred by reason of any such claim or suit or any such actual or threatened injury or damage from "asbestos"; or
 - c. for any losses, costs or expenses arising out of any obligation, order, direction or request of or upon any insured or others, including, but not limited to, any governmental obligation, order, direction or request, to test for, monitor, clean up, remove, contain, treat, neutralize, in any way respond to, or assess the effects of "asbestos."
3. "Asbestos" includes asbestos, asbestos fibers, asbestos materials, and asbestos products, or any goods or products containing asbestos or asbestos fibers, materials, or products.

Debris Removal - Claim #2

Coinsurance Problem

RC of Building	\$ 1,000,000
Building limit	\$ 600,000 at 80% coins.
Deductible	\$ 1,000
Building damage	\$ 400,000
Debris Removal costs	\$ 150,000

Debris Removal - Claim #2

Coinsurance Problem

Has Coinsurance been satisfied? NO

Direct Damage Paid $\$600k / \$800k \times \$400k - \$1,000 = \$299,000$

Debris Removal Sublimit $25\% (\$299,000 + \$1,000) = \$75,000$

$\$299,000 + \$75,000 + \$25,000 = \$399,000$

The remaining \$50k in debris removal is not paid.

Does a Blanket Limit Help?

Scenario #1 – assume coinsurance is satisfied

4 scheduled buildings - \$250,000 limit on each, \$1,000 ded.

\$250,000 damage to the first building + \$100,000 debris removal costs

How much is paid?

What is the sublimit? 25% of (\$249,000 + \$1,000) = \$62,500

\$249,000 direct damage + \$1,000 + \$25,000 extra = \$275,000

Does a Blanket Limit Help?

Scenario #2 – assume coinsurance is satisfied

4 buildings - \$1,000,000 blanket limit, \$1,000 ded.

\$250,000 damage to the first building + \$100,000 debris removal costs

How much is paid?

What is the sublimit? 25% of (\$249,000 + \$1,000) = \$62,500

\$249,000 direct damage + \$62,500 + \$25,000 extra = \$336,500

Builders Risk Debris Removal - AAIS

- “Debris removal means the costs for the demolition, clearing and removal of debris of covered property if such debris results from a covered peril.”
- Does not cover costs to extract pollutants or remove or restore polluted land or water
- Expenses must be reported within 180 days of the direct physical loss.
- Sublimit (25% of amount paid for direct physical loss) + an additional \$5,000 if needed

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Tropicana Casino and Resort
Atlantic City, NJ
October 30, 2003



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Debris Removal (Tropicana Claim - Policy Language)

Debris Removal

.....in the event of direct physical loss or damage insured hereunder and occurring during the policy period, the Company will pay the following necessary and reasonable costs:

*(1) costs to remove debris being an insured part of the property from the project location of the insured; and/or
(2) costs of cleanup, at the project location of the insured, made necessary as a result of such direct physical loss or damage.*

The sublimit was 25% of the amount of insured physical loss or damage.

90

Zurich Am. Ins. Co. v. Keating Bldg. Corp 513 F. Supp. 2d 55 (2007)

Court Ruled:

Debris removal costs were limited to the costs of removing debris from the property and transporting it away from the project site. Demolition costs and other costs related to the demolition were not subject to the sublimit.

Debris removal costs did not include forensic debris removal costs associated with the investigation into the cause of the collapse.

Result: Change in Debris Removal language in AAIS and many other carrier forms. The older language is still in some forms.

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Pollutant Cleanup and Removal

Additional Coverage

CP 00 01 10 12

- Covers expense to extract pollutants from land or water at the premises
- Pollution must be caused by a Covered Cause of Loss occurring during the policy period.
- Expenses must be reported in writing within 180 days.
- Does not cover testing, monitoring, assessments except for testing in connection with extracting pollutants
- \$10,000 is an annual aggregate limit.

Pollutant Cleanup and Removal

POLLUTANT CLEAN UP AND REMOVAL ADDITIONAL
AGGREGATE LIMIT OF INSURANCE CP 04 07 10 91

- \$10,000 annual aggregate is increased by the amount shown in the schedule.
- Endorsement includes its own deductible. (\$1,000 minimum)
- Some company enhancement forms provide additional limits.
- A pollution policy is a better solution.

CP 04 07 10 91

Example:

Pollutant Cleanup and Removal Additional Aggregate Limit of Insurance Endorsement with a limit of \$100,000 and a 5,000 deductible.

▪ Cost to clean up the pollutant	\$75,000
▪ Basic policy limit for pollutant cleanup paid by insurer	<u>\$10,000</u>
▪ Cleanup costs remaining	\$65,000
▪ Endorsement deductible (paid by insured)	<u>\$ 5,000</u>
▪ Costs paid under endorsement	\$60,000

Claim #3 –Policy Information

Fire broke out in a home decorating center. There was damage to the building and to the BPP in the building. The insured carried large quantities of paint removers and other toxic substances. Because of the type of stock involved, special disposal methods were needed. Unfortunately, some of the toxic substances were released into the ground, polluting the insured's site as well as the site of a neighboring business.

Coverage is written on a Commercial Property Policy, with limits sufficient to satisfy coinsurance. No endorsements that would impact coverage in this situation are included.

Building Limit	\$500,000
BPP Limit	\$200,000
Deductible	\$ 1,000

Coinsurance is satisfied.

Claim #3 – Loss Information

Loss	Amount of Loss	Amount Paid
Building Damage	\$100,000	\$99,000
BPP Damage	\$100,000	\$100,000
Debris Removal	\$300,000	\$75,000
Cost to clean up ground pollution at insured's premises	\$200,000	\$10,000
Cost of pollution monitoring equipment at insured's premises	\$50,000	0
Cost to clean up ground pollution at neighboring premises	\$100,000	0
Cost of pollution monitoring equipment at neighboring premises	\$50,000	0

Total \$284,000

Ordinance or Law

Sources of Today's Building Codes

- Model codes developed by various associations
 - International Code Council (International Building Codes IBC)
 - National Fire Protection Association – NFPA
- Codes may be developed by the federal government.
 - Flood plain management
 - Americans with Disabilities Act
- Historical societies
- States may amend a model code.
- Local jurisdictions may amend a model code.

Building and Personal Property Coverage Form CP 00 10 10 12 - Replacement Cost

e. We will not pay more for loss or damage on a replacement cost basis than the least of **(1)**, **(2)** or **(3)**, subject to **f.** below:

(1) The Limit of Insurance applicable to the lost or damaged property;

(2) The cost to replace the lost or damaged property with other property:

(a) Of comparable material and quality; and

(b) Used for the same purpose; or

(3) The amount actually spent that is necessary to repair or replace the lost or damaged property.

If a building is rebuilt at a new premises, the cost described in **e.(2)** above is limited to the cost which would have been incurred if the building had been rebuilt at the original premises.

f. The cost of repair or replacement does not include the increased cost attributable to enforcement of or compliance with any ordinance or law regulating the construction, use or repair of any property.

Special Form Causes of Loss CP 10 30 09 17

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance Or Law

The enforcement of or compliance with 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.

This exclusion, Ordinance Or Law, applies whether the loss results from:

- (a) An ordinance or law that is enforced even if the property has not been damaged; or
- (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

The Time Element Side

Which is the worst case scenario?

- Building burns to the ground
- Building sustains “major damage”
 - How long will it take the authority to decide whether the threshold to take down the building (major damage) has been met?
 - How long will it take to arrange for demolition of the standing building?
 - How long will it take to demolish the standing building and clear the debris?
 - How long will it take to draw up plans for a new building?
 - How long will it take to rebuild from the ground up?

Business Income and Extra Expense Form
CP 00 30 10 12

"Period of restoration" does not include any increased period required due to the enforcement of or compliance with any ordinance or law that:

(1) Regulates the construction, use or repair, or requires the tearing down, of any property; or

(2) Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".

Building and Personal Property Coverage Form CP 00 10 10 12 -
Increased Cost of Construction
Additional Coverage

- Applies only to buildings insured on a replacement cost basis
- Applies to the repair, rebuilding, or replacement of damaged parts of the building
- Covers increased costs incurred to comply with the minimum standards of ordinances or laws
- Limit of \$10,000 or 5% of the building limit (whichever is less)

Ordinance or Law CP 04 05 09 17

Coverage A – Coverage For Loss To The Undamaged Portion Of The Building

Coverage B – Demolition Cost Coverage

Coverage C – Increased Cost of Construction Coverage

Post-Loss Ordinance or Law Option

Major Damage

When must the entire structure be updated after a loss?
When do we need to tear down a partially damaged building and start over?

Jurisdictional Authority Rule: The authority having jurisdiction decides when a damaged building must be brought into compliance with current building codes.

Percentage Rule: A building damaged beyond a certain percentage of its value must be brought, in its entirety, into compliance with local building codes.

Post-Loss Ordinance or Law Option

Example - Hurricane Andrew – Florida – 8/24/1992

After the hurricane, codes were change to require, among other things:

- Metal bracing to anchor roofs to walls
- More reinforcement of roof trusses
- In high wind zones, exterior windows that were made of impact glass, protected with storm shutters, or engineered to withstand internal pressure

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 04 05 09 17

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ORDINANCE OR LAW COVERAGE

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Building Number/ Premises Number	Coverage A	Coverage B Limit Of Insurance	Coverage C Limit Of Insurance	Coverages B And C Combined Limit Of Insurance
/	<input type="checkbox"/>	\$	\$	\$ *
/	<input type="checkbox"/>	\$	\$	\$ *
/	<input type="checkbox"/>	\$	\$	\$ *

Post-Loss Ordinance Or Law Option: Yes ☐ No ☐

*Do not enter a Combined Limit of Insurance if individual Limits of Insurance are selected for Coverages B and C, or if one of these Coverages is not applicable.

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

Ordinance or Law

CP 04 05 09 17

Coverage A – Coverage for Loss to the Undamaged Portion of the Building

- *With respect to the building that has sustained covered direct physical damage, we will pay under Coverage A for the loss in value of the undamaged portion of the building as a consequence of a requirement to comply with an ordinance or law that requires demolition of undamaged parts of the same building.*
- Coverage A is included within the limit of insurance on the building.

Ordinance or Law

CP 04 05 09 17

Coverage B – Demolition Cost Coverage

With respect to the building that has sustained covered direct physical damage, we will pay the cost to demolish and clear the site of undamaged parts of the same building as a consequence of a requirement to comply with an ordinance or law that requires demolition of such undamaged property.

Ordinance or Law

CP 04 05 09 17

Coverage C – Increased Cost of Construction Coverage

With respect to the building that has sustained covered direct physical damage, we will pay the increased cost to:

- (1)** Repair or reconstruct damaged portions of that building; and/or*
- (2)** Reconstruct or remodel undamaged portions of that building, whether or not demolition is required;*

when the increased cost is a consequence of a requirement to comply with the minimum standards of the ordinance or law.

Ordinance or Law

CP 04 05 09 17

Coverage C – Increased Cost of Construction Coverage

***(1)** This coverage applies only if the restored or remodeled property is intended for similar occupancy as the current property, unless such occupancy is not permitted by zoning or land use ordinance or law.*

***(2)** We will not pay for the increased cost of construction if the building is not repaired, reconstructed or remodeled.*

Ordinance or Law

CP 04 05 09 17

Coverage C – Increased Cost of Construction Coverage

...coverage for the increased cost of construction also applies to repair or reconstruction of the following...

- (1) The cost of excavations, grading, backfilling and filling;*
- (2) Foundation of the building;*
- (3) Pilings; and*
- (4) Underground pipes, flues and drains.*

Ordinance or Law

CP 04 05 09 17

We will not pay under this endorsement for:

- a. Enforcement of or compliance with any ordinance or law which requires the demolition, repair.....due to contamination by "pollutants" or due to "fungus", wet or dry rot or bacteria;*
- b.compliance with any ordinance or law which requires..... [one] to test for, monitor, clean up..... "pollutants", "fungus", wet or dry rot or bacteria.*

We will not pay under this endorsement for any loss in value or any cost incurred due to an ordinance or law that you were required to comply with before the time of the current loss, even in the absence of building damage, if you failed to comply.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 15 31 09 17

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ORDINANCE OR LAW – INCREASED PERIOD OF RESTORATION

This endorsement modifies insurance provided under the following:

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM
BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM
EXTRA EXPENSE COVERAGE FORM

SCHEDULE

Described Premises:
Post-Loss Ordinance Or Law Option: Yes <input type="checkbox"/> No <input type="checkbox"/>
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

Cathy's Restaurant

The Building

- Built in 1890
- Frame construction
- Sprinklers only in kitchen
- Outdated electrical system
- Not handicapped accessible (but should be)

Cathy's Restaurant

Values and Coverages

- Building RCV \$1,000,000
- Building Coverage \$ 900,000
 - 90% coins, Special Form, AV
- BPP RCV \$ 400,000
- BPP Coverage \$ 360,000
 - 90% coins, Special Form, AV
- Business Income \$1,400,000
 - Special Form, AV
- Disregard Deductible

Cathy's Restaurant

The Building Code

- Tear down building if the loss is 50% or more of the market value of the building
- Masonry non-combustible construction
- Sprinklers throughout
- Updated electrical system
- Handicapped accessible

Cathy's Restaurant



Cathy's Restaurant

Loss	Amount of Loss	Amount Paid
Building Damage	\$500,000	\$500,000
Damage to BPP in the Building	\$200,000	\$200,000
Debris Removal of Damaged Property	\$25,000	\$25,000
Business Income loss for 6-month period of restoration	\$600,000	\$600,000
Value of the Undamaged Structure	\$500,000	0
Cost to demolish and remove the undamaged structure	\$20,000	0
Additional costs to rebuild as non-combustible and sprinklered	\$400,000	\$10,000

Cathy's Restaurant

Loss	Amount of Loss	Amount Paid
Additional costs to upgrade the electrical	\$50,000	0
Additional costs to make the premises accessible	\$20,000	0
Business Income loss for the additional 2 months needed to comply with building codes	\$200,000	0
TOTAL		\$1,335,000

Cathy's Restaurant

Policy with Endorsements

Ordinance or Law Coverage (CP 04 05 09 17)

- Coverage A – included
- Coverage B - \$100,000
- Coverage C - \$500,000

Note: Coverage B&C limits can be blanketed, but were not here.

Ordinance or Law – Increased Period of Restoration (CP 15 31 09 17)

Cathy's Restaurant

Loss	Amount of Loss	Amount Paid
Building Damage	\$500,000	\$500,000
Damage to BPP in the Building	\$200,000	\$200,000
Debris Removal of Damaged Property	\$25,000	\$25,000
Business Income loss for 6-month period of restoration	\$600,000	\$600,000
Value of the Undamaged Structure	\$500,000	\$400,000
Cost to demolish and remove the undamaged structure	\$20,000	\$20,000
Additional costs to rebuild as non-combustible and sprinklered	\$400,000	\$400,000

Cathy's Restaurant

Loss	Amount of Loss	Amount Paid
Additional costs to upgrade the electrical	\$50,000	\$50,000
Additional costs to make the premises accessible	\$20,000	0
Business Income loss for the additional 2 months needed to comply with building codes	\$200,000	\$200,000
TOTAL		\$2,395,000

What Does this Cost?

ISO Rates

(carrier rates may vary)

- Coverage A – 1.15 x 80% coinsurance building rate
(1.85 for Earthquake coverage)
- Coverage B – 80% coinsurance building rate
- Coverage C – 80% coinsurance building rate

- Ordinance or Law Time Element
 - increases BI/EE rate by 20%
 - for Earthquake, double BI/EE rate

- Post Loss Option – add an extra 2%

How much coverage do we need?

- Coverage A – no limit applies
- Coverage B – ??
- Coverage C – ??
- Blanketing the B&C limits increases the chances that the chosen limit will be adequate.

- Ordinance or Law Time Element
 - No separate limit applies.
 - No specified time limit is shown.
 - Need to increase BI/EE limit to cover the extended time period

Down Zoning

Down-Zoning - sample language

In the event the enforcement of an applicable Ordinance or Law results in the requirement to demolish and not replace the damaged Building(s), the Companies agree to pay the greater of:

- *the Actual Cash Value; or*
- *the outstanding loan balance including accrued fees, if applicable, as determined at the time of loss for the Building(s) not permitted to be rebuilt.*

Down Zoning

Down-Zoning - sample language (continued):

In the event the damaged Building(s) is permitted to be repaired or rebuilt, but only to a more limited extent as a consequence of the enforcement of any applicable Ordinance or Law, the Companies agree to pay:

- *Replacement Cost for the repair of or construction of the permitted structure(s); and*
- *Actual Cash Value for the incremental portion of the original building that is not permitted to be repaired or replaced.*

Down Zoning

Down-Zoning – sample language (continued):

Loss of Rents (if covered) shall include rents for those units that are unable to be rebuilt due to an Ordinance or Law Down-Zoning. Loss of Rents for those units not rebuilt due to Down-Zoning shall cease no later than the number of days as granted by the Extended Period of Indemnity

Vacancy

Vacancy Defined CP 00 10 10 12

For a tenant:

The unit or suite rented or leased to the tenant does not contain enough business personal property to conduct customary operations.

For a building owner (or general lessee)

31% of the entire building must be rented and used by a tenant to conduct its customary operations and/or it must be used by the building owner to conduct customary operations.

Buildings under construction or renovation are not considered vacant.

Effect of Vacancy on Coverage

Vacancy Clause applies when the premises has been vacant for more than 60 consecutive days.

No coverage for:

- Vandalism
- Sprinkler leakage (unless system is protected against freezing)
- Building glass breakage
- Water damage
- Theft or
- Attempted theft

Payment for damage by all other covered causes of loss is reduced by 15%




Example:

Your insured owns a flea market/auction. In addition to the numerous tables set up on the site, there is a large building which is used by many seasonal businesses between April and September. Each year, the insured takes bids for space in the building and rents stalls to the highest bidders for the period between April 1st and September 30th. There is a luncheonette on the side of the building facing the main road that is open year-round and occupies 20% of the building. The luncheonette is also your insured. Both customers are insured on CP 00 10 10 12 with Special Form Cause of Loss and no endorsements.

Claim #1




On November 20th, a fire begins in one of the stalls and spreads to other parts of the building, damaging 25% of the building. Is there coverage for damage to the building under the building owner's policy?

Luncheonette	

Yes. Because the building has not been vacant for more than sixty consecutive days, the vacancy provisions do not apply.

Claim #2



In January, a fire begins in the luncheonette and spreads to the stalls, damaging 50% of the building. Is there coverage for damage to the building under the building owner's policy?

Luncheonette 	 
---	--

Yes, The claim would be paid with a 15% reduction because the building was vacant for more than sixty consecutive days.

Claim #3

In March, vandals break the windows of the luncheonette, damaging the interior walls and fixtures and destroying much of the luncheonette's stock. Is there coverage?

Luncheonette  	<p>Building Owner's Policy There is no coverage for the building items as the building has been vacant for more than 60 consecutive days. The building owner is not insuring the stock.</p> <p>Luncheonette's Policy There is coverage for the stock as the luncheonette is not vacant. There is no coverage for damage to the building items as the luncheonette is not insuring those items.</p>
--	--

1/1/2021 to 1/1/2022 Policy
1/1/2021 occupancy information

Tenant	Description	Square Footage	Annual Rents	Annual expenses paid by tenant (e.g. CAM)
Harry's HVAC	HVAC contractor	10,000	Some number	Some number
Ollie's Office Depot	Office supplies distributor	20,000	Some number	Some number
Patty's Produce	Produce Wholesaler	8,000	Some number	Some number
Marty's Medical Goods	Medical Supplies distributor	40,000	Some number	Some number
Tiny Tumblers	Children's Gymnastics Studio	10,000	Some number	Some number
TOTAL		88,000		

1/1/2021 to 1/1/2022 Policy
7/1/2021 occupancy information

Tenant	Description	Square Footage	Annual Rents	Annual expenses paid by tenant (e.g. CAM)
Vacant	Vacant	10,000	Some number	Some number
Ollie's Office Depot	Office supplies distributor	20,000	Some number	Some number
Patty's Produce	Produce Wholesaler	8,000	Some number	Some number
Vacant	Vacant	40,000	Some number	Some number
Vacant	Vacant	10,000	Some number	Some number
TOTAL		88,000		

Is the building vacant?

We forgot something. Total Building area is 100,000 sf. There is 12,000 sf of common area. Is the building vacant?

Tommy's Trattoria

It is July 2020. Tommy's Trattoria in Wall Township, NJ has not been allowed to open for indoor dining since mid-March 2020 due to NJ's Executive Order concerning coronavirus.

Tommy rents a stand- alone building in Wall Township and is the only tenant. Tommy's is a fine dining restaurant, and Tommy determined that it did not make sense to open and offer take-out and delivery only.

Tommy removed the food from the restaurant so that it wouldn't spoil and donated it to a local food bank. He closed the restaurant, leaving in place all appliances, furnishings, kitchen items etc.

- Is Tommy's Trattoria vacant?
- You also insure the building owner. Is the building vacant?

Tommy's Trattoria

It is October 2020. Tommy's Trattoria in Wall Township, NJ could no longer pay its rent and moved out of the building it had been occupying. The space is now completely empty and has been for over 60 days.

Vandals damage the building on Mischief Night. In addition to the normal throwing of eggs and toilet-papering of trees, vandals break windows with rocks, enter the building and spray paint the interior walls. They also start a fire that causes significant damage.

- Is the vandalism damage covered?
- Is the fire damage covered?

Vandals start a Fire in a Vacant Building

Fire Damage is Covered

Nationwide Mut. Fire Ins. Co. v. Nationwide Furniture Co. 932 F. Supp. 655 (E.D. Pa. 1996)

The term vandalism is ambiguous. The insurer could have defined vandalism to include non-accidental fire to clarify, but did not.

Fire Damage isn't Covered

Botee v. Southern Fid. Ins. Co., 162 So. 3d 183 (Fla. Dist. Ct. App. 5th Dist. 2015)

Webster's defines vandalism as "willful or malicious destruction or defacement of public or private property." Arson is similarly defined. Vandalism unambiguously encompasses arson.

VACANCY PERMIT ENDORSEMENT (CP 04 50 07 88)

- Suspends the vacancy condition for specified locations for a stated period of time
- Allows coverage to continue at full value when a building is vacant beyond 60 days
- Can be written to specifically exclude vandalism and/or sprinkler leakage

VACANCY CHANGES ENDORSEMENT (CP 04 60 10 12)

- Used to redefine the minimum percentage that must be rented or used to avoid a vacancy condition
- Allows the 31% rented criteria to be reduced to as low as 10%

VACANT BUILDING POLICIES

Things to watch for:

- Non-admitted carriers
- Valuation – ACV instead of RC
- Causes of Loss – Basic or Broad instead of Special
- Exclusions for Sprinkler Leakage, Water Damage, Vandalism, Theft
- Warranties – e.g.
 - ✓ Maintenance of heat
 - ✓ Locked/secured building
 - ✓ Central station alarms
 - ✓ Security
 - ✓ Others

Tenant Property Issues

What If?

- The Tenant has made improvements and betterments to the space
- The Tenant is responsible for insuring portions of the building
- The Tenant is responsible for damage he does to the rented space
- The Tenant will suffer financially if the lease is cancelled because he has invested in the lease or the space or has favorable lease terms

Building And Personal Property Coverage Form (CP 00 10 10 12)

Your Business Personal Property includes:

Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:

- (a) Made a part of the building or structure you occupy but do not own; and*
- (b) You acquired or made at your expense but cannot legally remove*

Which are (probably) TIB?



Payment of a TIB claim

Damage to Tenant Improvements and Betterments	What is paid under Tenant's CPP
Tenant repairs promptly	ACV (RC if option is activated)
Landlord repairs	Nothing paid
Can not/does not repair or rebuild promptly	Unamortized portion of original cost

Payment of TIB claim

Tenant added \$100,000 of TIB at the beginning of a 10-year lease.

5 years into the lease, the building is destroyed, and the tenant permanently closes his business.

\$100,000 - \$50,000 (amortized portion of the original cost 50%) = \$50,000 paid

Your Business Personal Property – Separation of Coverage – CP 19 10 06 95

- Specify a limit of insurance for any of the seven categories of Your Business Personal Property
- The Your Business Personal Property Limit of Insurance on the declarations does not apply to property scheduled in this endorsement.
- Can be used for tenant's improvements & betterments to get a building rate rather than a business personal property rate

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**YOUR BUSINESS PERSONAL PROPERTY –
SEPARATION OF COVERAGE**

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY

A. The following Limits of Insurance and Covered Causes of Loss apply to the types of property included under YOUR BUSINESS PERSONAL PROPERTY:

Prem. No.	Bldg. No.	Type of Property	SCHEDULE		Coinsurance
			Limit of Insurance	Causes Of Loss Form Applicable	
1	1	TIB	\$250,000	Special	90%

B. If a Limit of Insurance is shown for Your Business Personal Property in the Declarations, without further indication of the Type of Property, that Limit of Insurance will not apply to any property described in this endorsement.

**Ordinance or Law Coverage for Tenants
Improvements and Betterments
CP 04 26 09 17**

Coverages A, B and C can be chosen

Post-Loss Ordinance or Law Option is available

Improvements and betterments are fixtures, alterations, installations or additions made a part of the building you occupy but do not own and which you acquired or made at your expense but cannot legally remove.

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 04 25 09 17

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ORDINANCE OR LAW COVERAGE FOR TENANT'S
INTEREST IN IMPROVEMENTS AND BETTERMENTS
(TENANT'S POLICY)**

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Building Number/ Premises Number	Coverage A	Coverage B Limit Of Insurance	Coverage C Limit Of Insurance	Coverages B And C Combined Limit Of Insurance
/	<input type="checkbox"/>	\$	\$	\$ -
/	<input type="checkbox"/>	\$	\$	\$ -
/	<input type="checkbox"/>	\$	\$	\$ -

Description Of Tenant's Improvements And Betterments

At Building Number/Premises Number :

At Building Number/Premises Number :

At Building Number/Premises Number :

Post-Loss Ordinance Or Law Option: Yes ☐ No ☐

*Do not enter a Combined Limit of Insurance if Individual Limits of Insurance are selected for Coverages B and C, or if one of these Coverages is not applicable.

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

What do you think?

Your insured owns and insures his building. His tenant has added \$1,000,000 in TIB, and the lease makes the tenant responsible for insuring the TIB. Your insured is not responsible for any damage to the TIB.

RC with TIB = \$5,000,000

RC exclusive of TIB = \$4,000,000

Your insured wants to insure the building for \$4,000,000 at 100% coinsurance because that is all he is responsible for according to the lease.

What do you think?

CP 00 10 10 12

Coinsurance

If a Coinsurance percentage is shown in the Declarations, the following condition applies:

a. We will not pay the full amount of any loss if the value of Covered Property at the time of loss times the Coinsurance percentage shown for it in the Declarations is greater than the Limit of Insurance for the property.

CP 14 30 07 88 - Additional Property Not Covered

Lease requires that the tenant
insure the building

Good Idea?

Bad Idea?

Tenant Insures the Building Might the Landlord Want This?

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 12 19 06 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – BUILDING OWNER

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

SCHEDULE

Premises Number:		Building Number:	
Building Description:			
Building Owner Name:			
Building Owner Address:			

The building owner identified in this endorsement is a Named Insured, but only with respect to the coverage provided under this Coverage Part or Policy for direct physical loss or damage to the building(s) described in the Schedule.

Tenant Insures the Building Might the Landlord Want This?

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 12 18 10 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LOSS PAYABLE PROVISIONS

This endorsement modifies insurance provided under the following:

BUILDERS' RISK COVERAGE FORM
BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM
CONDOMINIUM COMMERCIAL UNIT-OWNERS COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Location Number:	Building Number:	Applicable Clause (Enter C.1, C.2, C.3, or C.4.):
Description Of Property:		
Loss Payee Name:		
Loss Payee Address:		

4. Building Owner Loss Payable Clause

- a. The Loss Payee shown in the Schedule or in the Declarations is the owner of the described building in which you are a tenant.
- b. We will adjust losses to the described building with the Loss Payee. Any loss payment made to the Loss Payee will satisfy your claims against us for the owner's property.
- c. We will adjust losses to tenants' improvements and betterments with you, unless the lease provides otherwise.

Tenant Insures the Building Might the Landlord Want This?

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 15 03 06 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BUSINESS INCOME – LANDLORD AS ADDITIONAL INSURED (RENTAL VALUE)

This endorsement modifies insurance provided under the following:

BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM
BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM

SCHEDULE

Description Of Rented Premises:			
Name Of Additional Insured:			
Mailing Address Of Additional Insured:			
Causes Of Loss Form	Applicable Business Income Coverage Form (Enter Form Number)	Limit Of Insurance	Coinurance Percentage
		\$	%
Endorsements, If Any, Supplementing Or Restricting The Covered Causes Of Loss With Respect To The Coverage Provided Under This Endorsement:			
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

Business Income – Landlord as Additional Insured (Rental Value) CP 15 03 06 07

- A.** The person or entity identified in the Schedule is insured for loss of "Rental Value", up to the Limit of Insurance shown in the Schedule. Such coverage applies in accordance with all terms of Business Income – "Rental Value" Coverage under the applicable Business Income Coverage Form, and all conditions in the Common Policy Conditions and Commercial Property Conditions, except as otherwise provided in this endorsement or other applicable endorsement.

B. The Causes Of Loss Form shown in the Schedule applies to the coverage provided under this endorsement. Unless shown in the Schedule, endorsements which modify the Causes Of Loss Form do not apply to the coverage provided under this endorsement.

C. With respect to the coverage provided under this endorsement, the definition of "Rental Value" is replaced by the following:
"Rental Value" means the:

 1. Net income that would have been earned as rental income from tenant occupancy of the premises described in the Schedule, as furnished and equipped by the Additional Insured; and
 2. Amount of continuing normal operating expenses which are the legal obligation of the tenant and which would otherwise be the Additional Insured's obligations.

In Paragraphs C.1. and C.2. above, the terms tenant and tenant occupancy refer to the Named Insured under this policy, who is a tenant of the Additional Insured.

Business Income – Landlord as Additional
Insured (Rental Value)
CP 15 03 06 07

- D. If this endorsement provides coverage in excess of the coverage or benefits required under the terms of the lease between the Named Insured and the Additional Insured, the most we will pay is the amount determined in accordance with the terms of the lease, but not more than the Limit of Insurance shown in the Schedule.
- E. The following applies if this policy includes Business Income coverage for the interest of the Named Insured:
- The amount of any payment made to the Additional Insured under the terms of this endorsement will be deducted from the Named Insured's Business Income loss and therefore will not be payable to the Named Insured as a continuing normal operating expense.
- F. If we cancel this policy, we will provide advance notice in writing to the Additional Insured. The notice will be mailed to the Additional Insured at the last mailing address known to us, in the applicable timeframe specified in the policy's Cancellation Condition or any amendment to that Condition.
- G. The following do not apply to the coverage provided under this endorsement:
1. Extra Expense Coverage or Additional Coverage – Expenses To Reduce Loss;
 2. Additional Coverage – Alterations And New Buildings;
 3. Coverage Extension – Newly Acquired Locations; and
 4. Optional Coverages.

Business Income – Landlord as Additional
Insured (Rental Value)
CP 15 03 06 07

When might an agent recommend this?

Facts:

- Tenant Inc. – owned 100% by Son
- Building Owner Inc. – owned 100% by Mom
- Son is concerned with Mom's financial well-being.

Tenant Inc. is required by its lease with Building Owner Inc. to insure the building. Ownership is not common so your underwriter will not include both entities as Named Insured. Building Owner Inc. does not want to insure its own building on its own policy (despite your repeated suggestions.) Tenant Inc.'s policy includes Building, Business Personal Property and Business Income coverages.

The building burns to the ground, and it takes over a year to rebuild. How will Building Owner Inc. be made whole for the loss of rents?

Business Income – Landlord as Additional
Insured (Rental Value)
CP 15 03 06 07

What about Tenant Inc.'s Business Income coverage? (CP 00 30 10 12)

Business Income means the:

- a. *Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and*
- b. *Continuing normal operating expenses incurred, including payroll.*

Is the rent a continuing normal operating expense for Tenant Inc.?

- Language in the lease may state that the lease terminates if the premises are untenantable following damage or destruction.
- The law may state that the lease cancels if the premises is totally destroyed.
- Case law in a jurisdiction may address this issue.

Business Income – Landlord as Additional
Insured (Rental Value)
CP 15 03 06 07

Example
California Civil Code

1925. Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time.

1933.

The hiring of a thing terminates:

1. At the end of the term agreed upon;
 2. By the mutual consent of the parties;
 3. By the hirer acquiring a title to the thing hired superior to that of the letter; or,
 4. By the destruction of the thing hired.
- (Enacted 1872.)

Insuring Part of the Building

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 14 01 09 17

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SCHEDULED BUILDING PROPERTY TENANT'S POLICY

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Location Of Building:	
Causes Of Loss Form (and related endorsements, if any):	
Valuation Condition: Actual Cash Value <input type="checkbox"/> Or Replacement Cost <input type="checkbox"/>	
Coinsurance (if applicable): %	
Deductible On Building Glass (if any): \$	
Deductible On Building Property Other Than Glass: \$	
Description Of Building Glass	Limit Of Insurance
	\$
Description Of Other Building Property	Limit Of Insurance
	\$
	\$
	\$
	\$
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

Insuring Part of the Building

POLICY NUMBER:

COMMERCIAL PROPERTY
CP 14 02 09 17

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UNSCHEDULED BUILDING PROPERTY TENANT'S POLICY

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Location Of Building:	
Causes Of Loss Form (and related endorsements, if any):	
Valuation Condition: Actual Cash Value <input type="checkbox"/> Or Replacement Cost <input type="checkbox"/>	
Coinsurance (if applicable): %	
Deductible On Building Glass (if any): \$	
Limit Of Insurance On Building Glass: \$	
Deductible On Building Property Other Than Glass: \$	
Limit Of Insurance On Building Property Other Than Glass: \$	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

What if the
Tenant
Damages the
Building?



Can the Tenant Be Held Responsible for Damage Done to Rented Space?

1. What does the lease say?
 - Who is responsible for insuring the building?
 - Has landlord waived rights of recovery?
 - Is there waiver of subrogation language?
2. What if the lease is silent or unclear?
 - Can the landlord's carrier subrogate against the tenant?

State Positions Vary

1. The tenant is an implied coinsured – The Sutton Rule/Doctrine

Sutton v. Jondahl, 532 P.2d 478 (Okla. 1975)

.....subrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary....

Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary.

State Positions Vary

2. Subrogation is permitted – Anti-Sutton

- Tenant should be responsible for its negligence.
- Tenant is not a coinsured unless – e.g.
 - The lease requires that the landlord maintain insurance for the benefit of the tenant
 - OR
 - The lease exculpates the tenant from loss caused by the tenant's wrongdoing

3. Case-by-case

- What does the lease say?
- What are the reasonable expectations of the parties?
- Other factors

Business Auto Coverage Form
CA 00 01 11 20

Liability Exclusion

This insurance does not apply to any of the following:

6. Care, Custody Or Control

"Property damage" to or "covered pollution cost or expense" involving property owned or transported by the "insured" or in the "insured's" care, custody or control. But this exclusion does not apply to liability assumed under a sidetrack agreement.

Business Auto Coverage Form
CA 00 01 11 20

1. Who Is An Insured

The following are "insureds":

- a. You for any covered "auto".*
 - b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:*
- ...

Section V - Definitions

G. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.

Commercial General Liability Form
CG 00 01 04 13

Coverage A Exclusion

This insurance does not apply to:

j. Damage To Property

"Property damage" to:

(1) *Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;*

Possible Solutions

- Damage to Premises Rented to You
- Carrier-specific enhancements
- Legal Liability Coverage Form

Damage to Premises Rented to You
CG 00 01 04 13

- Insured must be legally liable for fire damage to the property he rents (other than simply contractually liable.)
- The limit is part of the Each Occurrence CGL limit.
- Erodes the General Aggregate limit

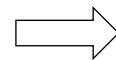
Damage to Premises Rented to You
CG 00 01 04 13

CGL is written with a \$1,000,000 each occurrence limit and \$300,000 Damage to Premises Rented to You.

Damages during a fire loss caused by the tenant:

- \$ 500,000 damage to rented space (policy will pay only \$300,000)
- \$ 600,000 damage to neighboring premises
- \$ 100,000 medical payments to 10 injured occupants of the building
- \$1,000,000 paid for this loss

Who will defend the Named Insured when the injured people begin to file lawsuits?



Damage to Premises Rented to You
CG 00 01 04 13

Surely, the Umbrella will help. Won't it?

- Umbrella likely will not drop down over a sublimit.
- Umbrella likely excludes damage to rented real or personal property.

And what if the Umbrella says this?

Retained Limit is the sum stated in the Declarations as such. If the policies of underlying insurance do not apply to the occurrence or offense covered by this insurance, the insured shall retain the amount stated as a Self-Insured Retention.....These retained limits shall only be reduced or exhausted by payment of claims that would be insured by this policy. The Named Insured shall bear all legal costs and expenses incurred until such time as the retained amounts are exhausted by payment of claims that would be insured by this policy.

Damage to Premises Rented to You

Insurers may:

- Increase limits in enhancement endorsements
- Increase perils to include causes of loss other than fire
- Enhance coverage in other ways using proprietary endorsements

Legal Liability Coverage Form – CP 00 40 10 12

We will pay those sums that you become legally obligated to pay as damages because of direct physical loss or damage, including loss of use, to Covered Property caused by accident and arising out of any Covered Cause of Loss.

- Insured must be legally liable for damage to the property he rents (other than simply contractually liable.)
 - For building damage from burglary or robbery, contractual liability triggers coverage.
- Basic, Broad or Special Form Cause of Loss is chosen.
- Insurer has the right and duty to defend.

Legal Liability Coverage Form – CP 00 40 10 12

- No deductible applies.
- No coinsurance applies.
- ISO rate - Multiply the 80% coinsurance building rate by .25

Note: Can also be used to coverage damage to leased personal property (.50 rate)

- Form is a cross between property and liability coverage. As such, it includes features common to liability coverage.
 - Supplementary payments (including defense)
 - Coverage for certain automatic insureds if NI is partnership, LLC or corporation (partners, LLC members, executive officers, trustees, directors, stockholders, LLC managers)

CP 10 30 09 17 (Special Form) and the Legal Liability Coverage Form

Certain special form exclusions do not apply

- Paragraph B.1.a. Ordinance or Law;
- Paragraph B.1.c. Governmental Action;
- Paragraph B.1.d. Nuclear Hazard;
- Paragraph B.1.e. Utility Services; and
- Paragraph B.1.f. War and Military Action

Two additional exclusions are added

- Contractual liability
- Nuclear hazard (replaces the nuclear exclusion that applies to other coverage forms)

CP 10 30 09 17 (Special Form) and the Legal Liability Coverage Form

Contractual Liability Exclusion

We will not defend any claim or "suit", or pay damages that you are legally liable to pay, solely by reason of your assumption of liability in a contract or agreement. But this exclusion does not apply to a written lease agreement in which you have assumed liability for building damage resulting from an actual or attempted burglary or robbery, provided that:

- (i) *Your assumption of liability was executed prior to the accident; and*
- (ii) *The building is Covered Property under this Coverage Form.*

Leasehold Interest Coverage Form CP 00 60 06 95

Provides coverage when:

- An insured is a tenant and has a favorable lease and/or invested in his lease or improvements to his space;
- The lease is cancelled by the landlord as a result of direct physical loss of or damage to property from a covered cause of loss; and
- The insured suffers a financial loss as a result

Leasehold Interest Coverage

Artie's Art Gallery signed a 10-year lease to rent one of nine stores in a building that extends a full block on Main Street. He made \$50,000 in improvements to his space and pays rent that is less than the going rate in the area. He got such favorable terms by paying a non-refundable amount of \$100,000 when the lease was initially signed. The lease includes the following clause.

If by fire or other casualty the Premises are totally damaged or destroyed, or the Building containing the Premises is partially damaged or destroyed to the extent of 20% or more of the replacement cost thereof, or the damage to the Building otherwise exceeds the amount of \$25,000 (even though the Premises may not be damaged), Landlord will have the option of terminating this Lease or any renewal thereof by serving written notice upon Tenant within 180 days from the date of the casualty and any prepaid Rent or Additional Rent will be prorated as of the date of destruction and the unearned portion of such Rent will be refunded to Tenant without interest.

Leasehold Interest Coverage

Five years into the lease, the space three stores down from Artie's is severely damaged by fire. Because rents in the area have increased dramatically, the landlord exercises the abatement clause and terminates Artie's lease.

Artie is insured under a Commercial Property Policy with the following limits:

- Business Personal Property \$250,000 limit, Special Form
- Business Income \$500,000 limit, ¼ monthly indemnity

Leasehold Interest Coverage Form CP 00 60 06 95

We will pay for loss of Covered Leasehold Interest you sustain due to the cancellation of your lease. The cancellation must result from direct physical loss of or damage to property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

1. Tenants' Lease Interest
2. Bonus Payments
3. Improvements and Betterments
4. Prepaid Rent

Leasehold Interest Coverage Form
CP 00 60 06 95

100 Main Street, Anytown, USA

Unit 1	Unit 2	Artie's Unit 3	Unit 4	Unit 5	Unit 6	Unit 7	Unit 8	Unit 9
--------	--------	-------------------	--------	--------	--------	--------	--------	--------

How should the premises be described on Artie's Leasehold Interest Coverage?

Leasehold Interest Coverage Form
CP 00 60 06 95

- a. **Tenants' Lease Interest**, meaning the difference between the:
- (1) Rent you pay at the described premises; and
 - (2) Rental value of the described premises that you lease.

CP 00 60 06 95 Copyright, ISO Commercial Risk Services, Inc., 1994

Leasehold Interest Coverage Form (CP 00 60 06 95)

In order to understand net leasehold interest, we must first understand gross leasehold interest

F. DEFINITIONS

1. **"Gross Leasehold Interest"** means the difference between the:
 - a. Monthly rental value of the premises you lease; and
 - b. Actual monthly rent you pay including taxes, insurance, janitorial or other service that you pay for as part of the rent.This amount is not changed:
 - (1) Whether you occupy all or part of the premises; or
 - (2) If you sublet the premises.

CP 00 60 06 95

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Page 4 of 4

Leasehold Interest Coverage Form (CP 00 60 06 95)

F. DEFINITIONS

3. **"Net Leasehold Interest":**

- a. Applicable to Tenants' Lease Interest.

"Net Leasehold Interest" means the present value of your "gross leasehold interest" for each remaining month of the term of the lease at the rate of interest shown in the Leasehold Interest Coverage Schedule.

The "net leasehold interest" is the amount that, placed at the rate of interest shown in the Leasehold Interest Coverage Schedule, would be equivalent to your receiving the "Gross Leasehold Interest" for each separate month of the unexpired term of the lease.

To find your "net leasehold interest" at any time, multiply your "gross leasehold interest" by the leasehold interest factor found in the table of leasehold interest factors attached to this form.

CP 00 60 06 95

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Page 4 of 4

Leasehold Interest Example Tenant's Lease Interest

- \$10,000 monthly rent paid
- \$12,000 monthly rent for equivalent space
- Gross leasehold interest is \$2,000 per month
- 60 months left on the lease as of policy inception
- Maximum exposure of \$120,000 (60 x \$2,000)
- Net Leasehold Interest is the sum that equals what the insured would have at the end of 60 months if he invested the amount paid at a specified rate of interest.
- Using a rate of return of 6%, the leasehold interest factor is 51.9238. (this number is found on the endorsement)
- $\$2,000 \times 51.9238 = \$103,847.60$ net leasehold interest

Endorsements are available for interest rates between 5% and 15% and cover periods up to 400 months.

e.g. CP 60 06 11 85

COMMERCIAL PROPERTY

LEASEHOLD INTEREST FACTORS FOR 6.0%

This endorsement provides supplementary information to be used with the following:
LEASEHOLD INTEREST COVERAGE FORM

MONTH	FACTOR	MONTH	FACTOR	MONTH	FACTOR	MONTH	FACTOR
1	0.9952	52	45.8429	103	80.8528	154	108.1829
2	1.9855	53	46.8160	104	81.4563	155	108.6540
3	2.9710	54	47.3854	105	82.0569	156	109.1229
4	3.9518	55	48.1510	106	82.6546	157	109.5894
5	4.9278	56	48.9129	107	83.2494	158	110.0537
6	5.8991	57	49.6711	108	83.8413	159	110.5158
7	6.8657	58	50.4257	109	84.4303	160	110.9756
8	7.8276	59	51.1766	110	85.0165	161	111.4332
9	8.7848	60	51.9238	111	85.5998	162	111.8886
10	9.7374	61	52.6675	112	86.1803	163	112.3417
11	10.6854	62	53.4075	113	86.7580	164	112.7927
12	11.6288	63	54.1439	114	87.3329	165	113.2415
13	12.5676	64	54.8768	115	87.9050	166	113.6881
14	13.5019	65	55.6062	116	88.4744	167	114.1326
15	14.4317	66	56.3320	117	89.0410	168	114.5749

CP 60 05 11 85 - LEASEHOLD INTEREST FACTORS FOR 5.0%
CP 60 06 11 85 - LEASEHOLD INTEREST FACTORS FOR 6.0%
CP 60 07 11 85 - LEASEHOLD INTEREST FACTORS FOR 7.0%
CP 60 08 11 85 - LEASEHOLD INTEREST FACTORS FOR 8.0%
CP 60 09 11 85 - LEASEHOLD INTEREST FACTORS FOR 9.0%
CP 60 10 11 85 - LEASEHOLD INTEREST FACTORS FOR 10.0%
CP 60 11 11 85 - LEASEHOLD INTEREST FACTORS FOR 11.0%
CP 60 12 11 85 - LEASEHOLD INTEREST FACTORS FOR 12.0%
CP 60 13 11 85 - LEASEHOLD INTEREST FACTORS FOR 13.0%
CP 60 14 11 85 - LEASEHOLD INTEREST FACTORS FOR 14.0%
CP 60 15 11 85 - LEASEHOLD INTEREST FACTORS FOR 15.0%

Leasehold Interest Coverage Form
CP 00 60 06 95

- b. Bonus Payments**, meaning the unamortized portion of a cash bonus that will not be refunded to you. A cash bonus is money you paid to acquire your lease. It does not include:
- (1)** Rent, whether or not prepaid; or
 - (2)** Security

CP 00 60 06 95 Copyright, ISO Commercial Risk Services, Inc., 1994

Leasehold Interest Coverage Form
CP 00 60 06 95

- d. **Prepaid Rent**, meaning the unamortized portion of any amount of advance rent you paid that will not be refunded to you. This does not include the customary rent due at:
- (1) The beginning of each month; or
 - (2) Any other rental period

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Payment of a Bonus Payments/Pre-paid Rent claim

Example:

- 10-year lease
- \$100,000 non-refundable bonus payment (or pre-paid rent) made at the beginning of the lease period

$\$100,000 \times 1825 \text{ days} = \$182,500,000$

$\frac{\$182,500,000}{3650} = \$50,000 \text{ (less deductible)}$

Leasehold Interest Coverage Form
CP 00 60 06 95

- c. **Improvements and Betterments**, meaning the unamortized portion of payments made by you for improvements and betterments. It does not include the value of improvements and betterments recoverable under any other insurance, but only to the extent of such other insurance.

Improvements and betterments are fixtures, alterations, installations or additions:

- (1) Made a part of the building or structure you occupy but do not own; and
- (2) You acquired or made at your expense but cannot legally remove.

CP 00 60 06 95 Copyright, ISO Commercial Risk Services, Inc., 1994

Payment of a TIB claim when damage is not repaired

Example:

- 10-year lease
- \$50,000 Improvements and Betterments made at the beginning of the lease period
- Fire destroys Improvements and Betterments exactly five years after the lease began.
- Tenant closes business

$\$50,000 \times 1825 \text{ days} = \$91,250,000$

$\frac{\$91,250,000}{3650} = \$25,000 \text{ (less deductible)}$

CP DS 07 10 00 - LEASEHOLD INTEREST COVERAGE SCHEDULE

This endorsement provides supplementary information to be used with the following:

LEASEHOLD INTEREST COVERAGE FORM

Inception Date of Lease _____ Months Remaining at Inception _____
 Expiration Date of Lease _____ % Interest _____

The Leasehold Interest Coverage Form applies to the items described below for which an amount of "Net Leasehold Interest" At Inception is shown:

	"Gross Leasehold Interest"	"Monthly Leasehold Interest"	"Net Leasehold Interest" At Inception	Premium
Tenants Lease Interest	\$ _____ per month	xxxxxx	\$ _____	\$ _____
Bonus Payments	xxxx	\$ _____	\$ _____	\$ _____
Improvements And Betterments	xxxx	\$ _____	\$ _____	\$ _____
Prepaid Rent	xxxx	\$ _____	\$ _____	\$ _____
Total Covered Leasehold Interest			\$ _____	\$ _____

Calculating the Limit of Insurance (TIB, Bonus Payments, Prepaid Rent)

- Calculated by dividing the original costs by the number of months in the lease at the time of the expenditure
- Does not consider any options to renew for an additional period of time
- Net leasehold interest is the "monthly leasehold interest" times the number of months remaining in the insured's lease.

F. DEFINITIONS

2. **"Monthly Leasehold Interest"** means the monthly portion of covered Bonus Payments, Improvements and Betterments and Prepaid Rent. To find your "monthly leasehold interest", divide your original costs of Bonus Payments, Improvements and Betterments or Prepaid Rent by the number of months left in your lease at the time of the expenditure.

Calculating the Limit of Insurance (TIB, Bonus Payments, Prepaid Rent)

Monthly leasehold interest is used in defining net leasehold interest.

3. "Net Leasehold Interest":

b. Applicable to Bonus Payments, Improvements and Betterments or Prepaid Rent.

"Net Leasehold Interest" means the unamortized amount shown in the Schedule. Your "net leasehold interest" at any time is your "monthly leasehold interest" times the number of months left in your lease.

CP 00 60 06 95

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Page 4 of 4

Calculating the Limit of Insurance (TIB, Bonus Payments, Prepaid Rent)

Insured has a brand new 10 year lease (120 months)
Insured put in \$120,000 TIB at the beginning of the lease.

\$ 1,000 Monthly Leasehold Interest Per Month
X 120 months left on lease at inception
\$120,000 Net Leasehold Interest at Inception

Fast Forward – 5 years later

\$ 1,000 Monthly Leasehold Interest Per Month
X 60 months left on lease at inception
\$60,000 Net Leasehold Interest at Inception

Thank You For Being Here

Catherine Trischan, CPCU, CIC, CRM, ARM, AU, AAI, CRIS, MLIS, TRIP
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James K. Ruble Seminar

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

Section 3

Projecting Ethics into a Competitive Advantage

PROJECTING ETHICS INTO A COMPETITIVE ADVANTAGE

LEGAL and ETHICAL RESPONSIBILITIES

Steven D. Lyon

Lyon Consulting Services, LLC 2017

**CAN YOU REMEMBER YOUR
FIRST EXPERIENCE WITH
INSURANCE?**

Society's Perception of Insurance

"The public carries a natural ambivalence about insurance. It is something they buy reluctantly and hope they will never have to use.

Yet when they do not use it, they feel they have wasted the money paid in premiums. It might be added that they feel especially cheated when they have paid premiums for years without a loss, and when they finally suffer one, their premium goes up immediately.

That may not always be the case, but that is what they believe. Some way must be found to make the public feel (as opposed to understand intellectually) that they get their money's worth out of insurance."

Confused Insured

- Just purchased home for \$250,000
- Stops by your agency for Insurance
- Concerned about Hurricanes
- What do we tell them / sell them ? (wind is covered / sell HO-3)
- 2 years later home destroyed by Katrina
- Cat 4 hurricane.....
- with storm surge, flooding and levy breakage
- Exclusions vs. Expectations
- Bad Reputation ?
- Deserved...probably not, but it is their perception
- Litigation

New Formula

$$PE > PP = \downarrow V$$

(When PE is greater than PP, we wind up below the V)

WHEN POLICY HOLDER EXPECTATIONS
ARE GREATER THAN
POLICY PERFORMANCE
WE WIND UP IN LITIGATION

PLAINTIFF
V.
INSURANCE
AGENCY

What are Ethics?

- According to Aristotle:
- Ethos is a Greek term from which ethics is derived and is referred to as ethical appeal in the rhetorical context.
- The basis of rhetoric is formed from the author's attitude and character toward his audience.
- His character is what gives value to his words and thus, provides support and proof to his arguments.

ETHICS:

Principles, Rules and Values that guide our Behavior.

Ethical vs. Moral Decisions

- Right vs. Wrong *IS NOT* Ethics
- Right vs. Wrong *IS* Morality
- Right vs. Right *IS* Ethics

Moral Decisions

- Honesty vs. Lying
- Paying vs. Stealing
- Playing by the Rules vs. Cheating

Ethical Decisions

- **Honesty vs. Loyalty**

I need to honestly answer your question .vs. I promised to keep the information confidential.

- **Short-Term vs. Long-Term**

Go on expensive vacation with the kids .vs. Save for College Education

- **Justice vs. Mercy**

You embezzled money, so you're fired .vs. I know you're having problems at home, so lets work out a payback schedule and never let this happen again.

- **Individual vs. Community**

I know a college degree from night school will get you out of that dead-end job, but the kids hardly ever see you now.

Ethical “Gray” Areas

- Is it wrong to kill in a time of war?
- Is Capital Punishment Wrong?
- Is it wrong to steal to feed your children?

- **ETHICS COUNTS**
- **CHARACTER MATTERS**
- **KNOWLEDGE IS THE KEY**

- **"Being ethical is professional, but the gesture goes beyond the mere compliance with law. It means being completely honest concerning ALL FACTS. It means more than merely NOT telling lies, because an incomplete answer can be more deceptive than a lie."**

- **"Never forget that a half truth is a whole lie."**

--Errol F. Moody Jr--

Group Discussion

- What can we do in our daily practice of Insurance to be perceived as more ethical ?
 - What should you say when your client asks about your compensation ?
 - What about selling on "price" ? [did your agent save you \$\$\$ last year?]
 - What about blocking markets with no intent of writing with that carrier ?
 - What about "shopping/moving" your clients insurance each year ?
 - Can you get this claim paid for me ?

Ethics in Insurance

- If you want to be known as an Ethical person- act the part !
 - Join organizations that support Ethics
 - Associate with others known to be Ethical
- Accept responsibility for your mistakes and fix them promptly
- Don't be afraid to tell the client you don't know the answer– but find it out and timely reply
- Only accept risks that you have the knowledge, experience and expertise in handling
- “Don't let the aroma of the premium, hide the problems with the risk”

Ethics in Insurance

- What should you do when a policy comes in higher than quoted ?
- Be careful when switching carriers that you don't leave off or limit coverages, without notifying the insured of such.
- Understand the clients risks and exposures, and reconcile them to the appropriate carrier and product
- Should you accept gifts from your clients and/or carriers ?
- Moving a book of business to provide better coverage for your clients vs. lower commission for you

ETHICS IS IN!

- It's cool to talk about Ethics
- Most companies have an Ethical Code of Conduct
- It's easy to talk the talk, but difficult to walk the walk!

THE CANONS AND RULES OF THE CODE OF PROFESSIONAL ETHICS

Canon 1 CPCUs should endeavor at all times to place the public interest above their own.

Canon 2 CPCUs should seek continually to maintain and improve their professional knowledge, skills, and competence.

Canon 3 CPCUs should obey all laws and regulations, and should avoid any conduct or activity which would cause unjust harm to others.

Canon 4 CPCUs should be diligent in the performance of their occupational duties and should continually strive to improve the functioning of the insurance mechanism.

Canon 5 CPCUs should assist in maintaining and raising professional standards in the insurance business.

Canon 6 CPCUs should strive to establish and maintain dignified and honorable relationships with those whom they serve, with fellow insurance practitioners, and with members of other professions.

Canon 7 CPCUs should assist in improving the public understanding of insurance and risk management.

Canon 8 CPCUs should honor the integrity of the CPCU designation and respect the limitations placed on its use.

Canon 9 CPCUs should assist in maintaining the integrity of the Code of Professional Ethics.

Independent Insurance Agents of America- Code of Ethics (partial)

I PLEDGE myself to maintain friendly relations with other agencies in my community. I will compete with them on an honorable and fair basis, make no false statements, nor any misrepresentation by omission of facts, inference or subterfuge.

I CONSIDER unethical, the obtaining of business by commercial bribery, coercion or unfair influence.

I WILL adhere to a strict observance of all insurance laws relative to the conduct of my business and will studiously avoid any practices which might cause the business adverse notoriety or disrepute. **I WILL** cooperate in every reasonable way with my competitors for the betterment of the insurance business and its advancement to a still higher level of service.

Realizing that only by unselfish service can the insurance business have the public confidence it merits, I will at all times seek to elevate the standards of the insurance profession by governing all my business and community relations in accordance with the provisions of the Code and by inspiring others to do likewise.

**IF IT WAS EASY..
EVERYONE
WOULD BE
DOING IT!**

The Basics of Insurance Ethics

- **Honesty** --Truthful, straightforward, sincere
- **Integrity** -- Honorable, courage of conviction, stands up for beliefs
- **Respect for Others** --Freedom, dignity, and rights
- **Caring/Compassion** -- Not selfish, manipulative, or controlling
- **Fiduciary Responsibility** -- Fidelity, Loyalty, Disclosure
- **Personal Responsibility** --Accountability, considers action
- **Trust** --Confidant, promise-keeper, reliable, dependable
- **Altruistic** -- Puts others first
- **Good Judgement** --Makes the right choices, fair, not prejudice

What stands in the Way?

- 1 in 6 Americans regularly drinks or uses drugs on the job
- 1 in 2 Americans genuinely believes you get ahead by politics and cheating, not by work
- American workers admit they spend more than 20% of their work day “not working”
- Americans feel the #1 cause of business decline is low executive ethics

Ethics Matters

- More people are watching what you do, more than what you say
- Practice Ethics on the easy things, so when the hard times come, you'll already know how to handle them
- Your reputation matters
- Good character takes commitment
- Would your children be proud of your actions ?

Can Ethics be Taught?

- Imprinting
- Training
- Ethical Re-Education
- Look to our Peers

“ In trials in which juries perceive the insurance agent has done something unethical, damages are now being awarded to the greatest extent possible. The amounts are not labeled as punitive, but the effects are the same”.

-Curtis Pearsall- Utica National E&O

Why be Ethical ?

- Enhance Credibility with Clients
- Avoid Government Regulation
- Avoid Public Criticism
- Social Responsibility

How do you Rate your Ethics?

- **On a scale of 1 to 10**
- **10 being the best**
- **1 being the worse**
- **Go ahead--Rate Yourself !**

Potential Conflicts and Disclosure

- Are Agents and Brokers Conflicted ?
- Who do we owe our foremost loyalty to ?
- Self-Serving ?
- Accusations of Inappropriate Activity
- Need for Disclosure
- New York Reg. 194



How do we Make Money from Our Clients?

- **Commission**
- **Fees**
- **Profit Sharing**
- **Trust Account**
- **Trips**
- **Producer Loans / Funding**
- **“Other Needs”**
- **Over-Rides / Placement Fees**

Actions Speak Louder than Words

Why Don't we Act More Ethically?

- To meet needs of immediate self-interest
- To gain certain short-term benefits
- To protect someone
- Fear of Punishment
- To Avoid Embarrassment
- To maintain privacy
- To win admiration of others

Ethics “Tests”

How do you know what is Ethical ?

- The Golden Rule Test
- TV Show Test
- Professional Conduct Codes Test

Are you a “Professional” ?

- Commitment to High Ethical Standards
- Prevailing Attitude of Altruism
- Mandatory Education Preparation / Training
- Mandatory Continuing Education
- A Formal Association or Society
- Independence
- Competence

LEGAL RESPONSIBILITIES

Legal Duties based upon....

- Torts
- Peer Standards
- Statutes (Dept. of Insurance, Legislature)
- Contracts (Oral or written, client or carrier)

How **BIG** of a problem is it?

INSURANCE FRAUD IS SECOND ONLY TO WHAT CRIME, AS THE MOST PRACTICED CRIME IN THE WORLD?

TAX FRAUD

QUIZ !

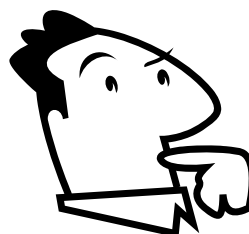
- If we took the total (in 2015 dollars) of the 10 most costly insured disasters, in the history of the United States – How much money would we be talking about ?

- \$188B

• 2004- IVAN	\$8.758B	2012-SANDY	\$19.563B
• 2004- CHARLEY	\$9.207B	1992-ANDREW	\$24.111B
• 2005- WILMA	\$12.929B	2001- WTC / PENTAGON	\$24.613B
• 2008- IKE	\$13.826B	2011-AL floods/tornadoes	\$ 7.751B
• 1994- Northridge,CA EQ	\$18.597B	2005-KATRINA	\$49.047B

Annual Cost of Fraud in Insurance Industry ?

- a). \$100 million
- b). \$ 10 billion
- c). \$ 80 billion
- d). \$750 million
- e). \$ 40 billion



Correct Answer:

- c). \$ 80 billion

Coalition Against Insurance Fraud -2015

Fraud Breakdown



\$32,000,000,000
in Property / Casualty



\$48,000,000,000 in
Health / Life

Insurance Information Institute -2015

Ethical vs. Legal Responsibility

- **Ethical** people do more than is required....
- **Unethical** people do less than is allowed.

Michael Josephson- Ethicist

- Ethics is something you aspire to....
- Legal is something you have to....
- Ethics is way beyond legal...

People's Attitudes

- 1:4 Americans say it's OK to defraud Insurance Companies
- 1:10 say it's OK to submit claims for items not stolen or damaged
- 4:10 would NOT report someone they know is committing fraud
- 5:10 would commit fraud if they knew they could get away with it

Coalition Against Insurance Fraud

People's Attitudes

- 40% of Americans say it's OK to exaggerate claims to make up deductible
- 25% say it's OK to pad a claim to make up for premiums already made
- 1:3 malingers at home, even though doctor gave them a return to work order
- 7:10 say Fraud is a widespread problem
- 1:5 are aware of Fraud at the workplace
- 3:4 are unwilling to pay more for Insurance

Coalition Against Insurance Fraud

Physician's Attitudes

- 1:3 say it's necessary to "play the game" with the Health Care Industry to provide proper care
- Almost 1:2 physicians say patients ask them to deceive third party providers to help get coverages
- 1:10 physicians have reported medical symptoms that a patient didn't have
- Problem: Threshold for review reduced to \$100
Answer: Submit two \$75 claims!

Coalition Against Insurance Fraud

Insurance Claim Statistics

- Automobile
 - 1:3 Bodily Injury Claims involve Fraud
 - 40%+ of claims involve attorney
- Property
 - Arson accounts for 500,000 fires annually
 - Only 2% of arson fires result in conviction
 - Arson is largest cause of property damage in United States
 - Why?

Coalition Against Insurance Fraud

“With the possible exception of murder and drug abuse, no serious crime attracts as wide a variety of perpetrators as insurance fraud. People who would never think of robbing a bank, stealing a car or burglarizing a home can find the temptations of “easy money” from insurance fraud hard to resist”

OIFP investigated!

N.J. Insurance Fraud Unit Itself Target of Probe Over Employee Payroll

May 31, 2005

New Jersey's award-winning office created to root out insurance fraud is under scrutiny itself, with the state auditor probing allegations the insurance industry was billed about \$4 million for employees who never worked on fraud cases.

The probe stems from a letter to a ranking state senator by a retired investigator from the state Division of Criminal Justice who said 43 employees had their salaries paid with insurance industry money but did little or no work on fraud cases.

"We investigate doctors for submitting false bills to insurance companies, and we put doctors in jail for that. What's the difference here?" Edward Buttimore, the retired investigator, told The Star-Ledger of Newark.

OIFP Resolved!

Bad Accounting, but No Criminal Intent at Office of Insurance Fraud Prosecutor

July 26, 2005

A state audit of the books of the Office of Insurance Fraud has found poor accounting practices but no malfeasance or criminal intent involving the costs of combating fraud in the state.

The state auditor did find that about \$9 million of the \$30 million budget may have been spent for matter not dealing with insurance, an incorrect use of the money the fraud office gets each year from car insurance companies doing business in New Jersey.

"The audit uncovered \$1 million in "questionable costs" and about \$8 million in salary payments not supported by any accounting on whether the money was paid in connection with insurance fraud investigations.

DUTY TO
DISCLOSE
RELATIONSHIP

E&S Carrier

Intermediary

DUTY TO DO
DUE
DILIGENCE

Broker/Agent

Client

Excess & Surplus Lines Due Diligence

1. Written statement establishing agency point person
2. Work with reputable, well-established brokers
3. Check with other agents, references
4. Obtain copies of all States relevant licenses
5. Written contract indicating who is responsible for S/L taxes, filings, compliance
6. Lexus litigation search

Excess & Surplus Lines Due Diligence

7. D&B report, Check with DOI or other regulatory agencies
8. Sample of all coverage forms
9. Copy of Brokers Binding Agreement with all placing carriers
10. Copy of Brokers E & O coverage certificate
11. Visit the Brokers office

Ethics and the Application Process

- Clients Signature
 - Fair Credit Reporting Act
 - Fraud Statement
 - Licensed Producer must Witness
- Default answers to “no”
- “Edit” information
- Application questions
 - Age of Structure
 - Construction Type
 - Adjoining Occupancies
 - Verify Insurable Interest (PC and Life Viaticals)
 - Previous Cancellations, Terminations, Non-Renewals, Refusals
 - Loss past three years

Ethical Disclosure Question

- Insured had a Fatality on their jobsite 37 months ago, for which the carrier has paid over \$2MM
- Risk has been written in E&S market for past three years
- You remarket the account to a voluntary carrier this year
- How do you answer the following question?

Carrier Application

- Have there been any claims in the past 36 months?
 - None, however there was a million dollar claim 37 months ago !
 - Should you disclose the old claim ?

What Happens in “Real Life” ?

- Agents were designed to be sales arms of Insurance Company
- We are in business to Sell
- We are paid to Sell
- We are very good at Selling
- Our Livelihood depends on Selling
- We are under pressure to Sell

What Happens in “Real Life” ?

- Clients are forced to Buy Insurance
- Clients do not like Insurance
- They think it is too expensive !
- Client don't feel they get their \$ worth
- Perceive Insurance Industry as greedy
- Don't understand policies- too complex
- Don't appreciate exclusions and/or limitations
- Sue when expectations are not met

Ethics and Policy Servicing

- Carrier Stability
- Do not rely on Guaranty Funds
- E&O is my ultimate backstop
- Certificates, Evidences (misleading ?)
- Producers “Famous” words
- Every plaintiffs statement
- Double edge sword of reviewing client documents
- Sharing MVR information with third parties
- Sharing policyholder information with third parties
- Privacy Issues / Confidentiality

THINK ABOUT IT.....

- **WHAT MAKES YOU DIFFERENT FROM OTHER AGENCIES ?**
- **WHY SHOULD I BUY MY INSURANCE FROM YOU ?**

The Answer is Always the Same

**OUR
SERVICE !!!**

WHY DO CUSTOMERS LEAVE?

- 1% DIE
- 3% MOVE
- 5% GO WITH FRIENDS
- 9 % PRICE
- 14% PRODUCT
- **68% INDIFFERENCE**

How do you measure Service?

- NEW BUSINESS
- RETENTION
- CLAIMS
- **ASK! / SURVEYS**

No Time !

RETENTION

- What's an acceptable Retention Ratio?
- Did you know that at a 90% retention level you will lose half of your book every five (5) years?

RETENTION

- For every 1 point you increase your Retention Rates, you add 10+ points to the bottom line!

Expenses or **Retention**

Expense Reduction

\$1,000,000 rev
- 100,000 90% ret
- 800,000 exp

\$ 100,000 profit

Retention Increase

\$ 1,000,000 rev
- 50,000 95% ret
- 800,000 exp

\$ 150,000 profit

50% Increase in Bottom Line !!

What to do with Complaining Customers ??

**LISTEN TO
THEM !!!**

WHY LISTEN ??

- The average Business never hears from 96% of it's unhappy customers
- 91% of the unhappy customers never return
- For every complaint received, there are 26 others who did not complain
- Of those who complain 54-70% will do business with you again if your resolve their complaint

WHY LISTEN ??

- That number jumps to 95% if the customer feels the problem was resolved quickly
- The average customer who has a problem tell 9-10 other people (do the math)
- Customers who have their complaints satisfactorily handled tell 5 other people about it. [not true anymore- social media!]

True or False ?

1. Profitability and Growth are driven by excellent Customer Service ?
2. Exceeding customer's service expectations makes them happy.
3. Happy customers don't leave.
4. Customer who don't leave, increase retention rates.
5. Happy customers also refer us to new ones.
6. The key to having a profitable company is retaining existing profitable customers AND bringing in new ones.
7. Customer Service is a critical component of any company !

Effective Communication Techniques

Best Ways

- Face to Face
- Telephone
- Letter
- Email
- Voice Mail

Our Wishes

- Voice Mail
- Email
- Letters
- Telephone
- Face to Face
- Younger generations

Why Cross-Sell ?

- They already have bought from you
- Increased Retention
 - 1 policy = 65% chance of leaving
 - 2 policies = 40% chance of leaving
 - 3 or more policies = 20% chance of leaving
- Increased Commission
- Account handling .vs. Single Policy
- E &O Reduction
- Feedback

Ethics in Policy Delivery

- Different Levels of Service for Different Customers
- Delivery of Policy to Customer
 - Insurance Department Requirements / Laws
 - Hand Deliver, Mail, .pdf file, Download Direct
- Discrepancies
 - Not as quoted
 - Worry about it when the policy comes in
 - Just send it out and hope they pay!
 - Added exclusions / New Policy Forms / New edition dates
- Disclosure
 - Cancellation Penalties
 - Warranties
 - Life Insurance
 - Using E&S market when Voluntary is available
 - Affidavit of Effort

Ethics in Claim Handling

- Reporting Requirements to Carrier
- Accepting or Denying Coverage
- Late Reports and Prejudice
- Advising an insured not to submit a claim
- Advising an insured to pay out of their pocket
- Settling your own E&O Claim
- When do you report claims to your Excess carrier?
- What happened to Agents Draft Authority ?
- Counseling Clients vs. 800 direct report

Additional Examples

- Local Competitor Confides in you about agency problems
- Intellectual Property- copying newsletter
- Underwriting Exceptions — building a book on exceptions, is problematic
- Hiring Practices- Employee Performance
- Downsizing- “your team” vs. confidentiality
- Reporting Data Breaches
- Insurance Groups — different carriers / different commission levels

Any concerns with.....

- Becoming a “Charter Agent” with a \$50,000 investment in a newly formed carrier
- Buying stock in an Insurance company you represent
- Getting your clients claim paid for him/her when it clearly should not be paid

People want to Deal with Reputable and Ethical Companies

- Name three retail stores with High Ethical Standards you would want to do business with?
- (Why is it hard?) (Shouldn't we seek these people out and be willing to pay a little more \$\$) (Shouldn't we send the right message for acting ethical?)
- Name three retail stores with Low Ethical Standards you would not want to do business with?

The Station Nightclub Warwick, RI February 20, 2003

Additional Defendants Added to Suit

- Original suit filed in July 2004
 - Days before 3 year Statute of Limitation
 - Included 4 dozen Defendants
- Suit now includes:
 - Individual members of Great White
 - Home Depot
 - State of Rhode Island
 - West Warwick Fire official
 - American Foam and it's president Aram DerManouelian

Settlements

- American Foam – sold foam (\$575 sale for noise control) to club in June 2000, obtained it from other mfgs.
 - \$6.3mil settlement
 - \$5.0mil from Insurance
 - \$1.3mil out of pocket
- Foam manufacturers agreed to pay \$30mil
 - Leggett & Platt
 - Wm. T. Burnett & Co.
- Home Depot, Clear Channel Broadcasting, Pyrotechnics manufacturer, and local TV station - \$70mil
- Brings total settlement to more than \$100mil

Settlements

- JBL, Inc. - \$815k
- ABC Bus Leasing, Inc. and Superstar Services - \$500k
- Anheuser-Busch - \$21mil
- State of Rhode Island- \$10mil
- Town of West Warwick - \$10mil
- Great White - \$1mil
- Total of all settlements to date: \$176mil

“A Cost of Doing Business”

“Viewing errors and omission claims as something to be dreaded, and to be protected against only by insurance, is the poorest management posture an agency can take in facing the business risk of malpractice. The risk of loss to the insurance agency from mistakes is a business risk, pure and simple. It is a cost of doing business whether the agency carries insurance or absorbs E&O claims costs on a full retention basis. Just as the agency must pay electric bills and salaries, it likewise will pay, either now or later, errors and omissions “bills”. It is a healthy attitude to expect what at some time or another your agency will have an E&O claim.”

Dr. Ronald T. Anderson
Agent's Legal Responsibility

Reason for Increased E & O

- Clients expectations not met
- Extra Contractual obligations / Special Relationships
- Experts
 - Requirements to File a Lawsuit
 - Affidavit of Merit
- Contract Complexity
- Legal Profession
 - Advertising
 - Contingency Fees
- Agency / Broker System stressed
 - Sales Oriented
 - Not enough staff or time
 - Continuing Education
 - Qualified Employees
- Clients obligation to read policy

Reason for Increased E & O

- Public Perception / Awareness
 - Media Impact
 - Fraud Statistics
 - Attitudes
- Deep Pockets / Multiple Defendants
- Public Accountability
- Catastrophes and Disasters

Unhappy Client = Potential Litigation

- Suit alleges Pennsylvania Insurance Agency failed to advise its insured (beverage company) that its warehouse sat in a 100 year Flood Plain
- Didn't recommend purchasing coverage though NFIP or other sources
- Remnants of Hurricane Ivan caused \$8.4MM in damages
- Property carrier refuses coverage
- Insured suing for return of its \$1.6MM premium payments and punitive damages

Certificates of Insurance

- Informational purposes only
- Does not alter, change or amend the policy
- Watch pending Cancellation dates
- Acord Rules: Do Not Use Certs to....
 - Waive Rights
 - Quote wording from a contract
 - Amend the policy terms without an endt.
 - To provide information on a Leased vehicle
- State Certificate Laws

PUBLIC PERCEPTION

- Advertising
- Letterhead
- Website
- Business Card
- Slogans
- Designations
- Bodega / Bail Bonds / Travel /
Insurance Agency

Winning a Lawsuit ?

- Tillman v Short
- Agent “Won” the suit on Appeal
- Involved \$2404.85
- Five years (trial and appeal)
- Time, Emotional distress, \$\$\$, public relations, angry client
- E&O deductible
- Even if you win, you lose

Law of Agency

- Agents are authorized to act on behalf of a Company to....
 1. Solicit / Effect Coverage
 1. Sign Policies
 1. Collect Premium

Duties an Agent owes to Principal

- Utmost Good Faith
- Obey Instructions
- Loyalty
- Honesty
- Exchange of Information / Disclosure
- Fiduciary – Account for Money
- Contractual

Duties Principal owes to Agents

- Employment under the terms of the contract
- Compensation
- Reimbursements
- Indemnity
- Right to Recover Advances

Duties an Agent owes to Clients

- Financially Stable Carriers
- Proper Coverage
- Timely Placement or Notification
- Altruistic Attitude
- Advice and Professionalism
- Availability
- Fiduciary Duty
- *Ryder v. Lynch* – skill and knowledge requisite to the calling

Special Relationships / Extra Contractual Duties

- **General Rule: No obligation to Advise Insured**

“In most states, the **general rule** is that an insurance agent or broker has no obligation to an insured to affirmatively advise the insured as to the type of insurance that should be purchased, or as to the limits of insurance that would be adequate to protect the insured’s interests.”

David H. Paige, Esq and Robert Sullivan, Esq.

General Rule

Exceptions:

- Insured relied upon agent's advice regarding a question of coverage
- Agent undertook an obligation beyond placement of insurance
- Agent provided inaccurate/incorrect advice
- Agent holds himself out to be a specialist and/or charges a separate fee
- Special Relationships

Texas Courts

....an insured is not completely without responsibility in the insurance transaction.

An agent, for example, has no duty to explain the terms or coverages of a policy to the insured, and the insured has a duty to read and be familiar with the terms of his or her own insurance policy, and is bound to the terms of the policy whether he or she reads it or not. (6 month policy)

The Texas Supreme Court has clarified that an agent will only be liable for failing to procure insurance when there is evidence that the agent has induced a client to rely on his or her performance of the undertaking to procure insurance, and the client reasonably, and to the client's detriment, assumed that he or she was insured against the risk which caused the loss.

An agent cannot be negligent for failing to obtain a specific type of insurance that he or she was never requested to obtain.

In *Moore v. Whitney-Vaky Ins. Agency*, for example, the court held that an agent who was charged with obtaining insurance for an apartment complex owner could not be negligent for failing to acquire insurance to cover an employment-related claim where such coverage was never discussed nor requested. Likewise, a court held that an agent could not be liable for failing to offer higher policy limits to an insured where there was no evidence that the insured sought advice from the agent as to how much coverage should be obtained.

Other duties owed by an agent to the insured will be defined by the particular facts and circumstances of the relationship between the agent and insured.

For example, courts will look at the past practices between agent and insured to determine whether a duty arises in a particular case. In *McCall v. Marshall*, the Texas Supreme Court declined to impose a legal duty on the part of an insurance agent to extend the insurance protection of his customer "merely because the agent has knowledge of the need for additional insurance of that customer, *especially in the absence of evidence of prior dealings where the agent customarily has taken care of his customer's needs without consulting him.*"

Similarly, the court in *Trinity Universal Ins. Co. v. Burnette* held that an agent owes his clients the duty to either renew his clients' policy, replace the policy with that of another company, or notify the clients of nonrenewal so that they could obtain insurance elsewhere, based on the uncontroverted evidence that the agent had a practice of *a/ways* renewing policies for his clients or notified them when the policies were non-renewed.

Agents Authority

Expressed / Written

The authority specifically given to an agent, either orally or in writing through an Agency Agreement, by the principal

Implied

The authority that is not specifically expressed to an agent, but arises out of relationship with the principal, in order to fully exercise the agent's expressed authority

Apparent

A doctrine that holds an agent may have whatever authority a reasonable person would assume they have by their actions. The Insurance carrier may have to pay the claim, but will exercise their right of subrogation against the agent

No Authority

ERRORS

Simply stated, these are mistakes that we make;

We usually say wrong things because we sincerely believe they are right.

Sometimes we say things we are pretty sure are right, but we are not certain.

And every now and then we take a guess and say it just so we'll look like we know what we are doing!

OMISSIONS

These are the things we don't say—but should.

It is not unusual for us in everyday life to assume certain things about our interactions with individuals. But in the insurance business, we cannot assume anything. It is the question about a client's needs that we don't ask; it is the statement we don't make because clients didn't bring up a given topic; it is the assumption we make about what clients do or don't know---that expose clients to risks they did not ask to take.

INTERMEDIARY

You are the intermediary in the chain between the Insurance company and the client. You are the Insurance company's eyes and ears in the field.

It is your job to find out everything the insurance company needs to know about its clients. And it is your job to tell your clients everything they need to know about their Insurance.

Errors and Omissions

- Under Insurance
- Failure to Communicate
- Notice of Non-Renewal / Cancellation
- Additional Premium v. Return Premium
- Due Diligence / Disclosure of Market
- Crane Story

Critical Times for E&O Claims

- Applications not signed and dated
- Lost Policy Releases
- Peer review of Residual / E&S market apps
- Coverage Documentation / Rejection
- Source of Property Values / Liability Limits
- Cell Phone Documentation
- Claims Reporting

Critical Times for E&O Claims

- Agents Authority – what is it ?
- Confidentiality and Privacy policies
- Cancellation NP \$ / Non-Renewal Notices
- “This is all I can get for you” – NFIP / State
- Cadillac / Taurus / Pinto proposal
- Broader coverage may be available
- Identifying Risk – Tangible and Intangible
- Renewal Reviews – especially E&S market

Critical Times for E&O Claims

- Written Confirmation of Changes
- Be careful of the words you use...

The “L” Syndrome

- Lack of Action
- Lack of Attention
- Lack of Communication
- Lack of Concern
- Lack of Consistency
- Lack of Control
- Lack of Knowledge

Edgar H. Lion, JD
Alpine Risk Management Corp, LLC

The “F” Syndrome Common Causes of E & O Claims

- Failure to place coverage
- Failure to maintain or renew
- Failure to place on best possible terms
- Failure to report / process claims timely
- Failure to supply information
- Failure to follow directions
- Failure to provide service
- Failure to notify client/carrier of material change

Edgar H. Lion, JD
Alpine Risk Management Corp, LLC

Critical Times for E&O Claims

- Tangible vs. Intangible Property
- Deny / Accept Claims for Payment
- Agent of Record Letters
- “Brokering” Business
- Acting outside of Expertise
- Companies and Agencies Merge / Acquired
- Loss of Key Employee
- New Clients / New Products / New Procedures

Interesting Statistics

- 90% of all Agents and Brokers E & O claims could be avoided !
- 10% will happen no matter how careful an agency may be in following its policies and procedures
- Consistent office procedures are the Key !

Agency Defense Strategy

- DO NOT admit liability
 - Prejudice carriers position
 - FRC v Jane Doe
- Report claims promptly
 - New York: Archaic law
- DO NOT try to settle yourself
- Have a “point person” to deal with claim
- Be careful what you say to the carrier
- Inform agency staff – use as learning experience
- NO Cover-ups
- Prepare for deposition and/or trial
 - Answer the question and Shut up !

Projecting Ethics to your Competitive Advantage

- CONCLUSION
 - Picture on Desk
 - Pork Chop Story
 - Olympic Ice Skating Gold Medal
 - It's your Choice

ALPHABET? What's Missing?

A B C D F G H I J
K L M N P Q R S
T U V W X Y Z

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)



James K. Ruble Seminar

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

Section 4

Commercial Liability Endorsements To Watch Out For

Commercial Liability Endorsements to Watch Out For

Catherine Trischan, CIC, CRM, CPCU, ARM, AU, AAI, CRIS, MLIS, TRIP
E&K Insurance Group
Eatontown, NJ
catherine.trischan@gmail.com

Covered Operations and Locations

Covered Operations and Locations

Coverage A Insuring Agreement (CG 00 01 04 13)

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.....

Insurer Areas of Concern

- Eliminating coverage when an exposure is to be insured elsewhere
- High hazard operations
- Work in specific states – eg.
 - New York – labor law concerns
 - Construction defect concerns

Premises Exclusion

Exclusion – All Hazards in Connection with Designated Premises (CG 21 00 07 98)

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of:

- 1. The ownership, maintenance or use of the premises show in the Schedule or any property located on these premises;*
- 2. Operations on those premises or elsewhere which are necessary or incidental to the ownership, maintenance or use of those premises; or*
- 3. Goods or products manufactured at or distributed from those premises.*

Designated Ongoing Operations Exclusion

Exclusion - Designated Ongoing Operations (CG 21 53 01 96)

This insurance does not apply to "bodily injury" or "property damage" arising out of the ongoing operations described in the Schedule of this endorsement, regardless of whether such operations are conducted by you or on your behalf or whether the operations are conducted for yourself or for others.....

Designated Work Exclusion

Exclusion - Designated Work (CG 21 34 01 87)

This insurance does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" and arising out of "your work" shown in the Schedule.

Designated Work Exclusion - used as a prior work exclusion

EXCLUSION – DESIGNATED WORK

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Description of your work:

Any operations started prior to xx/xx/xxxx

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

This insurance does not apply to "bodily injury" or "property damage" included in the "products-completed operations hazard" and arising out of "your work" shown in the Schedule.

CG 21 34 01 87

EIFS Exclusion CG 21 86 12 04

- A.** This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of, caused by, or attributable to, whether in whole or in part, the following:
1. The design, manufacture, construction, fabrication, preparation, distribution and sale, installation, application, maintenance or repair, including remodeling, service, correction or replacement, of any "exterior insulation and finish system" or any part thereof, or any substantially similar system or any part thereof, including the application or use of conditioners, primers, accessories, flashings, coatings, caulking or sealants in connection with such a system; or
 2. "Your product" or "your work" with respect to any exterior component, fixture or feature of any structure if an "exterior insulation and finish system", or any substantially similar system, is used on the part of that structure containing that component, fixture or feature.
- B.** The following definition is added to the **Definitions** Section:
- "Exterior insulation and finish system" means a non-load bearing exterior cladding or finish system, and all component parts therein, used on any part of any structure, and consisting of:
1. A rigid or semi-rigid insulation board made of expanded polystyrene and other materials;
 2. The adhesive and/or mechanical fasteners used to attach the insulation board to the substrate;
 3. A reinforced or unreinforced base coat;
 4. A finish coat providing surface texture to which color may be added; and
 5. Any flashing, caulking or sealant used with the system for any purpose.

Excluded Locations/Operations

Nonstandard endorsements

- Building heights
- Roofing
- Snow and ice removal
- Others

Snow and Ice Removal

Sample Language

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of snow and ice removal activities that are performed for others by the insured or by any contractors or subcontractors working on the insured's behalf. Snow and Ice Removal includes but is not limited to: snow plowing, snow blowing, snow or ice clearing, shoveling or salting, by any means whether mechanical or by hand.

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.

CGL exclusion

CG 00 01 04 13 – exclusion

g. Aircraft, Auto Or Watercraft

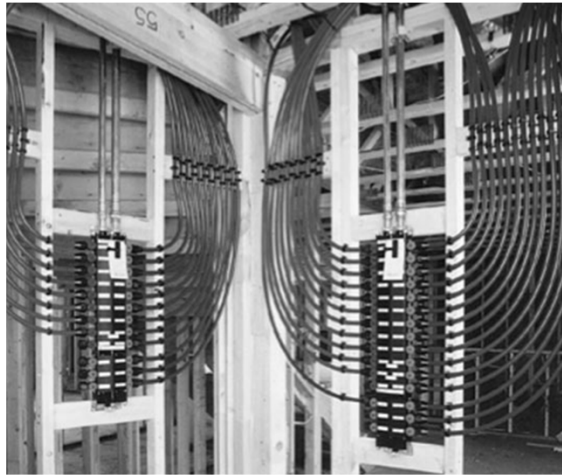
"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

Pex Piping

Sample Language

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of, caused by, or attributable to, whether in whole or in part, the following:

- 1. The design, manufacture, construction, fabrication, preparation, distribution and sale, installation, application, maintenance or repair, including remodeling, service, correction or replacement, of any "Pex piping system" or any part thereof, or any substantially similar system or any part thereof, including the application or use of, mechanical or compression fittings or sealants in connection with such a system; or*
- 2. "Your product" or "your work" with respect to any component, fixture or feature of any structure if a "Pex piping system", or any substantially similar system, is used on the part of that structure containing that component, fixture or feature.*



15



FUND RAISING EVENTS ENDORSEMENT

16

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. This insurance applies to "bodily Injury", "property damage", and "personal and advertising injury" arising out of all of your fund raising events with the following exceptions unless scheduled in paragraph C. below:

- Parades sponsored by the Insured
- Aircraft
- Motorcycle runs and automobile rallies
- Fireworks – exhibitors operated by the Insured.
- Firearms
- Animals – other than house pets
- Carnivals and fairs with mechanical rides sponsored by the Insured
- Rock, Hip-Hop or Rap concerts – with admission over 500 people
- Events including contact sports
- Rodeos sponsored by the Insured
- Political Rallies
- Any event lasting more than 5 days (including otherwise acceptable events)
- Any event with greater than 500 people at any one time (including otherwise acceptable events)
- Any event with liquor provided by the Insured if a license is required for such activity.
- Any activities by third party telemarketing, direct mail, or internet advertising (including spam) firms.

COMMERCIAL GENERAL LIABILITY
CG 40 04 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – EARTH MOVEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:
- This insurance does not apply to "bodily injury" or "property damage" arising out of "earth movement" that is:
1. Caused by or alleged to have been caused by, in whole or in part; or
 2. Aggravated by or alleged to have been aggravated by; "your work".
- B. The following definition is added to the Definitions section:
- "Earth movement" means:
1. Earthquake, including tremors and aftershocks and any earth sinking, rising or shifting related to such event;
 2. Landslide, including any earth sinking, rising or shifting related to such event;
 3. Mine subsidence, meaning subsidence of a man-made mine whether or not mining activity has ceased; or
 4. Earth sinking, rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of reality. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

Cannabis Exclusion CG 40 14 12 20

"Cannabis":

1. *Means:*

Any good or product that consists of or contains any amount of Tetrahydrocannabinol (THC) or any other cannabinoid, regardless of whether any such THC or cannabinoid is natural or synthetic.

2. *Paragraph C.1. above includes, but is not limited to, any of the following containing such THC or cannabinoid:*

a. Any plant of the genus Cannabis L., or any part thereof, such as seeds, stems, flowers, stalks and roots; or

b. Any compound, by-product, extract, derivative, mixture or combination, such as:

(1) Resin, oil or wax;

(2) Hash or hemp; or

(3) Infused liquid or edible cannabis;

whether or not derived from any plant or part of any plant set forth in Paragraph C.2.a.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CANNABIS EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART**A. The following exclusion is added:**

This insurance does not apply to:

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of:

a. The design, cultivation, manufacture, storage, processing, packaging, handling, testing, distribution, sale, serving, furnishing, possession or disposal of "cannabis"; or

b. The actual, alleged, threatened or suspected inhalation, ingestion, absorption or consumption of, contact with, exposure to, existence of, or presence of "cannabis"; or

2. "Property damage" to "cannabis".

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", or the offense which caused the "personal and advertising injury", involved that which is described in Paragraph A.1. or A.2. above.

However, Paragraph A.1.b. does not apply to "bodily injury" or "property damage" arising out of the actual, alleged, threatened or suspected inhalation, ingestion, absorption or consumption of, or contact with, "cannabis" by:

- (1) An insured; or
- (2) Any other person for whom you are legally responsible;

but only if the "bodily injury" or "property damage" does not arise out of your selling, serving or furnishing of "cannabis" to any person described above.

B. The exclusion in Paragraph A. does not apply to "personal and advertising injury" arising out of the following offenses:**1. False arrest, detention or imprisonment; or**

2. 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.

C. The following definition is added to the Definitions section:**"Cannabis":****1. Means:**

Any good or product that consists of or contains any amount of Tetrahydrocannabinol (THC) or any other cannabinoid, regardless of whether any such THC or cannabinoid is natural or synthetic.

2. Paragraph C.1. above includes, but is not limited to, any of the following containing such THC or cannabinoid:

a. Any plant of the genus Cannabis L., or any part thereof, such as seeds, stems, flowers, stalks and roots; or

b. Any compound, by-product, extract, derivative, mixture or combination, such as:

(1) Resin, oil or wax;

(2) Hash or hemp; or

(3) Infused liquid or edible cannabis;

whether or not derived from any plant or part of any plant set forth in Paragraph C.2.a.

Cannabis Exclusion (variation)**CG 40 15 12 20 Cannabis Exclusion with Hemp Exception****B. The exclusion in Paragraph A. does not apply to:**

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of goods or products containing or derived from hemp, including, but not limited to:

- a. *Seeds;*
- b. *Food;*
- c. *Clothing;*
- d. *Lotions, oils or extracts;*
- e. *Building Materials; or*
- f. *Paper.*

2. "Property damage" to goods or products described in Paragraph B.1. above.

.....

Cannabis Exclusion (variation)

21

CG 40 16 12 20 Cannabis Exclusion with Hemp and Lessors Risk Exceptions

B. The exclusion in Paragraph A. does not apply to:

1. and 2. from the CG 40 15 +

3. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the ownership, maintenance or use of a premises leased to others by you; or

4. "Personal and advertising injury" arising out of the following offenses:

a. False arrest, detention or imprisonment; or

b. The wrongful eviction from, wrongful entry into, or invasion of the right or private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.

Premises/Project Limitation

22

Exclusion - Limitation of Coverage to Designated Premises or Project (CG 21 44 07 98)

This insurance applies only to "bodily injury", "property damage", "personal and advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or

2. The project shown in the Schedule

Premises/Project Limitation

Exclusion - Limitation of Coverage to Designated Premises or Project (CG 21 44 04 17) BEWARE!

This insurance applies to "bodily injury" and "property damage" caused by an "occurrence" that takes place in the "coverage territory" only if:

(1) The "bodily injury" or "property damage":

(a) Occurs on the premises shown in the Schedule or the grounds and structures appurtenant to those premises; or

(b) Arises out of the project or operation shown in the Schedule;

Designated Operations – Coverage Limitation

Sample Language

The "bodily injury" or "property damage" is caused by or results from the business described in the Schedule.....This insurance applies to "personal and advertising injury" caused by an offense in the course of the business described in the Schedule.

Designated Classifications – Coverage Limitation

Sample Language

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

Designated Classifications – Coverage Limitation

91342 Carpentry (NOC)

91340 Carpentry – construction of residential property not exceeding three stories in height

91583 Contractors – subcontracted work – in connection with building construction, reconstruction, repair or erection – one or two family dwellings

Wrap-Ups

- OCIP—Owner Controlled Insurance Program
- CCIP— Contractor Controlled Insurance Program
- Potential concerns for participants
 - What are the limits of coverage?
 - What are the terms of coverage?
 - When does the wrap-up terminate?
 - How long is the extended completed operations coverage? How does it compare to the statute of repose?



Statute of Repose

42 Pa. Cons. Stat. § 5536

A 12-year statute of repose governs damages actions, for injuries to property, real or personal, personal injuries, wrongful death, contribution, and indemnity claims arising from deficiencies in the design, planning, supervision, or observation of construction, or construction of improvements to real property. The statute is triggered by completion of construction. If an injury occurs between 10 and 12 years after completion, the statute allows claims to be brought within 2 years of the date of the injury, but not later than 14 years after construction is completed.

The repose limitations do not apply to persons who own, possess, or control the improved property when the injury occurs.

Source: IRMI Construction Risk Management

EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONTROLLED (WRAP-UP) INSURANCE PROGRAM (CG 21 54 12 19)

29

- A.** The following exclusion is added to Paragraph 2. **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:**
This insurance does not apply to "bodily injury" or "property damage":
1. Arising out of your ongoing operations; or
 2. Included in the "products-completed operations hazard";
- at the location(s) described in the Schedule of this endorsement, but only if you are enrolled in a "controlled (wrap-up) insurance program" with respect to the "bodily injury" or "property damage" described in Paragraphs **A.1.** and **A.2.** above at such location(s).
- This exclusion applies whether or not the "controlled (wrap-up) insurance program":
- a. Provides coverage identical to that provided by this Coverage Part;
 - b. Has limits adequate to cover all claims; or
 - c. Remains in effect.
- B.** The following definition is added to the **Definitions** section:
"Controlled (wrap-up) insurance program" means a centralized insurance program under which one party has secured either insurance or self-insurance covering some or all of the contractors or subcontractors performing work on one or more specific project(s).

EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONTROLLED (WRAP-UP) INSURANCE PROGRAM (CG 21 54 12 19)

30

SCHEDULE
Description And Location(s) Of Operation(s): <div style="text-align: center; font-size: 1.2em; margin-top: 20px;">ALL</div>
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

- A.** The following exclusion is added to Paragraph 2. **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:**
This insurance does not apply to "bodily injury" or "property damage":
1. Arising out of your ongoing operations; or
 2. Included in the "products-completed operations hazard";
- at the location(s) described in the Schedule of this endorsement, but only if you are enrolled in a "controlled (wrap-up) insurance program" with respect to the "bodily injury" or "property damage" described in Paragraphs **A.1.** and **A.2.** above at such location(s).
- This exclusion applies whether or not the "controlled (wrap-up) insurance program":
- a. Provides coverage identical to that provided by this Coverage Part;
 - b. Has limits adequate to cover all claims; or
 - c. Remains in effect.
- B.** The following definition is added to the **Definitions** section:
"Controlled (wrap-up) insurance program" means a centralized insurance program under which one party has secured either insurance or self-insurance covering some or all of the contractors or subcontractors performing work on one or more specific project(s).

LIMITED EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONTROLLED (WRAP-UP) INSURANCE PROGRAM (CG 21 31 12 19)

31

A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

1. This insurance does not apply to "bodily injury" or "property damage":

- a. Arising out of your ongoing operations; or
- b. Included in the "products-completed operations hazard";

at the location(s) described in the Schedule of this endorsement, but only if you are enrolled in a "controlled (wrap-up) insurance program" with respect to the "bodily injury" or "property damage" described in Paragraphs 1.a. and 1.b. above at such location(s).

2. This exclusion applies whether or not the "controlled (wrap-up) insurance program":

- a. Provides coverage identical to that provided by this Coverage Part; or
- b. Has limits adequate to cover all claims.

3. However, this exclusion does not apply if the "controlled (wrap-up) insurance program" in which you are enrolled with respect to the "bodily injury" or "property damage" described in Paragraph A.1. above at the location(s) described in the Schedule of this endorsement has been cancelled, nonrenewed or otherwise no longer applies for reasons other than the exhaustion of all available limits, whether such limits are available on a primary, excess or on any other basis. You must advise us of such cancellation, nonrenewal or termination as soon as practicable.

LIMITED EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONTROLLED (WRAP-UP) INSURANCE PROGRAM (CG 21 31 12 19)

32

SCHEDULE

Description And Location(s) Of Operation(s):

ALL

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

1. This insurance does not apply to "bodily injury" or "property damage":

- a. Arising out of your ongoing operations; or
- b. Included in the "products-completed operations hazard";

at the location(s) described in the Schedule of this endorsement, but only if you are enrolled in a "controlled (wrap-up) insurance program" with respect to the "bodily injury" or "property damage" described in Paragraphs 1.a. and 1.b. above at such location(s).

2. This exclusion applies whether or not the "controlled (wrap-up) insurance program":

- a. Provides coverage identical to that provided by this Coverage Part; or
- b. Has limits adequate to cover all claims.

3. However, this exclusion does not apply if the "controlled (wrap-up) insurance program" in which you are enrolled with respect to the "bodily injury" or "property damage" described in Paragraph A.1. above at the location(s) described in the Schedule of this endorsement has been cancelled, nonrenewed or otherwise no longer applies for reasons other than the exhaustion of all available limits, whether such limits are available on a primary, excess or on any other basis. You must advise us of such cancellation, nonrenewal or termination as soon as practicable.

Wrap-Ups – DIC/Excess a better option

Sample Language

It is hereby agreed and understood:

- 1. This policy shall apply to the Named Insured's interest in projects insured under a "wrap-up" or similar rating plan, but only to the extent that this policy provides coverage for legal liabilities or hazards which are not covered by the other "wrap-up" insurance. This policy responds only for the differences in conditions and will apply in excess of the other "wrap-up" insurance. This policy excludes any liability which is covered by the other "wrap-up" insurance.....*

Residential Exclusions

How is residential defined? Does it include?

- Single family houses
- Multi-family houses
- Residential condos
- Residential cooperatives
- Townhouses/townhomes
- Projects over a certain number of units
- Buildings of a certain construction type
- Mixed-use buildings
- Apartment buildings



Residential Construction/Roofing Operations



Residential Exclusions

- Does the exclusion apply to Bodily Injury and/or Property Damage?
- Conversion to Habitational Exclusions

Conversion to Habitational Endorsement

A. The following exclusion is added to Paragraph 2. Exclusions of Section I - Coverage A - Bodily Injury and Property Damage Liability:

2. Exclusions

This insurance does not apply to:
Condominium or Townhouse Conversion
 "Bodily injury" or "property damage" arising from "Your work" or "your product" related to any project or structure that is converted, by any party, into a "condominium or townhouse project".

B. The following exclusion is added to Paragraph 2. Exclusions of Section I - Coverage B - Personal and Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:
Condominium or Townhouse Conversion
 "Personal and advertising injury" arising from "Your work" or "your product" related to any project or structure that is converted, by any party, into a "condominium or townhouse project".

C. The following definition is added to the Definitions Section:

"Condominium or townhouse project" means a project that includes or is intended to include structure(s) with two or more habitational units and in which each unit is separately owned and titled. "Condominium or townhouse project" includes site improvements and all related common areas.

Cross Liability
 a/k/a
 Cross Suits
 a/k/a
 Cross Claims

Cross Liability/Cross Suits

CG 00 01 04 13 - Separation of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and*
- b. Separately to each insured against whom claim is made or "suit" is brought.*

Cross Suits Exclusion

Named Insured vs. Named Insured

Sample Language

This insurance does not apply to:

Any claim or "suit" for damages by any named insured against another named insured.

COMMERCIAL GENERAL LIABILITY
CG 40 10 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – CROSS SUITS LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- | | |
|---|--|
| <p>A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverages – Coverage A – Bodily Injury And Property Damage Liability:</p> <p>This insurance does not apply to:</p> <p>Cross Suits</p> <p>Any claim made or "suit" brought by any Named Insured under this Policy against another Named Insured under this Policy for damages because of "bodily injury" or "property damage".</p> | <p>B. The following is added to Paragraph 2. Exclusions of Section I – Coverages – Coverage B – Personal And Advertising Injury Liability:</p> <p>This insurance does not apply to:</p> <p>Cross Suits</p> <p>Any claim made or "suit" brought by any Named Insured under this Policy against another Named Insured under this Policy for damages because of "personal and advertising injury".</p> |
|---|--|

Cross Suits Exclusion

Exclusion – Intercompany Products Suits (CG 21 41 12 19)

This insurance does not apply to any claim made or "suit" brought for damages by any Named Insured against another Named Insured because of "bodily injury" or "property damage" arising out of "your products" and included within the "products-completed operations hazard."

Why? Intercompany sales are not charged for.

Cross Suits Exclusion

Any Insured vs. Any Insured

Sample Language

This insurance does not apply to:

Any claim or "suit" for damages by any insured against another insured.

Cross Suits Exclusion (something in between)

This insurance does not apply to bodily injury, property damage, personal or advertising injury arising from claims or suits brought by:

- a. One Named Insured against another Named Insured;*
- b. Any parent company, parent corporation, or holding company that owns any interest in any Named Insured, or any subsidiary company or subsidiary corporation which owns any interest in any Named Insured;*
- c. Any other company or corporation of which any interest is owned by any of the entities described in a. or b. above;*
- d. Any division or department of any of the entities described in a., b., or c. above;*
- e. Any officer, director or employee of any of the entities described in a., b., c., or d. above.***

Contractual Liability

Contractual Liability Exclusion **CG 00 01 04 13**

"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.....*

Insured Contract – CG 00 01 04 13

9. "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;*

Insured Contracts

L ease

E asement

A n obligation to Indemnify a
Municipality

S idetrack

E levator Maintenance Agreement

Insured Contract – CG 00 01 04 13

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.

Agreements

- Hold Harmless
- Indemnification
- Two Parties
 1. Indemnitor (the protector)
 2. Indemnitee (the one protected)

Indemnify

Black's Law Dictionary

To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. Also to make good; to compensate; to make reimbursement to one of a loss already incurred by him.

Indemnification Agreement

Indemnification is the obligation of one party (indemnitor) to reimburse another party (indemnitee) for the losses the indemnitee incurs or the damages for which it may be held liable.

- 1) One party, the indemnitor, assumes responsibility for the financial consequences of the liabilities of another, the indemnitee.
- 2) Involves injury or damage to a third party
- 3) May include defense or legal fees
- 4) May require indemnification at the close of the claim or suit or it may require that the indemnitor assume the defense obligation

Hold Harmless Agreement

- The obligation of one party to assume financial responsibility for the legal liability of another party
- Pay on behalf (hold harmless) vs. reimburse (indemnification)
- As is the case with an indemnification agreement, the liability is not transferred; only the responsibility is transferred.

Insured Contract - Exception

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, road-beds, tunnel, underpass or crossing;

Railroads - Coverage Enhancing Endorsements

- **CG 24 17 10 01** Contractual Liability – Railroads
- **CG 24 27 04 13** Limited Contractual Liability – Railroads
- **CA 20 70 10 13** Coverage for Certain Operations in Connection with Railroads

Insured Contract – Exception **CG 00 01 04 13**

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

(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.

Defense of Indemnitees

CG 00 01 04 13

Conditions that must be met for an insurer to defend the indemnitee and for those defense costs to be supplementary payments:

- Insured and indemnitee are named co-defendants
- Contract is an insured contract to which insurance applies
- Contract includes the obligation to defend
- No existing or potential conflicts
- Indemnitee and insured concur in the request for defense
- Represented by single counsel
- Indemnitee must agree to cooperate

Endorsements Affecting Contractual Liability

COMMERCIAL GENERAL LIABILITY
CG 21 39 10 93

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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 obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement.

Indemnification Agreements

Limited Form

- a/k/a Common Law a/k/a Comparative
- The indemnitor assumes responsibility when liability is imputed to the indemnitee because of the indemnitor's actions or inactions (e.g. negligence)
- The indemnitor is obligated only to the extent of its own fault.

Indemnification Agreements

Intermediate Form

- Limited + responsibility for indemnitor's and indemnitee's joint actions/inactions (e.g. negligence) - % of responsibility of each party does not matter
- The indemnitor assumes all liabilities of the indemnitee, except where the injury or damage is caused solely by the indemnitee or a third party.
- Not permitted in some states in certain kinds of contracts

Indemnification Agreements

Broad Form

- Limited + Intermediate + Indemnitor agrees to be responsible even if he is without fault (e.g. indemnitee's sole negligence)
- The indemnitor assumes an unqualified obligation to hold the indemnitee harmless for all liabilities even if the injury or damage is not due to any wrongdoing on the part of the indemnitor.
- Not permitted in many states in certain types of contracts



Pa. Stat., Title 68, § 491, prohibits indemnity of design professionals.

Intermediate form is permissible if the negligence is not related to design or supervision, but not for the indemnitee's concurrent negligence arising out of design and out of supervision where the negligent supervision was the primary cause of the injury or damage.

Pennsylvania does not have a construction anti-indemnity statute that applies to standard construction contracts.

AIA 201 3.18.1**§ 3.18 Indemnification**

§3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, 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), 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. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

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AIA 201 3.18.1**§ 3.18 Indemnification**

§3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys' fees, 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), 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. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

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Amendment of Insured Contract Definition Endorsement

CG 24 26 04 13

- 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. However, such part of a contract or agreement shall only be considered an "insured contract" to the extent your assumption of the tort liability is permitted by law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.*

What About Breach of Contract?

***VANDENBERG V. SUPERIOR COURT OF SACRAMENTO COUNTY
(Centennial Ins., Co.), 21 CAL. 4TH 815, 88 Ca. Rptr. 2d 366 (CAL. Aug 30, 1999)***

"[W]hether a particular claim falls within the coverage afforded by a liability policy is not affected by the form of the legal proceeding. Accordingly, the legal theory asserted by the claimant is immaterial to the determination of whether the risk is covered." (9 Couch, Insurance (3d ed. 1997) § 126:3, p. 126-8.)

"The expression 'legally obligated' connotes legal responsibility that is *broad* in scope. It is directed at civil liability [which] can arise from either unintentional (negligent) or intentional tort, under common law, statute, or contract." (Malecki & Flitner, Commercial General Liability (6th ed. 1997) p. 6, italics added.)

What About Breach of Contract?

VANDENBERG V. SUPERIOR COURT OF SACRAMENTO COUNTY
(Centennial Ins., Co.), 21 CAL. 4TH 815, 88 Ca. Rptr. 2d 366 (CAL. Aug 30, 1999)

"The coverage agreement [which] embraces 'all sums which the insured shall become legally obligated to pay as damages is intentionally broad enough to include the insured's obligation to pay damages for breach of contract as well as for tort, within limitations imposed by other terms of the coverage agreement (e.g. bodily injury and property damage as defined, caused by an occurrence) and by the exclusions" (Tinker, *Comprehensive General Liability Insurance-Perspective and Overview* (1975) 25 Fed. Ins. Coun. Q. 217, 265.)

Breach of Contract Exclusion

Sample Language

This insurance does not apply to any claim or "suit" for breach of contract, whether express or oral, nor claims for breach of an implied in law or implied in fact contract, whether "bodily injury", "property damage", "personal and advertising injury" or an "occurrence" is alleged.

This exclusion also applies to any additional insureds under this policy.

Furthermore, no obligation to defend will arise or be provided by the Company for such excluded claims.

What About Coverage B?

CG 00 01 04 13

Coverage B – Personal and Advertising Injury Liability

Exclusions:

This insurance does not apply to:

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

There is no "insured contract" exception.

What About Coverage B?

CG 22 74 10 01

Limited Contractual Liability Coverage for Personal and Advertising Injury Endorsement

- False arrest
- Detention
- Imprisonment

Adds coverage for scheduled contracts

What About Coverage B?

Sample Language

CONTRACTUAL LIABILITY AMENDMENT — (PERSONAL AND ADVERTISING INJURY)

If it is required in a written contract, written agreement or written permit with the insured that any contractual liability exclusion for Personal Injury be removed from the policy, then Exclusion e. Contractual Liability under COVERAGE B PERSONAL AND ADVERTISING INJURY, 2. Exclusions is deleted in its entirety and replaced with the following:

e. Contractual Liability

"Personal and advertising Injury" for which the insured has assumed liability in a contract or agreement arising out of an "advertisement". This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

What About Coverage B?

CG 00 01 04 13

Coverage B – Personal and Advertising Injury Liability

Exclusions:

This insurance does not apply to:

f. Breach of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement."

Subcontractor Issues (from the gc/project owner point of view)

Inadequately Insured Subcontractor

- Premium issue
- Coverage issue – endorsements may:
 - Eliminate coverage completely
 - Give coverage, but with a much lower limit
 - Give coverage, but with a much higher deductible
 - Include requirements for contract language, coverage features, COIs

Inadequately Insured Subcontractor

What are the requirements?

- Certain language in a hold harmless agreement – e.g.

Such independent contractors or sub-contractors agree in writing to defend, indemnify, and hold harmless you and.....[others] from and against all claims, damages, losses, and expenses attributable to, resulting from, or arising out of the independent contractor's or sub-contractor's operations performed for you, caused in whole or in part by any act or omission of the independent contractor or sub-contractor or any one directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by you.

Inadequately Insured Subcontractor

What are the requirements?

- Certain limits on a CGL policy
- Certain coverage features on a CGL policy
- Specific additional insured endorsements
- Obtaining a COI
- Others

Subcontractor Warranty/Conditions Sample Language I

77

Additional Conditions - Certificates of Insurance and Hold Harmless Agreements – Deductible Amount Applies if Conditions Not Met

- a. You must obtain from all subcontractors or independent contractors, prior to commencement of any work performed on your behalf by that contractor, certificates of Insurance evidencing:
 - (1) Commercial General Liability limits of insurance of \$1,000,000 for Each Occurrence, \$1,000,000 for the General Aggregate and \$1,000,000 for the Products-Completed Operations Aggregate, and
 - (2) Workers compensation insurance in compliance with the statutes of the applicable state.
- b. You must obtain written hold harmless agreements from subcontractors or independent contractors indemnifying you against all losses for the work performed for you by any and all subcontractors or independent contractors, prior to the commencement of any work performed on your behalf by that contractor; and
- c. You must be listed as an Additional Insured on all subcontractors or independent contractor's General Liability policies either by endorsement or by written contract, prior to the commencement of any work performed on your behalf by that contractor.

Subcontractor Warranty/Conditions Sample Language II

78

INDEPENDENT CONTRACTORS RESTRICTION

The following Condition is added to section IV.:

- 1. You must see to it that:
 - a. all independent contractors have inforce, at the time they commence working for you, insurance of the type provided by this Policy and the limits for such insurance are equal to or greater than the Limits of Insurance provided by this Policy;
 - b. such independent contractors have held you harmless under contract as respects liability arising from their negligence; and
 - c. the Insured will obtain copies of a Certificate of Insurance from each independent contractor showing inforce insurance Limits of Liability as required in 1.a. above.
- 2. Such insurance as is afforded by this Policy will be excess over the independent contractor's insurance Limits of Liability as required in 1.a. above.
- 3. Your failure to comply with the terms of this endorsement will not invalidate this Policy but, in the event you fail to comply, we will be liable only to the same extent we would have been had you complied with the terms of this endorsement.

Subcontractor Warranty/Conditions

Sample Language III

79

Except in the State of New York, it is agreed that the following Condition is added to Section IV – Commercial General Liability Conditions

- 10 a. *It is agreed that any independent contractors or subcontractors hired by or for you shall maintain insurance of the type described in the Schedule and with limits of insurance equal to or greater than those shown in the Schedule.*
- b. *It is further agreed that you will obtain a valid certificate of insurance from independent contractors or subcontractors hired by or for you stating that you have been named as an Additional Insured on the independent contractor's or subcontractor's insurance policy.....*

Subcontractor Warranty/Conditions

Sample Language IV

80

"Adequate" insurance means Commercial General Liability, Workers' Compensation and Employer's Liability Insurance written by an insurance carrier with an A.M. Best rating of not less than A- VII and which:

1. *Remains in force and effect from the dates in which the contract for work being performed for the insured or on the insured's behalf is executed until the date in which the work is completed and the insurance is not cancelled, discontinued nor does not expire during this period of time;.....*
5. *Does not contain any conditions or provisions that preclude coverage based on requirements for hiring or contracting with subcontractors or independent contractors.....*

CG 00 01 04 13

Employee Injuries

"Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

Employers' Liability Exclusion

CG 00 01 04 13

This insurance does not apply to:

e. Employer's Liability

"Bodily Injury" to:

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

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

.....

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

Subcontractor employees

What if “employee” is redefined to include employees of subcontractors?

Exclusion:

“Bodily Injury” to:

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

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured’s business; or

.....

This exclusion does not apply to liability assumed by the insured under an “insured contract”

Subcontractor Injury - Sample Exclusion I

The following exclusion is added.....

This insurance does not apply to:

Bodily injury to any contractor hired or retained by or for any insured or to any employee of such contractor, if bodily injury arises out of and in the course of employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity.....

Subcontractor Injury - Sample Exclusion II

It is agreed that this insurance does not apply to bodily injury, property damage or personal and advertising injury to:

Any independent contractor or the employee of any independent contractor while such independent contractor or their employee is working on behalf of any insured.....

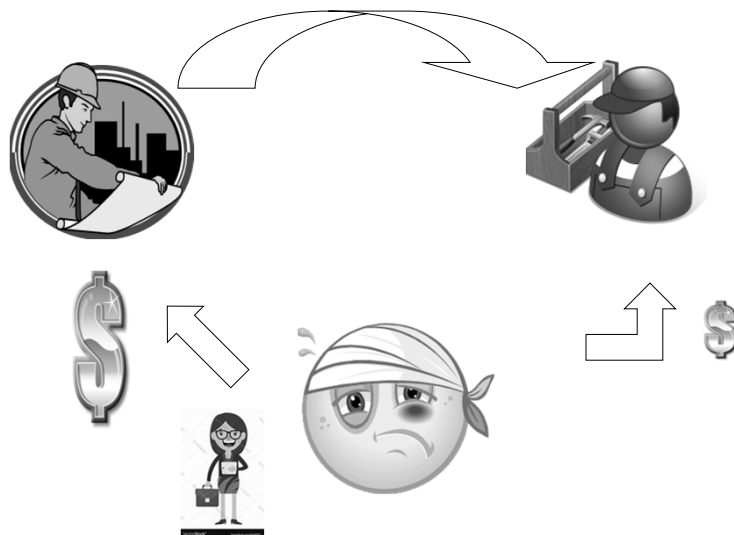
Excluding the acts of contractors and subcontractors

Sample Language

This insurance does not apply to "bodily injury", "property damage", "personal and advertising injury" or medical payments arising out of operations performed for you by contractors or subcontractors you hire or your acts or omissions in connection with your general supervision of such operations.

The Third Party Over Claim

Third Party Over Claim



Employers' Liability Exclusion

CG 00 01 04 13

This insurance does not apply to:

e. Employer's Liability

"Bodily Injury" to:

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

(a) Employment by the insured; or

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

.....

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

Cross Liability Exclusion

Sample Language

This insurance does not apply to:

Any claim or "suit" for damages by any insured against another insured.

.....

Modified CGL Employers' Liability Exclusion

BEWARE

Sample Language

This insurance does not apply to:

"Bodily injury" to:

- (1) An "employee" or temporary worker of any insured arising out of and in the course of:*
 - (a) Employment by any insured; or*
 - (b) Performing duties related to the conduct of any insured's business; or.....*

This exclusion applies...to any liability assumed under any contract or agreement.

Action Over Exclusion – Another Version

ACTION OVER EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

It is agreed that the following change is made to Coverage A. 2. Exclusions:

Exclusion e. **Employer's Liability** is deleted in its entirety and replaced with the following:

e. Employer's Liability

"Bodily injury" to:

- (1)** An "employee" of the named insured arising out of and in the course of:
 - (a)** Employment by the named insured; or
 - (b)** Performing duties related to the conduct of the named insured's business; or
- (2)** The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies:

- (1)** Whether the named insured may be liable as an employer or in any other capacity; and
- (2)** To any obligation to share damages with or repay someone else who must pay damages because of the injury.

What if the AI's employee gets hurt?

Sample Language (sub's policy)

This insurance does not apply to "bodily injury" to:

.....

(3) Any person who is employed by, is leased to or contracted with any organization that:

(a) Contracted with you or with any insured for services; or

(b) Contracted with others on your behalf for services; arising out of and in the course of employment by that organization or performing duties related to the conduct of that organization's business; or

Known Loss or Damage

Insuring Agreement CG 00 01 04 13

Coverage A - Bodily Injury or Property Damage

Historically:

- Insured must be legally obligated to pay
- BI or PD must be caused by an occurrence that takes place in the coverage territory
- BI or PD must occur during the policy period

Something else is now important (and has been since 1999)!

The Way It Was

- Known Loss Rule a/k/a Loss in Progress Rule
- Common law principle
- For a risk to be insurable, losses must be accidental and unexpected.
- Montrose Chemical Corporation v. Admiral Insurance Company
- The end of the known loss rule as we'd known it

Additional Question added

Adds an additional question to ask to determine if coverage is triggered

- Was BI or PD caused by an occurrence in the coverage territory?
- Did BI or PD occur during the policy period?
- Who knew what, and when did they know it?

Insuring Agreement CG 00 01 04 13

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.

Who Must Know?

Depending on the form of business:

- Individual Named Insured and spouse
- Partners in a partnership (and spouses)
- Members of a joint venture (and spouses)
- Limited liability company (LLC) members and managers
- Executive officers, directors and stockholders of organizations
- Trustees of a trust

Any "employee" authorized by you to give or receive notice of an "occurrence" or claim.

Insuring Agreement CG 00 01 04 13

"Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

Insuring Agreement CG 00 01 04 13

Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;*
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or*
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.*

The Problem

If a responsible person knows, prior to the policy period, that the BI or PD occurred, in whole or in part, 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.

- What about the small PD loss the insured just pays for or fixes that later turns into a larger loss?
- What if PD results in later BI?

The Problem

Policy Intent

- Policy A – damage starts
- Policy B – damage continues
- Policy C – damage continues

Policy A should be responsible for all damages.

BUT

CG 00 01 04 13

*Duties In The Event Of Occurrence, Offense, Claim
or Suit*

*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.*

The Problem

ABC, Inc. builds houses. During Policy A term, ABC became aware of some minor damage to the foundation of a home that was sold and repaired it. During Policy C, it was discovered that the repair didn't work and the damage continued. It's now a major claim.

Policy A is triggered, but Policy A was not put on notice.

What about Policy C? It is a known loss.

Modifying the Language

Sample Language

Prior to the policy period, no one knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If anyone 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.

"Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by anyone includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

Pre-Existing Damage or Injury Exclusion

EXCLUSION - PRE-EXISTING DAMAGE OR INJURY

The following exclusion is added to the policy:

This insurance does not apply to:

- (1) Any "bodily injury" or "property damage," whether such "bodily injury" or "property damage" is known or unknown:
 - (a) Which first occurred prior to the inception date of this policy (or the retroactive date of this policy, if any, whichever is earlier); or
 - (b) Which is, or alleged to be, in the process of occurring at the inception date of the policy (or the retroactive date of this policy, if any, whichever is earlier) even if the "occurrence" continues during this policy period.
- (2) Any "bodily injury" or "property damage," whether known or unknown, which is in the process of settlement, adjustment or "suit" as of the inception date of this policy (or the retroactive date of this policy, if any, whichever is earlier).

"Bodily injury" or "property damage" which first occurs during this policy period includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of this policy period.

We have no duty to either defend or indemnify any Insured for any claim or "suit" to which this exclusion applies.

Pollution

Pollution Exclusion

What is a pollutant?

- Any solid, liquid, gaseous or thermal irritant or contaminant
- Includes smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste
- Waste includes materials to be recycled, reconditioned or reclaimed.

What is a Pollutant? When does the Exclusion Apply?
It Depends

- | | |
|---|-----------------------------|
| • Odors from a meat processing plant | Yes, NE 1996 |
| • Bacteria which causes Legionnaire's disease | No – LA 2014, FL 2013 |
| • Bacteria in cow manure | Yes – WI 2014, WA 2017 |
| • Storm water runoff | Yes – GA 2018 |
| • Sewage | Yes – NY 2017; No – AL 2017 |
| • Curry Aroma | Yes – AL 2011 |
| • Cooking grease in a sewer drain | Yes – CO 2013 |

PA

Does the Pollution Exclusion Apply?

No – Lead in water (Netherlands Ins. Co., et al v. Butler Area School Dist., et al 2017 WL 2533525 (W.D. Pa. June 9, 2017))

Exclusion does not apply to water contamination in an elementary school. The court held that the pollution exclusions in the policies were ambiguous and construed coverage in favor of the insured. The court stated that the policies exclude damages “arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants, but that the Pennsylvania courts have found this language does not accurately describe the degradation over time that causes lead exposure from lead-based paint.

PA

Does the Pollution Exclusion Apply?

Yes – Sealant fumes (Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100 (Pa. 1999))

Exclusion applies to preclude coverage for bodily injury arising out of fumes from a concrete sealer. Definition of pollutant clearly and unambiguously encompassed the cement sealing agent.

**Pollution Exclusion
(premises)
CG 00 01 04 13**

113

General rule for premises that are or were owned or occupied by or rented or loaned to any insured:

- No coverage for BI/PD arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants"

**Exceptions To Pollution
Liability Exclusion (premises)**

114

Pollution Liability Coverage provided for:

- BI sustained within a building and caused by smoke fumes, vapor or soot from building heating, cooling, dehumidifying or water heating equipment
- BI/PD if the named insured is a contractor performing operations at a premises where the owner has been added as an additional insured to the named insured contractor's CGL Policy
- BI/PD arising out of heat, smoke or fumes from a hostile fire

**Pollution Exclusion (premises)
- continued -**

115

- Excludes pollution at/from any premises used for handling, storage, disposal, processing or treatment of waste
- Excludes pollutants transported, handled, stored, treated, disposed of, or processed as waste

**Pollution Exclusion
(operations)
CG 00 01 04 13**

116

General rule for the insured's off - premises operations :

- No coverage for BI/PD arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at or from a premises where the insured is performing operations if the pollutants are brought on or to the premises in connection with the operations

Exceptions To Pollution Liability Exclusion (operations)

Coverage provided for:

- BI/PD from arising out of the accidental release of fuels, lubricants or other operating fluids related to the operation of mobile equipment
- BI/PD caused by the release of gases, fumes or vapors from materials brought into that building in connection with the operations being performed
- BI/PD arising out of heat, smoke or fumes from a "hostile fire"





Pollution Liability Inferred Exceptions CG 00 01 04 13

Coverage provided for:

- Off - premises operations when the insured does not bring the pollutant
- Most products – completed operations exposures (waste can't be the product)

Pollution Exclusion

- Excludes operations to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or assess
- Excludes cleanup costs arising out of regulatory requirements, or for claims by governmental authority for damages because of testing or clean up
- **EXCEPTION**
Cleanup costs may be covered if the expense was included as part of the damages in a covered claim.

COMMERCIAL GENERAL LIABILITY
CG 21 49 09 99

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TOTAL POLLUTION EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion f. under Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to:

f. Pollution

- (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

- (2) Any loss, cost or expense arising out of any:

- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
- (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

Pollution Endorsements

- **CG 21 55 09 99** - Total Pollution Exclusion with a Hostile Fire Exception
- **CG 21 65 12 04** - Total Pollution Exclusion with a Building Heating, Cooling and Dehumidifying Equipment Exception and a Hostile Fire Exception

Pollution Endorsements

It is not uncommon for an insurer to add specific exclusions for:

- Asbestos
- Lead
- Silica
- Welding/Metal Gas and other By-Products
- Others

Fungi or Bacteria Exclusion

CG 21 67 12 04

125

This insurance does not apply to:

- a. *"Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.*
- b. *Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.*

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

Communicable Disease Exclusion

CG 21 32 05 09

126

A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

2. Exclusions

This insurance does not apply to:

Communicable Disease

"Bodily injury" or "property damage" arising out of the actual or alleged transmission of a communicable disease.

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

- a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;
- b. Testing for a communicable disease;
- c. Failure to prevent the spread of the disease; or
- d. Failure to report the disease to authorities.

B. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:

Communicable Disease

"Personal and advertising injury" arising out of the actual or alleged transmission of a communicable disease.

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

- a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;
- b. Testing for a communicable disease;
- c. Failure to prevent the spread of the disease; or
- d. Failure to report the disease to authorities.

Damage To Your Work

CG 00 01 04 13

This insurance does not apply to:

I. 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.

CG 00 01 04 13

"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.

For the purposes of this insurance, electronic data is not tangible property.

CG 00 01 04 13

"Your work"

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.

Before We Proceed

- The coverage triggers in the insuring agreement must be satisfied before exclusions are considered.
- We are assuming here that the loss in question is an occurrence of property damage and that the property damage occurred during the policy period.
 - Policy language is important.
 - State statutes may address the issue.
 - Case law is important.

Before We Proceed

- Most courts say that defective workmanship that doesn't damage anything other than the insured's completed work is not covered. (There are exceptions.)
- Reasons:
 1. It is not an occurrence of property damage.
 2. The Damage to Your Work exclusion applies.
 - In this case, the subcontractor exception may restore coverage.

Sample Carrier (Coverage Enhancing) Endorsement

Resulting Damage to Your Work Endorsement

This endorsement modifies insurance provided under the:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The Definition of "occurrence" is deleted in its entirety and replaced by the following:

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions and includes:

- a. "Property damage" to property that is not "your work" but is caused by "your work"; and
- b. "Your work" if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor and the "property damage" to "your work" is included in the "products-completed operations hazard."

All other terms, conditions, provisions, and exclusions of the policy not changed by this endorsement shall continue to apply as written.

Damage to Your Work Exclusion

Assumption: The loss is an occurrence of property damage for which the insured is legally liable.

Damaged Work **Damage Done By**

Covered	insured's	sub's work
Covered	sub's	sub's work
Covered	sub's	insured's work
Excluded	insured's	insured's work

Damage to Your Work Exclusion

Assumption: The loss is an occurrence of property damage for which the insured is legally liable.

Residential home builder builds a house and does all of the work himself, except for the electrical system and the heating system, which were performed by two separate subcontractors. Two years after the house is sold, a problem with the electrical system causes the house to burn to the ground.

What's covered under the builder's CGL?

Everything

Damage to Your Work Exclusion

Assumption: The loss is an occurrence of property damage for which the insured is legally liable.

Residential home builder builds a house and does all of the work himself, except for the electrical system and the heating system, which were performed by two separate subcontractors. Two years after the house is sold, a problem with the foundation causes the house to collapse, completely destroying it.

What's covered under the builder's CGL?

Electrical and Heating

Damage to Your Work - Endorsements

137

CG 22 94 10 01 Exclusion- Damage to Work Performed by Subcontractors on Your Behalf

- Eliminates the subcontractor exception to the Damage to Your Work exclusion

CG 22 95 10 01 Exclusion- Damage to Work Performed by Subcontractors on Your Behalf – Designated Sites or Operations

- Eliminates the subcontractor exception to the Damage to Your Work exclusion
- The restriction only applies to scheduled sites or operations

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Liquor Liability

CG 00 01 04 13

Liquor Liability Exclusion

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.*

CG 00 01 04 13

Liquor Liability Exclusion (continued)

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.

CG 00 01 04 13

Liquor Liability Exclusion (continued)

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, serving or furnishing alcoholic beverages.

Liquor Liability Endorsements

- Amendment of Liquor Liability Exclusion - CG 21 50 04 13
- Amendment of Liquor Liability Exclusion – Exception for Scheduled Premises or Activities - CG 21 51 04 13
- Amendment of Liquor Liability Exclusion – Limited Exception for Bring Your Own Alcohol - CG 40 09 12 19

CG 21 50 and CG 21 51

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, including causing or contributing to the intoxication of any person because alcoholic beverages were permitted to be brought on your premises, for consumption on your premises;

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;

(3) Serve or furnish alcoholic beverages without a charge, if a license is required for such activity; or

(4) Permit any person to bring any alcoholic beverages on your premises, for consumption on your premises.

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

CG 40 09 12 19 (NEW!)

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, ~~including causing or contributing to the intoxication of any person because alcoholic beverages were permitted to be brought on your premises, for consumption on your premises;~~

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;

(3) Serve or furnish alcoholic beverages without a charge, if a license is required for such activity; or

~~(4) Permit any person to bring any alcoholic beverages on your premises, for consumption on your premises.~~

Assault and Battery

CG 00 01 04 13

Coverage A Insuring Agreement

.....

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.

CG 00 01 04 13

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Expected or Intended Injury Exclusion

This insurance does not apply to:

Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

CG 00 01 04 13

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Separation of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and*
- b. Separately to each insured against whom claim is made or "suit" is brought.*

What is Reasonable Force?

Black's Law Dictionary

- That degree of force which is not excessive and is appropriate in protecting oneself or one's property; when such force is used, a person is justified and is not criminally liable, nor is s/he liable in tort.

Make my day/Stand your ground/Castle laws



What is Reasonable Force?

§ 505. Use of force in self-protection.

(a) Use of force justifiable for protection of the person.-

The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(b) Limitations on justifying necessity for use of force....

Assault and Battery Exclusion

Sample Language

This insurance does not apply to:

(1) Assault or Battery

"Injury" arising out of any assault, battery, fight, altercation, misconduct or similar incident or act of violence.

This exclusion applies whether the assault, battery, fight, altercation, misconduct or similar incident or act of violence was:

(a) caused by;

(b) at the instigation of; or

(c) at the direction of

you, your "employee", your customers, patrons, guests or any other person or cause whatsoever.

Assault and Battery Exclusion

Sample Language (Continued)

This exclusion also applies whether the insured may be liable as an employer or in any other capacity.

(2) Coverage of any kind, including but not limited to the cost of defense, for Bodily Injury and/or Property Damage arising out of, or caused in whole or in part by an assault and/or battery.

C. No Coverage is provided under this policy if the underlying operative facts constitute an assault and/or battery irrespective of whether the claim alleges negligent hiring, training, supervision and/or retention against the insured, or for any other negligent actions of the insured.

Assault and Battery Coverage

Sample Language

We will pay those sums that the insured becomes legally obligated to pay as damages for "bodily injury", "property damage", or "personal and advertising injury" arising from "Assault and/or Battery."

This endorsement applies regardless of the degree of culpability or intent and without regard to:

- 1) whether the acts are alleged to be by or at the instruction or at the direction of the insured, his officers, "employees", agents or servants; or by any other person lawfully or otherwise on, at or near the premises owned or occupied by the insured; or by any other person;*

Assault and Battery Coverage

Sample Language (continued)

This endorsement applies regardless of the degree of culpability or intent and without regard to:

- 2) the alleged failure of the insured or his officers, "employees", agents or servants in the hiring, supervision, retention or control of any person, whether or not an officer, "employee", agent or servant of the insured.*

Assault and Battery Each Occurrence Limit	\$100,000
Assault and Battery P&AI Limit	\$100,000
Assault and Battery Aggregate Limit	\$100,000

Assault and Battery Coverage

Sample Language (continued)

This insurance does not apply to:

- 1) Emotional distress or for loss of society, services, consortium and/or income; or*
- 2) Reimbursement for expenses (including but not limited to medical expenses, hospital expenses and wages) paid or incurred by such other person, firm or organization; or*
- 3) Any obligation to share damages with or repay someone who must pay damages because of the injury*

David Cohne v. Navigators Specialty Insurance Co.

- David Cohne was a bouncer/doorman at the Royale Night Club in Boston
- Kenneth Yianacopolus was a patron of the club
- Kenneth left the club and attempted to re-enter. When David tried to stop him, there was a physical altercation.
- Kenneth filed suit against David and Royale Night Club

David Cohne v. Navigators Specialty Insurance Co.

157

Issue #1 – Was David acting within the scope of his employment or while performing duties related to the conduct of the Club's business?

- Navigators claimed no.
- Court decided yes.

Effect: David is an insured under the CGL.

David Cohne v. Navigators Specialty Insurance Co.

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Issue #2 – Was coverage excluded by the A&B exclusion?

The policy excluded BI or PD arising from:

I. A. Assault and/or battery committed or alleged to have been committed by any person; or

Any act or omission connected directly or indirectly with the prevention or suppression of any act indicated in [Item A]..including the protection of persons or property, whether caused by or at the instigation or direction of any insured, an insured's employee, an insured's patrons or guests, or volunteers working for or on behalf of an insured, or any other person.

David Cohne v. Navigators Specialty Insurance Co.

159

Issue #2 – Was coverage excluded by the A&B exclusion?

Notwithstanding the foregoing, we shall pay up to the following amounts you become obligated to pay for all damages and claim expenses which result from claims or suits based on allegations of any of the acts or omissions in item I. above.

\$250,000 any one claim or suit

\$250,000 aggregate for the policy period

A Related Issue Firearms Exclusion

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Sample Language

This insurance does not apply to:

"Bodily injury", "property damage", "personal and advertising injury", or any loss, cost, damage or expense arising out of the ownership, rental, maintenance, use or misuse of any firearm.

Commercial Liability Endorsements to Watch Out For

Thank You for Being Here



James K. Ruble Seminar

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

Section 5

Policy Formation, Interpretation & Indemnity Principles

POLICY FORMATION, INTERPRETATION & INDEMNITY PRINCIPLES



PREPARED BY

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Legal Concepts for Insurance Professionals

CONTRACTS

Why are contracts important to insurance professionals?

Insurance policies are contracts – and are interpreted by courts as contracts!!!

Definition of a Contract

An agreement between two or more parties creating obligations enforceable or otherwise recognizable at law – Black’s Law Dictionary (Seventh Edition)

I. Contracts – General

A. Elements of a Contract

1. **Agreement** – valid offer and acceptance creates agreement (mutual assent)
 - a. Offer – all three necessary for valid offer
 - Parties must intend to be bound¹
 - Reasonably certain of its material terms² – clear enough to be enforced
 - Person making offer can choose to whom they wish to make an offer (offer can’t be “overheard” by party not intended to receive offer).

Because the offeror is the master of his offer he controls the person or persons in whom a power of acceptance is created.³

Illustrations:

“I am thinking about selling my car for \$5,000” is not a valid offer as there is no *present* intent to enter into a contract but is rather an expression of future intent.

“Would you buy my car for \$5,000” is also not a valid offer but is an invitation to make an offer or to an invitation to negotiate.

“I want to sell my car to you” is not a valid offer as material terms are missing – in this case, price of the car.

“I will sell my car to you for \$5,000” is an offer as it contains all the elements.

b. Acceptance – all three necessary for valid acceptance

- Person accepting must also intend to accept contract⁴
- Acceptance is on proposed terms – negotiation or proposed acceptance with changed terms (lower price, for example) is counteroffer and original offeror has right to accept or reject.

The common law rule is that a purported acceptance which adds qualifications or conditions operates as a counteroffer and thereby as a rejection of the offer.⁵

- Person accepting must be the person intended by person making offer to receive offer.

An offer may be accepted only by the offeree or the offerees to whom it is made.⁶

Illustrations:

“Let me think about it” is not an acceptance – no present intent to enter a contract.

“I will buy your car for \$4,000 but not \$5,000” is not an acceptance but is a rejection of the original offer and a counteroffer.

“I will buy your car for \$5,000 but you have to put on new tires” is conditional and not an acceptance.

“I will buy your car for \$5,000” is an acceptance and thus an agreement is formed.

2. **Consideration** – “bargained for exchange” – each party has bargained for something in return for something else.

Promises to do what he is not legally obligated to; refrain from doing or promise to refrain from doing what he is legally privileged to do.⁷

- Consideration may be an act (such as painting your house)

- Consideration may be a promise to act (such as a *promise* to paint your house)
- Consideration may be a forbearance to act (foregoing a right) – give up the right to sue by accepting settlement is forbearance to act.

3. **Capacity to contract** – competent parties

- Contracts with minors are generally not enforceable – may be voided at the option of the minor ONLY
- Mental incapacity –person entering contract cannot understand that a contract is being made and the effect of the contract- not enforceable against such person and may be voided by person with mental incapacity ONLY

There are certain classes of persons whose contractual capacity is limited. Their agreements are either void, or more often, voidable. These classes include infants and persons that suffer from mental infirmity⁸.

4. **Genuine Assent** – agreement not real (objectively viewed)

- **Misrepresentation** – incorrect statement of a material fact reasonably relied upon by other party.

Before relief for misrepresentation may be awarded, causation must be shown. It must be proved that the party was in fact deceived by the misrepresentation and relied upon it entering the transaction. A rebuttal presumption of deception arises and reliance arises if the misrepresentation is material.⁹

Illustration:

I bought a car for \$5,000 based on the honestly mistaken representation by the seller that the mileage was 20,000. In fact, the mileage was 200,000 miles. This would allow the purchaser to void the contract and receive their money back. The representation of the mileage was a fact that was material (significant) and was relied upon by the other party.

- **Fraud** – intentional deception of other party by incorrectly stating or failing to state a material fact in order to induce party, who reasonably relies upon fact, to enter into contract (intent required) – may also be a basis for tort damages

Where the misrepresentation is made with the knowledge of its falsity with an intent to deceive and that it shall be acted on in a certain way, the scienter [knowing] of element of tort liability is made out.¹⁰

Illustration:

The owner of the car turned the mileage back from 200,000 miles to 20,000 miles to get me to buy the car. This is fraud. In this illustration, the fraud is probably criminal as well as civil (tort).

- **Duress or Undue Influence** – Coercion to enter contract or persuasion by person upon whom trust is provided (fiduciary) and the persuasion is unfair or unjust.

Illustration:

While my elderly father is in the hospital recovering from surgery, I tell him to give me the summer house as a gift. This contract is not enforceable as coercion was used – no genuine assent is given.

I convince my elderly aunt, who relies on me for financial advice, to agree to sell her stock portfolio to me at a fraction of its market price.

Today the general rule is that any wrongful act or threat which overcomes free will of a party constitutes duress.¹¹

General remedy for lack of genuine assent – innocent party may *rescind* (void) contract, giving the contract no legal effect *ab initio* - from the beginning (both parties must return all consideration).

5. **Legality** – contract must be legal and not against public policy.

As a general rule an illegal bargain is unenforceable and often void.¹²

Void means the contract has no legal effect

- Agreement to commit a criminal act not binding (a contract for murder or assault)
- Agreement to violate law not binding (agreement for sale of assault weapons after legal ban on such weapons is no longer enforceable)

- Wagering agreements may not be legal and therefore not binding (judge will not enforce my contract with my bookie for wagering on a horse race).
- Against public policy – Some non-competition agreements not enforceable (some states restrict both the scope [when it applies] and duration of the agreement).

6. **Formality - Requirement of Contract to be in Writing** – oral contracts are valid and binding EXCEPT when subject to the **Statute of Frauds** (such contracts are not binding *unless in writing*).

Statute of Frauds applies only to:

- a. Contracts to perform as a surety (guarantee the payment of another if the original promisee fails to pay)
- b. Contracts for the sale of real estate (purchase and sale agreement to purchase a home must be in writing)
- c. Contracts that exchange a promise for a promise but cannot be performed within one year (impossible to perform within one year)
- d. Contracts for the sale of goods with a price of \$500 or more (governed by the Uniform Commercial Code- UCC)
- e. Contracts of an estate executor or administrator to be personally liable for the debts of the estate (an executor of an estate is not personally responsible to pay for the debts of the estate UNLESS the promise is in writing)
- f. Contracts in which marriage is consideration (father's promise to give his business to son's future bride if she marries his son must be in writing) ¹³

B. Other General Contract Issues

Parol Evidence Rule – all terms of a contract are presumed by law to be incorporated into the final executed written contract. Any documents (letters, memos, etc.) or any oral testimony that *contradicts* the final written contract is inadmissible under this doctrine.

Restatement (Second) of Contracts, Section 213 – “...it is not a rule of evidence but a rule of substantive law. Nor is it a rule of interpretation; it defines the subject matter of interpretation. It renders inoperative prior written agreement as well as prior oral agreements.”

Illustration:

Final written executed contract to purchase building does not include an adjacent plot of land. Purchaser attempts to introduce evidence of a conversation before the contract was executed that the adjacent plot of land was to be included in the purchase price.

As this testimony is of a discussion *prior* to the execution of the final written contract which *contradicts* contract, it will not be admitted as evidence to change the contract (if the other party objects).

Promissory Estoppel– not a contract but promise enforced by courts even if *lacking consideration*. Enforced for equitable or reasons of fairness

- Promise made and person making promise knows promisee (person accepting promise) is relying on that promise
- Reliance on the promise by promisee is reasonable
- Breaking of promise will result in detriment or damages to promisee

A promise which the promisor should reasonably expect to induce action or forbearance to act of a definite and substantial character on the part of the promisee and which does induce such actions such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.¹⁴

Even though a contract is not made, courts will enforce a promise if the results of not enforcing the promise would be unfair.

Illustration:

Jack promises his brother, Jim, that he would give him a gift of \$5,000 if Jim wants to buy a car. Jim proceeds to buy a car, but later Jack refuses to pay the \$5,000 as he promised. This is not a contract as Jack did not receive consideration for his promise to give the gift of \$5,000. However, relying on his promise, Jim did buy a car that he otherwise would not have purchased and has suffered “detriment.” Jack may be estopped (prevented) from breaking his promise to give Jim the \$5,000 gift.

II. Insurance Contracts

A. Elements of an insurance contract – same as general contracts

- To be valid and enforceable, such contract [insurance] must possess the legal prerequisites of a contract¹⁵

1. Agreement in Insurance Contract

a. Offer in Insurance

- 1) Application as offer by insured – insured must intend to purchase insurance
- 2) Application as invitation for insurer to make offer- insured wants quote; wants the insurance company to make an offer
- 3) Proposal of coverage as offer by insurer – insurer offers proposal to prospective insured which the insurer is prepared to bind
- 4) Policy as offer by insurer – policy is issued (instead of a proposal) such as a life insurance policy that has been “rated”

b. Acceptance in Insurance

- 1) Oral or written acceptance by insured of insurer’s offer
- 2) Payment of premium by insured as acceptance
- 3) Promise to pay premium as acceptance (may not be effective in life, accident, health or disability insurance)
- 4) Policy delivery as acceptance by insurer of insured offer – particularly true in life & disability insurance
- 5) Lapse of time or failure to act on part of insurer as acceptance – in some circumstances, failure to act may be found to be binding on insurer

2. **Consideration for an Insurance Contract**

- a. Payment or promise to pay annual premium– insured's consideration
- b. Implied promise to pay premium by insured may be inferred by law – insured asks for binder for closing, purchase of vehicle, promise of premium payment may be implied
- c. Promise of protection to insured - insurer's consideration (if no loss occurs, insurer has still performed)
- d. **Unilateral modification of policy** – may not be enforceable for lack of consideration (example: excluding young driver from commercial auto during policy period without return or reduction in premium)
 - Like any contract, an insurance policy can be modified by agreement of the parties. Because a modification creates a new agreement between the parties, it must satisfy all of the essential requirements of contract formation, including new consideration and mutual assent as to the terms to be added or changed, in order to be effective.¹⁶

3. **Capacity to Contract**

- a. Insurance Policy with minors may be enforceable (life insurance)
- b. Insurance for auto – application may be co-signed with parent or legal guardian

4. **Genuine Assent** – Insurance a contract of utmost good faith

- a. Misrepresentation in Insurance
 - 1) False statement of fact
 - 2) Fact must be material (affect insurer's decision in acceptance or pricing – see also statutory modifications)
 - 3) Insurer must have reasonably relied upon fact (if insurer might have easily checked, reliance may not have been reasonable)
 - a) Innocent misrepresentation – if material, may still be grounds for rescission of policy

- b) Intentional misrepresentation – if material, usually considered fraud
 - c) Concealment – misrepresentation by silence (reasonable applicant must disclose certain information that they should know is material – insurance is utmost good faith contract)
- b. Warranties in Insurance – part of the insurance contract
 - 1) Usually by attaching application to contract – may be other (sprinkler or alarm warranty)
 - 2) Warranties are considered material (all representations are not material)
 - 3) Affirmative warranty - statement of fact is true when made (when made on application – may change after policy is issued)
 - 4) Promissory warranty – statement of fact must be true and remain true throughout policy period (such as alarm or sprinkler warranty)
- c. Insurer Remedy for Material Misrepresentation or Breach of Warranty
 - 1) Rescind or void policy *ab initio* (from the beginning) – insurer must return full annual premium
 - When an insurance contract is rescinded, it is though the policy – any obligations of either party – never existed. Unlike cancellation or termination, rescission operates retroactively and is often asserted by insurers after a claim has been made.¹⁷
 - 2) Rescission is NOT treated as an exclusion – may have to have a court declare policy void for rescission to be effective – insurer must perform duties for otherwise covered loss until rescission (any payment by insurer must be refunded by insured).

- d. Statutory Modifications to Misrepresentation
 - 1) Increase of risk of loss statutes – defines what is considered material
 - Material if representations made with actual intent to deceive or if the matter misrepresented increased the risk of loss.¹⁸
 - 2) Contribute to loss statutes – misrepresentation must have contributed to the loss
 - The statute attempts to define materiality by providing that the misrepresentation must have contributed to the loss. This requirement makes it more difficult for an insurer to have a policy rescinded.¹⁹
- e. Insurance policies not generally assignable
 - 1) Insurance does not “run with the land” – building owner cannot sell building and assign policy to new purchaser
 - 2) Most policies (except some ocean marine insurance) require written permission of insurer to “assign” (most likely cancel and rewrite policy)
 - 3) Insurance is underwritten not just based on the property but on the insured – insurer has right to underwrite the insured/owners

5. Legality - same as general contracts including

- a. Insurable interest requirement – at the time of loss in P & C insurance (prevent wagering)
- b. Principle of indemnity – insured to be made whole (no gain permitted)
- c. Insurance is “affected with a public interest” and therefore highly regulated by states
- d. Insurance on illegal property, operation or activity is void and with no affect
- e. McCarran-Ferguson Act – states have right to regulate insurance

6. **Formality – Statute of Frauds**

- a. Insurance is not considered subject to Statute of Frauds – it is *possible* for an insurer to perform within one year
- b. Oral insurance contracts are binding – may be difficult to prove
- c. Terms necessary for coverage (oral or written binder)
 - 1) Identify the parties – insured and insurer
 - 2) The subject matter of insurance – building, contents, vehicle, etc.
 - 3) Risk insured against – fire, vandalism, liability, etc.
 - 4) Duration of risk – when and how long was coverage bound (30 day binder?)
 - 5) Amount of insurance – limit or value of insurance provided
 - 6) Premium or rate²⁰
- d. Other terms that may be implied by prior dealings or trade usage
 - 1) Premium may be implied based on insurer's usual or filed rates
 - 2) Duration may be implied based on prior dealings
 - 3) Policy forms or coverage terms based on insurer's customary policy forms (HO3, etc.)
 - 4) Any statutory endorsements or forms will be understood to apply

B. Other Insurance Contract Issues

Contract of Adhesion (*Contra Proferentem* – against the offeror) – Insurer drafts contract and insured “takes it or leaves it.” Ambiguity or mistakes usually construed against author (insurer)

Doctrine of Reasonable Expectations – policy terms receive the meaning a reasonable policyholder would expect them to mean (even if not intended as such by insurer).

The test of meaning of a word or phrase under the reasonable expectations doctrine is not what the drafter of a policy provision actually intended, but rather what a reasonable person in the position of the insured would have understood it to mean.²¹

Parol Evidence Rule – applies to insurance policies – insurer or insured cannot contradict unambiguous written policy with either oral or written evidence that existed prior to policy issuance (presumption is all agreements incorporated in final insurance contract). See Parol Evidence Rule in Insurance Below.

III. Insurance Contract Interpretation

- A. Interpretation of insurance policy is a matter of law – juries decide fact, judges decide law. In other words, the opinion of claims personnel, underwriting personnel, agent, broker or policyholder does not control insurance policy interpretation at the time of a claim.

Ultimately, any dispute as to the meaning of policy wording is decided by the courts.

- Interpreting the language of an insurance policy is a question of law for the court.²²
- B. To the extent possible, courts will attempt to read the intent of the parties into an insurance policy and interpret an insurance policy in a way both parties intended.
- Courts seek to interpret insurance policies in a way that promotes the parties' mutual intent.²³
- C. Entire policy will be considered as a whole in determining the meaning. In interpreting policy wording, words or phrases cannot be dismissed or given no meaning.

Illustration:

Sudden and accidental is interpreted as both abrupt (sudden) and unintended (accidental).

- The language at issue also must be construed with other language in the policy as a whole.²⁴
- D. The policy terms will be given their plain, ordinary meaning (unless clearly defined otherwise within the policy)
- The language is to be given its plain and ordinary meaning and the intention of the parties is to be tested from the standpoint of the reasonable person. Thus, a court may not rewrite an insurance contract, and the language must be given its plain meaning if the contract is unambiguous.²⁵

E. General Burden of Proof Issues

1. Policyholder must first prove loss falls within insuring agreement
 - As a general matter, the policyholder has the burden of establishing that a loss comes within the coverage of a policy. Once the applicability of the policy is established, the insurer has the burden of showing that exclusionary provisions apply to limit or eliminate coverage.²⁶
2. Insurer must prove exclusions apply or prove other defenses (breach of policy condition, misrepresentation).
 - Additionally, the insurer has the burden of proving affirmative defenses to coverage such as failure to comply with conditions subsequent and fraud in inducement of the policy.²⁷
3. Insurer usually must also prove exception to exclusion does not prevent coverage. If an exclusion has an exception, the insurer has to demonstrate the exception *does not apply*. If the insurer cannot carry that burden, the exception and thus coverage will apply. Some jurisdictions do not follow this rule.
 - The majority rule is that, when an exclusion or exception is itself subject to an exception, the burden is on the insurer to prove that the exception or limitation to the exclusion does not apply to prevent application of the exclusion.²⁸

F. Parol Evidence Rule in Insurance

- Agreements to waive or give up rights made *prior to policy issuance* cannot be used to contradict and therefore alter the plain meaning of an otherwise unambiguous policy. Only actual policy wording will be considered.
- The parol evidence rule generally precludes consideration of extrinsic evidence of the meaning of an insurance contract...²⁹
- Extrinsic evidence is admissible not to vary or modify the terms of the agreement nor to add or detract from its terms...³⁰
- Many courts, however, construe the rule to admit parol evidence to interpret a written contract when the contract appears incomplete in some manner unless the agreement has an integration clause.³¹
- An integration clause expressly provides that the written instrument contains the entire understanding of the parties.³²

G. Ambiguity in Insurance

1. What is considered an ambiguity?

- An ambiguity exists when a word or phrase is reasonably susceptible to more than one construction.³³

2. How is an ambiguity determined?

- A word or phrase is ambiguous when it is capable of more than one single meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology generally understood in the particular [insured's] trade or business.³⁴
- The existence of multiple dictionary definitions does not prove a word in an insurance policy is ambiguous.³⁵
- If policies are unambiguous, conflicting judicial interpretations do not prevent a court from so finding.³⁶
- The court should not find the language ambiguous on the basis of the interpretation urged by one party, where the interpretation would 'strain the contract language beyond its reasonable and ordinary meaning.'³⁷

Simple disagreement in interpretation of policy terms, conditions and exclusions does not create an ambiguity. Even conflicting rulings by courts on the same or similar coverage issues do not necessarily create an ambiguity in the policy.

H. Interpreting Insurance Containing Ambiguous Wording

1. Traditional Approach – construe ambiguity against insurer in favor of insured

- The courts recognize that the language of insurance policies is selected by one of the parties alone, and the language employed by that party should be construed against it. This is the very meaning of the term *contra proferentem*, that the ambiguity will be construed against the drafter of the policy (insurer) and liberally in favor of the insured.

Thus, if the meaning of the words employed is doubtful or uncertain, or if for any reason an ambiguity exists either in the policy as a whole or in portions thereof, the insured should have the benefit of a favorable construction in such instance.³⁸

- Courts extend the doctrine of construing ambiguous terms liberally in favor of the insured under the theory that the policy is one of adhesion.³⁹
- The insurer must demonstrate both that it's asserted interpretation and construction of the language is reasonable and that it is the only fair interpretation in order to overcome the potential application of *contra proferentem* doctrine.⁴⁰

2. Extrinsic Evidence Approach – allows outside evidence to attempt to understand actual intent of parties. Parol evidence rule only prevents *contradictory* evidence being used to interpret policies; outside evidence that is to aid in ascertaining the true intent of the parties does not violate the Parol Evidence Rule – such extrinsic evidence may be allowed and given weight if an ambiguity is found to exist.
- However, some courts refuse to employ *contra proferentem* but rather choose to construe insurance policies in the same manner as any other contract and look to the intent of the parties and in certain circumstances permit resort to extrinsic evidence.⁴¹
 - In recent years, courts have re-evaluated these doctrines (*contra proferentem*) that favor the insured. Some courts have decided that an insurance policy provision need not automatically be construed in favor of the insured. In such cases, the court may resolve the ambiguity by resort to parol evidence.⁴²
 - *This notion of invoking the contra proferentem principle as a tie breaker only after consideration of extrinsic evidence specific to the case is a better reasoned modern view of contract law.* Thus, the issue of whether an insured is entitled to *contra-insurer* rules of construction does not arise unless it is first demonstrated that: a) the policy is ambiguous and; (b) the ambiguity may not be resolved by resort to extrinsic evidence.⁴³

- The test of admissibility of extrinsic evidence to explain the meaning of a written instrument... is whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.⁴⁴
- a. Regulatory Estoppel – insurers bound by their explanation to state regulators of policy provisions
 - The insurers' can be held to the representations concerning the meaning of the policy language made by them or on their behalf. The quintessential example of use of regulatory estoppel is in the interpretation of the so-called pollution exclusion.⁴⁵
- b. Drafting History – policyholders seek drafting history to determine policy meaning
 - Courts throughout the country have examined drafting history to assist them in interpreting the meaning of disputed policy language.⁴⁶

3. Other Approaches to Ambiguity

- a) *Statutory language* – if the policy language is prescribed by statute, contra proferentem is not applicable
 - But where the language in question has been prescribed by statute, it is to be construed as it reads, and the doctrine of construing terms more strongly against the insurer has no application.⁴⁷
- b) *Sophisticated Policyholder* – a policyholder with sophistication and bargaining power may not be entitled to contra proferentem
 - However, none of these rules [contra proferentem] should apply where the parties to the contract are sophisticated and freely negotiated the policy's terms⁴⁸
- c) *Other* – when the industry wrote or contributed to writing policy such as Financial Institution Bond – Standard Form 24 (American Bankers Association has significant input into bond form – may not be entitled to contra proferentem).
 - However, none of these rules [contra proferentem] should apply...in the case of a bankers blanket bond negotiated by industry groups representing insurers and insureds.⁴⁹

I. Treatment of Exclusionary Wording

- ...there is a tendency to go to great lengths to protect the insured in construing exclusions. *Although exclusions will be followed if clear and unambiguous, they are to be strictly construed.*
- This strict construction has been said to apply even if the terms [of the exclusionary wording] are not ambiguous, or to a greater extent than when other terms are involved.
- Many jurisdictions...requirements relating to how “plain” and “conspicuous” they are [exclusions] as well as where they are located in the policy or even what font size they must use.⁵⁰
- Contra-insurer [contra proferentem] rules of construction apply with particular force when there is an ambiguity in an exclusionary clause.⁵¹
- Where the insuring clause of a policy clearly and conspicuously covers risk, and a subsequent limiting clause does not clearly and conspicuously exclude it, the risk will be deemed to be covered by the policy.⁵²

J. Endorsements and riders

1. Endorsement must be referenced in the policy to be effective
 - The mere fact of the fastening of a slip to a policy cannot make it a part of the contract where no reference on either the policy or the slip from one to the other. Thus, a slip containing a stipulation is not part of the policy merely because it is pinned thereon.⁵³
2. Code numbers on a declarations page without the attached endorsements are not effective
 - But the mere reference to code numbers for endorsements contained in the declarations without the attachment of the actual endorsements contained in the declarations will be insufficient to incorporate the endorsements by reference.⁵⁴
3. Signature of insurer is not required if the endorsement is included at policy issuance.
 - An unsigned rider pasted to the face of an automobile liability policy at the time of its execution is part of the policy, since the signing of the policy was the signing of all riders properly attached to the policy at the time of signing.⁵⁵
4. Signature of insured not usually not required on endorsement.
 - Likewise, the insured's failure to sign his copy of the rider has been held not to render it effective.⁵⁶

K. Doctrine of Reasonable Expectations

- Although the courts continued to use the rule that interpreted ambiguities in favor of the insured, some cases went further than the doctrine justified.
- In a seminal article in the Harvard Law Review Professor (now Judge) Keeton argued that these cases could be explained with a doctrine that construed insurance policies consistent with reasonable expectations of the insured.⁵⁷
- In general, courts will protect the reasonable expectations of applicants, insureds and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.
- Stated another way, under reasonable expectations doctrine, where attempted exclusions in insurance policy are not clear, plain, and conspicuous enough to negate a layperson's objectively reasonable expectations of coverage, they are unenforceable.⁵⁸
- In many jurisdictions, the application of reasonable expectations doctrine does not depend upon the presence of ambiguities.⁵⁹
- In any event, recognizing the reasonable expectations doctrine of the insured does not mean that an insured is entitled to every benefit imaginable within a contractual framework.⁶⁰
- Some courts have expressly rejected the reasonable expectations doctrine.⁶¹

1. Classic application of Doctrine of Reasonable Expectations

- A doctrine that can modify the terms of an insurance policy to protect the reasonable expectations of the insured.⁶²

2. Limited application of Doctrine of Reasonable Expectations
 - Many courts take a more limited approach to the reasonable expectations doctrine. The most common limitation...is to restrict to use as a device to resolve ambiguities. It has even been said that this is the majority view of the reasonable expectations doctrine.⁶³
 - For example, in Iowa, the reasonable expectations doctrine is to be used only where the terms of the policy are bizarre or oppressive, or would eviscerate the coverage if enforced as written.⁶⁴
3. States have expressly rejected the Doctrine of Reasonable Expectations
 - Illinois courts have declined to apply the reasonable expectations doctrine to insurance contracts. The doctrine of reasonable expectations has not been adopted as law in Utah.⁶⁵

L. Insured's duty to read the insurance policy

1. Classic approach

In the absence of mistake or fraud, an applicant for insurance who accepts a policy is bound by its provisions, whether the applicant reads it or not.⁶⁶

2. Additional approaches

Courts apply equitable and public policy approaches in their interpretation of the parties' agreement. This is particularly true regarding the duty to read. Could a reasonable applicant understand all the material terms? Could the applicant in fact bargain over material terms?⁶⁷

IV. Subrogation

A. What is subrogation?

The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. – Black's Law Dictionary (Seventh Edition)

- Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant.⁶⁸

B. Whose right is subrogation?

Only the right of the insurer – insured cannot waive or relinquish a right they do not have!

- Subrogation...involves a pre-existing contractual relationship (in insurance, the policy) under which the insurer pays the damaged party and is, by operation of law, entitled to subrogation.⁶⁹

C. Elements of Subrogation in Insurance

1. Payment of a loss

- An insurer's right to subrogation arises only when certain requirements are met. First, the insurer must have paid the loss.⁷⁰

2. As required by the policy

- The second requirement is that the insurer must not have merely volunteered to pay the loss, but must have been required to pay based upon its contract of insurance.⁷¹

D. Reasons for subrogation

1. Avoids insured recovering twice for same loss – collect insurance proceeds and recover from liable party for property damage not permitted.
 - Subrogation eliminates the possibility that the insured might obtain a duplicate recover.⁷²
2. Avoids windfall of liable party
 - Subrogation prevents a windfall to tortfeasor, since, if the insured only received payment from the insurer and no action was brought against the responsible party, the tortfeasor would not suffer any detriment.⁷³
3. Reduces overall insurance rates
 - Amounts recovered by insurers through subrogation, less expense of recovery, are figured into the rate structure for the insurance coverage as a reduction in the amount of incurred losses.⁷⁴

E. Extent of insurer's right of subrogation

1. Insurer acquires via subrogation only the rights of the insured and no greater rights (an action in subrogation is not independent of insured's rights)
 - When an insurer brings an action against a tortfeasor based upon its subrogation rights, the insurer's rights flow from the insured's rights. The subrogated insurer, known as the subrogee, can be subrogated to and enforce only such rights as the insured, known as the subrogor, has against the party whose wrong caused the loss.⁷⁵
 - When subrogation claimed by an insurer is based on contract, the subrogation provisions of the policy constitute the sole measure of its rights.⁷⁶

2. Collateral Contracts – release of third party extinguishes insurer's rights

- Since the existence and the extent of the insurer's right to subrogation is derived from the rights of the insured, contracts collateral to the insurance contract may affect the insurer's right to subrogation if those contracts modify or nullify the insured's rights against a tortfeasor.⁷⁷
- Whatever defenses the tortfeasor has to the insured's claim will constitute a defense to the insurer's claim. ... If the insured waives its right to bring an action against a tortfeasor, then the insurer is barred from bringing a subrogation action.⁷⁸

3. Effect on insured of releasing third parties

- a. Release or waiver of third party *before a loss* usually allowed by insurance policies
 - Since an insured's acts may result in the insurer's losing its right to subrogation, insurance policies commonly contain a provision that the insured will do nothing after loss to prejudice the insurer's subrogation loss.⁷⁹
- b. Releases or waivers of third party *after loss* may result in claim denial or a requirement that the insured reimburse insurer
 - 1) A violation of this provision [insured will do nothing after loss to prejudice an insurer's subrogation right] will, in most cases, enable the insurer to deny the insured's claim if it has not already paid it or recover its money back from the insured if already paid.⁸⁰
 - 2) If the insured settles with and releases the tortfeasor after payment is made by the insurer, the insurer is entitled to seek reimbursement from the insured.⁸¹

F. No Subrogation Allowed Against Insured

- No right of subrogation can arise in favor of the insurer against its own insured, since by definition subrogation arises only with respect to the rights of the insured against third persons to whom the insurer owes no duty.⁸²

G. Who is an insured?

1. Additional insureds – to the extent coverage applies to AI
2. Person entitled to the protection of named insured insurance by reason of contract with the named insured and thus become coinsureds.⁸³
3. Permissive users of vehicles
4. Tenants of insured landlords (if the landlord contracts to provide property insurance).
 - Some courts will presume that the tenant is a coinsured under the landlord's policy, even absent a specific lease provision requiring the landlord to insure. Assumption is that part of the rent the tenant pays goes to the landlord's insurance premiums. Other courts reject this presumption....contending competition, not expenses such as insurance, set rental rates.⁸⁴
 - Some cases limit the tenant's immunity from subrogation to the premises that tenant leased. Others extend it to all of the landlord's property damaged by the tenant's negligence.⁸⁵
5. Loss Payee not an insured⁸⁶
 - A loss payee is not an insured, so as to be protected from subrogation.⁸⁷

H. Who receives the proceeds if insured not paid in full?

1. Majority rule – insured made whole first
 - The amount being paid by the insurer must result in the insured's being made whole. The general rule is that subrogated insurer is entitled to no subrogation, or to reduced subrogation, if the result of full subrogation would be to cause the insured to be less than fully compensated for loss.⁸⁸
2. Other approaches to receipt of proceeds of subrogation
 - a. Insurer whole first – One approach is to find the insurer is entitled to the full amount of its subrogation, whether or not its insured is made whole.⁸⁹
 - b. Allocation between policyholder and insurer – the court should make an equitable distribution of any recovery from the tortfeasor, in light of all circumstance.⁹⁰

I. Recovery of Defense Costs – split of authority

1. Not recoverable in subrogation – the liability insurer's defense obligation does not depend on the insured's liability.⁹¹
2. Defense costs recoverable – had the insured not had liability insurance, he would have had to bear the defense costs himself; therefore, he would have had the right to recover those fees from party responsible for the loss.⁹²

J. Insurer's Actions

1. Expressly waiving rights by endorsement to policy
2. Implied waiver of subrogation rights – denial of coverage or unreasonable delay in handling a claim may result in a waiver.⁹³

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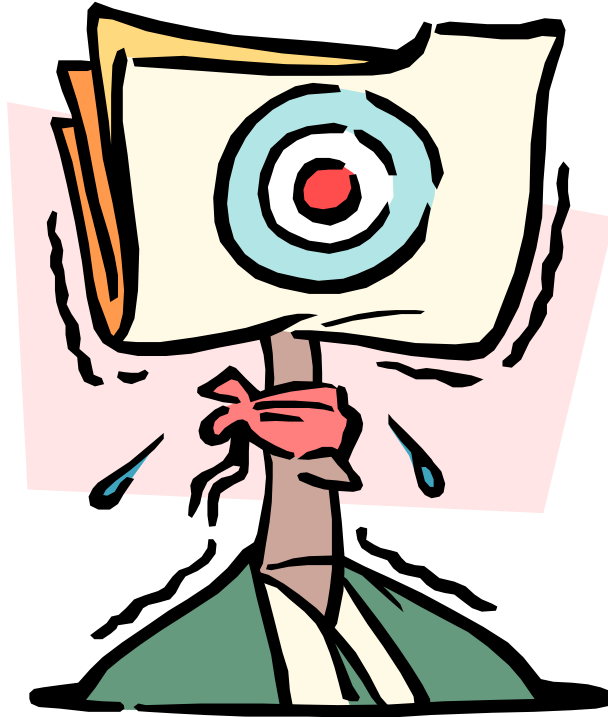
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Section 6

Employment-Related Practices Insurance

EMPLOYMENT-RELATED PRACTICES INSURANCE



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I. EMPLOYMENT LIABILITY EXPOSURES

- A. Employment – Hiring
- B. Supervision
 - 1. Discrimination
 - a. Compensation
 - b. Promotion
 - c. Work activities or assignments
 - 2. Sexual harassment or "hostile working environment"
- C. Termination – Wrongful
 - 1. Sexual harassment
 - 2. Discrimination
 - 3. "Whistle blowing"
 - 4. Contractual
- D. Discipline or retaliation – retaliation claims on the increase!

BASIS OF LIABILITY COMMON & CONTRACT LAW

II. Traditional “At Will” Doctrine¹

Employer’s decision to hire, fire or change condition of employment was restrained only by unions and other market forces (supply & demand for labor)

A. Exceptions to the “At Will” Doctrine – Wrongful Discharge/Wrongful Termination²

1. Contract or Common Law

a. Breach of Express Contract³

- 1). Written Contract
- 2). Oral Representations – “Job for as long you want”
- 3). Implied Contract – Employee Handbook

b. Breach of Implied-in-fact covenant to terminate only for good cause⁴

- 1). Long-term employment and;
- 2). Consistent salary increases, promotions, outstanding performance reviews and;
- 3). Personnel practice to provide poor performance with notice and chance to improve

c. Breach of implied covenant of good faith and fair dealing⁵

- 1). Implied obligation of good faith and fair dealings by employer
- 2). Example: Failure to pay earned bonus or commission after termination/discharge

d. Violation of Public Policy⁶

- 1). Termination for reasons against public policy
- 2). Examples: For serving on jury duty; “whistle blowing”; refusing to commit unlawful act

e. Defamation⁷

- 1). Communication to others (publication) of information to humiliate, ridicule, or embarrass employee—Example: allegations of drinking, drug use, immoral behavior, sexual harassment
- 2). Communication may be oral or written to others
- 3). Truth is a defense
- 4). “Qualified privilege”- communication to someone with legitimate interest AND not reckless or malicious also a defense (even if false)

f. Invasion of Privacy⁸

- 1). Intrusion unreasonable and substantial
- 2). Example: Video surveillance acceptable for security reasons, but not in changing rooms or bathrooms

g. Intentional or Negligent interference with contractual relations⁹

- 1). May be asserted against person who made the decision to terminate—if termination made with malice
- 2). May be asserted against third parties (other than employer) who provided false information that resulted in termination (may be former employer with malicious intent)

h. Intentional or Negligent infliction of emotional distress¹⁰

- 1). Employer's actions "outrageous and extreme" – Restatement (Second) of Tort S46
- 2). Examples: termination conducted publicly by being escorted from building by security guards or police

BASIS OF LIABILITY-STATUTORY

III. Statutory Causes of Action– Affects ALL aspects of Employment

IV. Overview of Major Federal Employment Related Laws

A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND CIVIL RIGHTS ACT OF 1991 (TITLE VII)¹¹

1. PURPOSE:

Prohibits employment discrimination based on race, color, religion, sex, or national origin.

KEY PROVISIONS:

Prohibits discrimination in hiring/firing and the terms/conditions of employment because of race, religion, sex or national origin.

Prohibits retaliation against employees for opposing discriminatory acts of their employer.

2. IMPORTANT EXCLUSIONS:

Bona fide occupational qualifications (BFOQ) – it is not unlawful for an employer to only hire a person of a certain religion, sex or national origin where that person's religion, sex or national origin is reasonably necessary to the normal operation of the employer's business.

Bona fide seniority or merit system.

3. ENFORCEMENT:

Equal Employment Opportunity Commission (EEOC) or private suit.

4. **REMEDIES: An employee may obtain—**

- An injunction against the employer's unlawful conduct
- Compensatory Damages – cap of between \$50,000 and \$300,000
- Punitive Damages – not available in suit against public employer (also subject to above cap)
- Hiring, promotion or reinstatement (or front pay if reinstatement not feasible)
- Back Pay
- Attorney Fees & Costs

MERITOR SAVINGS BANK V. VINSON 477 U.S. 57 (1986)

IN *MERITOR*, U. S. SUPREME COURT HELD THAT DISCRIMINATION BASED ON SEX INCLUDES “SEXUAL HARASSMENT” AS A MATTER OF LAW

COURT FOUND TWO TYPES OF CLAIMS:

- QUID PRO QUO SEXUAL HARASSMENT
- HOSTILE WORKPLACE SEXUAL HARASSMENT

Sexual Harassment Defined by the EEOC:

- “[U]NWELCOME SEXUAL ADVANCES, REQUESTS FOR SEXUAL FAVORS, AND OTHER VERBAL OR PHYSICAL CONDUCT OF A SEXUAL NATURE . . .”
- WHERE SUBMISSION IS MADE A TERM OR CONDITION OF EMPLOYMENT, IS USED FOR MAKING AN EMPLOYMENT DECISION, OR THE CONDUCT CREATES A HOSTILE WORKING ENVIRONMENT OR INTERFERES WITH THE EMPLOYEE’S JOB PERFORMANCE”

The #MeToo Movement – What does sexual harassment mean today?

B. THE EQUAL PAY ACT OF 1963 (EPA)¹²

1. PURPOSE:

The EPA prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions.

2. KEY PROVISIONS:

Act is violated if unequal wages are paid to workers' of different sexes when those workers' are performing substantially equivalent work under similar conditions in the same establishment.

Act prohibits retaliation against an employee for exercising rights under the EPA.

3. MINIMUM NUMBER OF EMPLOYEES REQUIRED:

No – applies to all public employers and all private employers if the employer has gross sales of \$500,000 or more and has two or more employees engaged in interstate commerce; or

An individual employee is covered if the employee is engaged in interstate commerce.

4. IMPORTANT EXCLUSIONS:

- Seniority Systems
- Merit Systems
- Systems which measure earnings by quantity or quality of production

5. ENFORCEMENT AGENCY:

Equal Employment Opportunity Commission (EEOC), the Secretary of Labor or private suit.

6. REMEDIES:

- Back pay
- Interest on back pay
- Additional liquidated damages equal to the amount of back pay recovered (unless employer can show “good faith” omission)

C. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA)¹³

1. PURPOSE:

Prohibits age discrimination against persons age 40 or older

2. KEY PROVISIONS:

Prohibit discrimination in hiring/firing and the terms/conditions of employment because of age (protects workers 40 year or older only).

Prohibits retaliation against any person exercising his/her ADEA rights.

3. MINIMUM NUMBER OF EMPLOYEES REQUIRED:

Yes – 20 or more employees for each working day in each of 20 or more calendar weeks in current or preceding year.

4. IMPORTANT EXCLUSIONS:

Bona fide occupational qualifications (BFOQ) – it is not unlawful for an employer to based on age where the use of age criteria is reasonably necessary to the normal operation of the employer's business.

Bona fide seniority or employee benefits plans.

5. ENFORCEMENT AGENCY:

Equal Employment Opportunity Commission (EEOC) and private suit.

6. REMEDIES:

- Back pay
- Hiring, promotion or reinstatement (or front pay if reinstatement not feasible)
- Liquidated damages for willful violations
- Attorney's fees and costs

D. THE AMERICANS WITH DISABILITIES ACT (ADA)¹⁴

1. PURPOSE:

Prohibits discrimination against individuals with a disability and requires that employers make reasonable accommodations for disabled workers.

2. KEY PROVISIONS:

Employers may not discriminate against a “qualified individual with a disability” in regard to hiring/firing and terms/conditions of employment because of person’s disability

Employers must make “reasonable accommodations” to known physical or mental limitation of an otherwise “qualified individual with a disability”

- Individual with a Disability under the ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

Major life activities are activities that an average person can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, learning, and working.

- A Qualified Individual with a Disability is a qualified employee or applicant with a disability is someone who satisfies skill, experience, education, and other job-related requirements of the position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of that position.
- Reasonable Accommodation includes existing facilities readily accessible to and usable by individuals with disabilities and other forms of scheduling or work assignment modifications that can allow disabled individuals to perform their essential job functions.

3. MINIMUM NUMBER OF EMPLOYEES REQUIRED:

Yes- 15 or more employees for each working day in each of 20 or more calendar weeks in current or preceding year.

4. IMPORTANT EXCLUSIONS:

- Employee that is not a “qualified individual with a disability” is not covered
- Reasonable accommodation not required if such accommodations imposes undue hardship
- Where employer demonstrates good faith efforts, in consultation with disabled employee, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the employer’s business.
- Certain behaviors excluded, such as illegal use of drugs, kleptomania, pedophilia.

5. ENFORCEMENT AGENCY:

Equal Employment Opportunity Commission (EEOC) or private suit.

6. REMEDIES:

An employee may obtain—

- An injunction against the employer’s unlawful conduct
- Compensatory Damages – cap of between \$50,000 and \$300,000
- Punitive Damages – not available in suit against public employer (also subject to above cap)
- Hiring, promotion or reinstatement (or front pay if reinstatement not feasible)
- Back Pay
- Attorney Fees & Costs

E. FAIR LABOR STANDARDS ACT (FLSA)¹⁵

1. PURPOSE:

Governs the compensation employers must pay to employees.

2. KEY PROVISIONS:

- Employers must pay a specified minimum wage (currently \$7.25 per hour federal law –states may be higher)
- Employers must pay overtime (generally 1.5 times the employee's regular rate for each hour worked over 40 hours per week)
- Employers may not discriminate or retaliate against employees for exercising their FLSA rights
- The Act also prohibits/restricts child labor

3. MINIMUM NUMBER OF EMPLOYEES:

No – applies to all public employers and all private employers if the employer has gross sales of \$500,000 or more and has two or more employees engaged in interstate commerce; or

An individual employee is covered if the employee is engaged in interstate commerce.

4. IMPORTANT EXCLUSIONS:

Certain types of employees are exempt from the act:

“White collar employees” (those paid at a certain minimum salary and who regularly exercise discretion on the job):

- Executives
- Administrative employees
- Professionals
- Outside salespeople

Certain specific industries (e.g. agricultural workers) and certain types of employment (e.g. certain seasonal workers)

5. ENFORCEMENT:

Wage and Hour Division of the Department of Labor or by private suit.

6. REMEDIES:

For minimum wage/overtime violations:

- Back pay (unpaid minimum wages or overtime payments)
- Interest on back pay
- Additional liquidated damages equal to the amount of back pay recovered (unless employer can show “good faith” omission)

For employees exercising their FLSA rights, the above plus:

- Compensatory damages
- Punitive Damages
- Reinstatement, Promotion
- An injunction against further violations
- Attorney’s fees and costs

For willful and repeated violations – civil fines up to \$1,000 per day

F. FAMILY AND MEDICAL LEAVE ACT (FMLA)¹⁶

1. PURPOSE:

Requires that employers grant up to 12 weeks of unpaid leave to employees for specified family reasons

2. KEY PROVISIONS:

Employers must provide employees with up to 12 weeks unpaid leave in any twelve month period for newborn child care, adoption, and serious health conditions affecting the employee himself or any member of his immediate family

Employers must restore employees to their previous position upon conclusion of leave

Employers may not discriminate against employees who exercise their FMLA rights

3. MINIMUM NUMBER OF EMPLOYEES:

Yes – 50 for private employers or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding year; no minimum for public employers

4. IMPORTANT EXCLUSIONS:

- The Act does not apply to any employee who works at a facility with fewer than 50 employees and whose employer has fewer than 50 employees within 75 miles of that facility
- The Act does not apply to employees who have less than 12 months of service with the employer or have worked less than 1250 hours during the previous 12 months
- An employer may refuse to restore an employee to his/her previous position upon conclusion of leave if the employee is salaried and among the highest paid 10% of employees within 75 miles of the facility at which the employee works and restoration would cause grievous economic injury to the employer's operations.

5. ENFORCEMENT:

Secretary of Labor or by private suit.

NEW January 16, 2009 – MILITARY SERVICE MEMBER & FAMILY

- Up to 12 weeks of leave for certain “qualifying exigencies” arising out of a covered military member's active duty status, or notification of an impending call or order to active duty status, in support of a contingency operation, and
- Up to 26 weeks of leave in a single 12-month period to care for a covered service member recovering from a serious injury or illness incurred in the line of duty on active duty. Eligible employees are entitled to a combined total of up to 26 weeks of all types of FMLA leave during the single 12-month period.
- The Department’s final rule defines “qualifying exigency” by referring to a number of broad categories for which employees can use FMLA leave: (1) Short-notice deployment; (2) Military events and related activities; (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Counseling; (6) Rest and recuperation; (7) Post-deployment activities; and (8) Additional activities not encompassed in the other categories, but agreed to by the employer and employee.
- Employers must restore employees to their previous position upon conclusion of leave
- Employers may not discriminate against employees who exercise their FMLA rights

6. REMEDIES:

An employee may obtain/recover:

- Damages equal to the amount of wages and benefits lost; or if none have been lost, then any actual monetary loss sustained as a result of the violations such as the cost of providing care, up to a sum equal to 12 weeks pay for the employees
- Interest
- Additional liquidated damages equal to the amount of back pay recovered (unless employer can show “good faith” omission)
- An injunction against further violations
- Equitable relief such as reinstatement
- Attorney’s fees and costs

G. SARBANES-OXLEY (SOX)

WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o (d)), or any officer, employee, contractor, subcontractor, or agent of such company, may:

Discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee such as:

1. Provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by;
 - a Federal regulatory or law enforcement agency;
 - any Member of Congress or any committee of Congress; or
 - a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discovery, or terminate misconduct); or
2. File, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders

H. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

USERRA prohibits discrimination in hiring, retention, promotions, or other benefits of employment against a person because that person “is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service....”

In addition, employers are prohibited from reprisal against anyone who exercises USERRA rights

- **In order to qualify for reemployment rights following military service:**
 - You must have left a civilian job;
 - You must have given notice that you were leaving to perform military service;
 - The cumulative period of service must not have exceeded five years (there are exceptions);
 - You must have been released from service under honorable or general conditions; and
 - You must have reported back to work or applied for reemployment within time constraints prescribed by law.
- **Reemployment Entitlements**
- Following a period of military service:
 - You are entitled to prompt reemployment. You are entitled to seniority, seniority-related benefits (including pension), status, and rate of pay as if you were continuously employed during the military absence.
 - You are entitled to immediate reinstatement of health insurance for you and previously covered dependents, with no waiting period and no exclusion of preexisting conditions

OVERVIEW OF STATE LAWS

Additional Protected Categories – Employers cannot make decisions to hire, fire, promote, demote or otherwise change the terms of employment based upon:

- Pregnancy
- Marital Status
- Sexual Orientation
- Political Affiliation
- Arrest or Conviction Record
- Smoking Status
- Use of Lawful Products (Alcohol)
- AIDS Status

State laws vary greatly by state. See your state's Employment Laws.

V. Coverage for Employment Related Claims

A. CGL Policy

1. Expected or Intended Injury Exclusion

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

2. Mental Anguish alone not generally considered "bodily injury" under CGL

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

3. Loss of wages claimed not generally considered "property damage" under CGL

17. "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.**

4. Personal Injury Coverage may apply for defense IF covered offense

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 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 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".

Coverage under Personal and Advertising Injury usually removed by EPLI Exclusion

5. Employment Practices Related Exclusion – CGL

COMMERCIAL GENERAL LIABILITY
CG 21 47 12 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYMENT-RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to Paragraph 2. Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability:

This insurance does not apply to:

"Bodily injury" to:

- (1) A person arising out of any:

- (a) Refusal to employ that person;
- (b) Termination of that person's employment; or
- (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or

- (2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the injury-causing event described in Paragraphs (a), (b), or (c) above occurs before employment, during employment or after employment of that person;
- (2) Whether the insured may be liable as an employer or in any other capacity; and
- (3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

B. The following exclusion is added to Paragraph 2. Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability:

This insurance does not apply to:

"Personal and advertising injury" to:

(1) A person arising out of any:

(a) Refusal to employ that person;

(b) Termination of that person's employment; or

(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination or malicious prosecution directed at that person; or

(2) The spouse, child, parent, brother or sister of that person as a consequence of "personal and advertising injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

(1) Whether the injury-causing event described in Paragraphs (a), (b), or (c) above occurs before employment, during employment or after employment of that person;

(2) Whether the insured may be liable as an employer or in any other capacity; and

(3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

B. Employers' Liability Coverage – Express Exclusion

C. Exclusions

This insurance does not cover:

7. damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions;

C. Umbrella Policies

1. Insuring agreement

a. Coverages

- 1) "Bodily injury" or "personal injury"
- 2) "Occurrence" – expected or intended injury or damage usually excluded

2. Exclusions

- a. Discrimination
- b. Employment-related practices excluded
- c. ERISA and other Federal employment-related laws excluded

D. Directors and Officers Liability Policies

34% of Directors and Officers Claims were by current or former employees.

Source: 2018 Willis Towers Watson Management Liability (Directors and Officers) U.S. Survey

1. Coverage
 - a. Insuring agreement
 - 1) What – Breach of duty as Director or Officer
 - 2) Who - directors and officers, not the organization
 - b. Definitions
 - 1) "Wrongful act"
 - 2) "Personal injury"
2. Exclusions
 - a. Discrimination
 - b. Violation under ERISA
 - c. Emotional distress and libel/slander
 - d. Insured vs. insured
 - e. Employment practices exclusion

VI. Types of specific forms

A. Specific Offenses Coverage

1. ADA – form focuses on liability arising from ADA and other laws relating to discrimination against individual with disabilities
2. Termination – covers termination of employment but would cover discrimination only if it was a part of the termination.

B. Broad

Employment claims including discrimination, termination, or failure to hire or promote, wrongful termination, sexual harassment, breach of employment contract, employment-related defamation, and wrongful infliction of emotional distress.

C. Endorsements to Provide Employment-Related Practices

1. Non-sexual harassment in workplace
2. Non-employment related sexual harassment and discrimination (third party) – “third party” usually means sexual harassment or discrimination against customers, vendors, or other non-employees. It usually does not refer to sexual harassment or discrimination against employees by a third party.

VII. Employment Practices Liability Coverage

- A. Common Characteristics
 - 1. Non-standard forms
 - 2. Written on claims-made basis (may be claims-made and reported)
- B. Coverage
 - 1. Insuring agreement
 - a. Specified offense/offenses
 - b. Additional insuring agreement or options - may provide third party discrimination and harassment
 - 2. Definitions (critical to define coverage provided)
 - 3. Defense Obligations
 - a. Varies by insurer
 - b. Defense costs usually included within the limit
 - c. Insurer may have duty to defend *or may reimburse for defense provided by insured*
 - d. Insured may have choice of defense counsel – from pre-approved list (panel counsel) or submit defense counsel for approval

4. Who is an Insured
 - a. Entity
 - b. Directors
 - c. Officers
 - d. Employees
5. Typical Exclusions – vary from policy to policy
 - a. If notice to a prior insurer
 - b. Pending or Prior
 - c. Prior Knowledge (before Continuity Date)
 - d. Bodily injury and property damage (but may cover emotional distress, humiliation, mental anguish)
 - e. Workers compensation, unemployment compensation, disability benefits (claims for retaliation may be covered)
 - f. Wage and Hour violations (may provide sublimit for defense)
 - g. Violations of certain federal acts (examples: Workers Adjustment Retraining Notification (WARN), Consolidated Omnibus Budget Reconciliation Act (COBRA), or the Occupational Safety and Health Act (OSHA), Employee Retirement Income Securities Act (ERISA), ADA accommodations.
 - h. Contractual Liability (agreement to indemnify others – unless liable absent contract)
 - i. Breach of Written Contract (may defend such claims)
 - j. Severance payments
 - k. Future compensation if hired, promoted or reinstated
 - l. Pollution (claims for retaliation may be covered)

- m. Costs of non-monetary relief (may defend such actions)
 - n. Strikes and lockouts/collective bargaining
 - o. Benefits administration and compliance
 - p. Claims against subsidiaries for acts occurring prior to acquisition.
 - q. Change in control – policy ends for any subsequent employment related wrongful acts committed after change in control
- 6. Territory (Worldwide is not uncommon)
 - 7. Limits of liability
 - a. Per claim
 - b. Annual aggregate
 - 8. Deductibles – usually include defense costs
 - 9. Coinsurance or co-payments provisions (unusual – may be underwriting requirement)
 - a. Purpose is to encourage loss control
 - b. Coinsurance is usually 5 to 10% of the claim
 - 10. Retroactive date (may be date of first policy)
 - 11. Consent to Settle (Hammer Clause or “Soft” Hammer Clause)
 - 12. Potential Claim (report *specifics* of incident that is not yet a claim – i.e. sexual harassment lodged internally)

13. Extended reporting provisions
 - a. Cost of ERP
 - b. When it is available – insured or insurer cancel or non-renew?
 - c. When must ERP be elected?
14. Applications – usually part of policy and warranty
15. Underwriting considerations
 - a. Industry type or class of business
 - b. Employment Handbook with “at will” statement
 - c. Sexual Harassment policy in place and communicated at least annually to all employees
 - d. Performance evaluations and job applications
 - e. Claim history
 - f. Turnover rate and planned location/plant closings
 - g. Training of supervisors and employees
 - h. Complaint procedures (if any)

VIII. Loss Control Measures – May be the most critical part of Employment Related Practices

- A. Most claims can be avoided
- B. Able to effectively defend those claims that are alleged
- C. Need to have in place BEFORE insurance can be purchased

IX. EPLI Insurance – COVERAGE ANALYSIS

Chubb Group of Insurance Companies

ForeFront Portfolio 3.0

EMPLOYMENT PRACTICES LIABILITY COVERAGE PART Form 14-02-17272
(12/2010)

NOTICE: THE LIABILITY COVERAGE PARTS PROVIDE CLAIMS-MADE COVERAGE, WHICH APPLIES ONLY TO "CLAIMS" FIRST MADE DURING THE "POLICY PERIOD", OR ANY APPLICABLE EXTENDED REPORTING PERIOD. THE LIMIT OF LIABILITY TO PAY DAMAGES OR SETTLEMENTS WILL BE REDUCED AND MAY BE EXHAUSTED BY "DEFENSE COSTS", AND "DEFENSE COSTS" WILL BE APPLIED AGAINST THE RETENTION. IN NO EVENT WILL THE COMPANY BE LIABLE FOR "DEFENSE COSTS" OR THE AMOUNT OF ANY JUDGMENT OR SETTLEMENT IN EXCESS OF THE APPLICABLE LIMIT OF LIABILITY. READ THE ENTIRE POLICY CAREFULLY.

A. Insuring Agreement – What is Covered?

Insuring Clause (A): Employment Practices Liability Coverage

(A) The Company shall pay, on behalf of an **Insured**, **Loss** on account of an **Employment Claim** first made against the **Insured** during the **Policy Period**, or the Extended Reporting Period if applicable, provided the Company's maximum liability for this Insuring Clause (A) shall be the Limit of Liability set forth in Item 3(A) of the EPL Declarations or the unpaid portion of the Maximum Aggregate Limit of Liability set forth in Item 2 of the EPL Declarations for each **Policy Year**, whichever is less.

Insuring Clause (B): Third Party Liability Coverage

(B) The Company shall pay, on behalf of an **Insured**, **Loss** on account of a **Third Party Claim** first made against the **Insured** during the **Policy Period**, or the Extended Reporting Period if applicable, provided the Company's maximum liability for this Insuring Clause (B) shall be the Limit of Liability set forth in Item 3(B) of the EPL Declarations or the unpaid portion of the Maximum Aggregate Limit of Liability set forth in Item 2 of the EPL Declarations for each **Policy Year**, whichever is less.

1. Key Definitions

a. Loss

Loss means the amount which an **Insured** becomes legally obligated to pay as a result of any **Claim**, including:

A) compensatory damages;

(B) (1) punitive, exemplary or multiplied damages, if and to the extent such damages are insurable under the law of the jurisdiction most favorable to the insurability of such damages, provided such jurisdiction has a substantial relationship to the **Insured**, the Company, or to the **Claim** giving rise to such damages; or

(2) liquidated damages awarded pursuant to the Age Discrimination in Employment Act, Family and Medical Leave Act or Equal Pay Act;

(C) back pay, front pay, claimant's attorney's fees awarded by a court against an **Insured** or agreed to by the Company in connection with a settlement (but only if such claimant's attorney's fees are agreed to in writing by the Company at the time of or after a final settlement);

(D) judgments, including pre-judgment and post-judgment interest;

(E) settlements; and

(F) **Defense Costs**,

provided that **Loss** does not include any portion of such amount that constitutes any:

(1) cost of compliance with any order for, grant of, or agreement to provide non-monetary relief, including injunctive relief;

(2) amount uninsurable under the law pursuant to which this Coverage Part is construed;

(3) tax, fine or penalty imposed by law; except as provided above with respect to punitive, exemplary or multiplied damages, or liquidated damages;

(4) future salary, wages, commissions, or **Benefits** of a claimant who has been or shall be hired, promoted or reinstated to employment pursuant to a settlement, order or other resolution of any **Claim**;

(5) salary, wages, commissions, **Benefits** or other monetary payments which constitute severance payments or payments pursuant to a notice period;

(6) **Benefits** due or to become due or the equivalent value of such **Benefits**, except with respect to any **Employment Claim** for **Wrongful Termination**, or **Stock Benefits**;

(7) cost associated with providing any accommodation for persons with disabilities or any other status which is protected under any applicable federal, state, or local statutory law or common law anywhere in the world, including, the Americans with Disabilities Act, the Civil Rights Act of 1964, or any amendments to or rules or regulations promulgated under any such law;

(8) amount incurred by an **Insured** in the defense or investigation of any action, proceeding or demand that was not then a **Claim** even if (a) such amount also benefits the defense of a covered **Claim**; or (b) such action, proceeding, investigation or demand subsequently gives rise to a **Claim**; or

(9) cost incurred in cleaning-up, removing, containing, treating, detoxifying, neutralizing, assessing the effects of, testing for, or monitoring **Pollutants**

b. Employment Practices Wrongful Act

Employment Practices Wrongful Act means any actual or alleged:

(A) **Breach of Employment Contract**;

(B) **Employment Discrimination**;

(C) **Employment Harassment**;

(D) **Retaliation**;

(E) **Workplace Tort**;

(F) **Wrongful Employment Decision**; or

(G) **Wrongful Termination**,

committed, attempted, or allegedly committed or attempted by an **Organization** or by an **Insured Person** while acting in his or her capacity as such.

c. Breach of Employment Contract

Breach of Employment Contract means any breach of any oral, written or implied contract or contractual obligation including any contract or contractual obligation arising out of any personnel manual, employee handbook, policy statement or other representation.

d. Employment Discrimination

Employment Discrimination means any violation of employment discrimination laws including any actual, alleged or constructive employment termination, dismissal, or discharge, employment demotion, denial of tenure, modification of any term or condition of employment, any failure or refusal to hire or promote, or any limitation, segregation or classification of any employee or applicant for employment in any way that would deprive or tend to deprive any person of employment opportunities or otherwise affect his or her status as an employee

based on such person's race, color, religion, creed, genetic information, age, sex, disability, marital status, national origin, pregnancy, HIV status, sexual orientation or preference, Vietnam Era Veteran status or other protected military status or other status that is protected pursuant to any federal, state, or local statutory law or common law anywhere in the world.

e. Employment Harassment

Employment Harassment means:

(A) sexual harassment, including unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature that is made a condition of employment with, used as a basis for employment decisions by, interferes with performance or creates an intimidating, hostile or offensive working environment within an **Organization**; or

(B) workplace harassment, including work related harassment or bullying of a non-sexual nature that interferes with performance or creates an intimidating, hostile or offensive working environment within an **Organization**.

f. Retaliation

Retaliation means retaliatory treatment against an **Employee** or **Independent Contractor** of an **Organization** on account of such individual:

(A) exercising his or her rights under law, refusing to violate any law, or opposing any unlawful practice;

(B) having assisted or testified in or cooperated with a proceeding or investigation (including any internal investigation conducted by the **Organization's** human resources department or legal department) regarding alleged violations of law by the **Insured**;

(C) disclosing or threatening to disclose to a superior or to any governmental agency any alleged violations of law; or

(D) filing any claim against the **Organization** under the Federal False Claims Act, Section 806 of the Sarbanes Oxley Act or any other federal, state, local or foreign whistleblower law.

g. Workplace Tort

Workplace Tort means any:

(A) employment-related:

(1) misrepresentation;

(2) defamation (including libel and slander);

(3) invasion of privacy (including the unauthorized use or disclosure of an **Employee's** (a) medical information in violation of the Health Insurance Portability and Accountability Act ("HIPAA"); (b) credit information or related information in violation of the Fair Credit Reporting Act; or (c) other information obtained through an employment-related background check);

(4) negligent evaluation;

(5) wrongful discipline; or

(6) wrongful deprivation of career opportunity; or

(B) employment-related:

(1) negligent retention;

(2) negligent supervision;

(3) negligent hiring;

(4) negligent training;

(5) wrongful infliction of emotional distress, mental anguish or humiliation;

(6) failure to provide or enforce consistent employment-related corporate policies and procedures; or

(7) false imprisonment

h. Wrongful Employment Decision

Wrongful Employment Decision means any wrongful demotion, denial of tenure, or failure or refusal to hire or promote, failure to employ, or wrongful or negligent employee reference.

i. **Wrongful Termination**

Wrongful Termination means any wrongful termination, dismissal or discharge of employment, including constructive termination, dismissal or discharge. **Wrongful Termination** does not include **Breach of Employment Contract**.

B. **Defense Obligation – some EPL policies are defense reimbursement with NO obligation to defend.**

DEFENSE AND SETTLEMENT

(A) Except as provided in Subsection (B) below, the Company shall have the right and duty to defend any **Claim** covered by this Coverage Part. Coverage shall apply even if any of the allegations are groundless, false or fraudulent.

1. Defense – what expenses are included?
2. Who has choice of legal counsel?

Defense Costs means that part of **Loss** consisting of reasonable costs, charges, fees (including attorneys' fees and experts' fees) and expenses (other than regular or overtime wages, salaries, fees, benefits of the **Insured Persons**) incurred in defending, opposing or appealing any **Claim**, and the premium for appeal, attachment or similar bonds.

3. Defense within or outside limit?

THE LIMIT OF LIABILITY TO PAY DAMAGES OR SETTLEMENTS WILL BE REDUCED AND MAY BE EXHAUSTED BY "DEFENSE COSTS",

C. **Who is protected as an Insured?**

Insured means any **Organization** and any **Insured Person**.

Insured Person means any:

(A) **Executive** or **Employee** of an **Organization**; or

(B) **Independent Contractor** working for an **Organization**, but only while acting in his or her capacity as such and only if the **Organization** agrees to indemnify the **Independent Contractor** in the same manner as provided to the **Organization's Employees** for liability arising out of a **Claim**.

D. Coverage Trigger –Insuring Clause (A) and (B)

....on account of an **Employment Claim** first made against the **Insured** during the **Policy Period**, or the Extended Reporting Period, if applicable...

....on account of an **Third Party Claim** first made against the **Insured** during the **Policy Period**, or the Extended Reporting Period, if applicable...

1. What constitutes an Employment Claim?

Employment Claim means:

(A) (1) any:

(a) written demand first received by an **Insured** for monetary or non-monetary relief, including a written demand for reinstatement, reemployment, re-engagement or injunctive relief;

(b) civil proceeding commenced by the service of a complaint or similar pleading;

(c) criminal proceeding outside the United States of America commenced by a return of an indictment, information or similar document;

(d) arbitration proceeding pursuant to an employment contract, policy or practice of an **Organization**, commenced by the receipt by an **Insured** of a demand for arbitration or similar document, or any other external alternative dispute resolution proceeding commenced by receipt by an **Insured** of a demand for an alternative dispute resolution or similar document; or

(e) administrative, regulatory or tribunal proceeding commenced by:

(i) the issuance of a notice of charge, formal investigative order or similar document; or

(ii) in the event the **Insured** is not issued notice as set forth in (e)(i) above, the receipt by an **Insured** of the administrative, regulatory or tribunal proceeding resulting from such notice of charge, formal investigative order or similar document, including any such proceeding brought by or in association with the Equal Employment Opportunity Commission or any similar governmental agency located anywhere in the world with jurisdiction over the **Organization's** employment practices; or

(2) in the context of an audit conducted by the Office of Federal Contract Compliance Programs, a Notice of Violation or Order to Show Cause or written demand for monetary relief or injunctive relief, commenced by the receipt by an **Insured** of such Notice, Order or written demand, which is brought and maintained by or on behalf of a past, present or prospective **Employee** or **Independent Contractor** of an **Organization** against any **Insured** for an **Employment Practices Wrongful Act** (even if such **Employment Practices Wrongful Act** is related to allegations in a criminal proceeding in the United States of America), including any appeal therefrom; or

(B) a written request first received by an **Insured** to toll or waive a statute of limitations relating to a potential **Employment Claim** as described in Subsection (A) above.

Notwithstanding the foregoing, **Employment Claim** shall not include any labor or grievance arbitration or other proceeding pursuant to a collective bargaining agreement.

2. When must a claim be reported (including lodging of complaint with administrative agency)?

IV. REPORTING

(A) An **Insured** shall, as a condition precedent to exercising any right to coverage under this Coverage Part, give to the Company written notice of any **Claim** as soon as practicable after the chief executive officer, chief financial officer, any person with the responsibility for the management of insurance claims (or any equivalent position to any of the foregoing), or any member of the in-house general counsel or human resources departments, of an **Organization** becomes aware of such **Claim**, but in no event later than:

(1) if this Coverage Part expires (or is otherwise terminated) without being renewed with the Company, ninety (90) days after the effective date of such expiration or termination; or

(2) the expiration date of the Extended Reporting Period, if applicable,

(B) Notwithstanding the foregoing Subsection (A) and solely with respect to an **Employment Claim** that is brought as a *formal administrative or regulatory proceeding commenced by the filing of a notice of charges*, an **Insured**, shall, as a condition precedent to exercising any right to coverage under this Coverage Part, give written notice thereof to the Company during the **Policy Period**, or, if applicable, in no event later than the earliest of the following dates:

(1) if this Coverage Part is renewed, 180 days after the end of the **Policy Period**,

(2) if this Coverage Part expires (or is otherwise terminated) without being renewed with the Company and if no Extended Reporting Period is purchased, ninety (90) days after the effective date of such expiration or termination; or

(3) the expiration date of the Extended Reporting Period, if elected,

3. Requirement to “potential claim”?

If during the **Policy Period**, or any applicable Extended Reporting Period, an **Insured** becomes aware of a **Potential Claim** and gives written notice of such **Potential Claim** to the Company, and requests coverage under this Coverage Part for any **Claim** subsequently resulting from such **Potential Claim**, then any **Claim** subsequently arising from the **Potential Claim** shall be deemed made against the **Insured** during the **Policy Year** in which written notice of such **Potential Claim** was first given to the Company,

Potential Claim means a complaint or allegation of a **Wrongful Act** by or on behalf of a potential claimant if such complaint or allegation:

(A) does not constitute a **Claim** but may subsequently give rise to a **Claim**; and

(B) is lodged with:

(1) any supervisory employee having management-level responsibility for personnel matters with respect to such claimant, if such supervisory employee provides notice of such complaint or allegation to any member of an **Organization's** human resources, general counsel or risk management departments, or other comparable department; or

(2) any member of an **Organization's** human resources, general counsel or risk management departments, or other comparable department.

E. Extended Reporting Period Option – Typically one year but must be requested and pay in 60 days

V. EXTENDED REPORTING PERIOD

With respect to the **Liability Coverage Parts**:

(A) If this Policy does not renew or otherwise terminates for a reason other than for failure to pay premium (each a "Termination of Coverage"), then an **Insured** shall have the right to purchase an Extended Reporting Period for the Additional Period and Additional Premium set forth in Item 5 of the GTC Declarations.

This right to purchase an Extended Reporting Period shall lapse unless written notice of election to purchase the Extended Reporting Period, together with payment of the applicable Additional Premium, is received by the Company within sixty (60) days after the effective date of the Termination of Coverage.

F. Important Exclusions

1. Prior Notice

Prior Notice

based upon, arising from or in consequence of any fact, circumstance, situation, transaction, event or **Wrongful Act** that, before the inception date set forth in Item 2 (A), Policy Period, of the GTC Declarations, was the subject of any notice accepted under any employment practices liability policy or coverage part or any other liability policy or coverage part that includes coverage for employment practices liability of which this Coverage Part is a direct or indirect renewal or replacement;

2. Pending or Prior

Pending or Prior Proceedings

based upon, arising from or in consequence of a written demand alleging a **Wrongful Act**, suit, formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document, a Notice of Violation or Order to Show Cause resulting from an audit conducted by the Office of Federal Contract Compliance Programs or arbitration proceeding pending against or order, decree or judgment entered for or against any **Insured** on or prior to the applicable Pending or Prior Proceedings Date as set forth in Item 5 of the EPL Declarations or the same or substantially the same fact, circumstance or situation underlying or alleged therein;

3. Pollution

Pollution

based upon, arising from or in consequence of any:

- (1) discharge, emission, release, dispersal or escape of any **Pollutants** or any threat thereof;
- (2) treatment, removal or disposal of any **Pollutants**; or
- (3) regulation, order, direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize any **Pollutants**, including any **Claim** for financial loss to an **Organization**, its securityholders or its creditors based upon, arising from or in consequence of any matter described in Paragraphs (1), (2) or (3) of this Exclusion (C), *provided that this Exclusion (C) shall not apply to Loss on account of any Employment Claim for Retaliation*;

4. Bodily Injury or Property Damage

Bodily Injury/ Property Damage

for bodily injury, mental anguish, humiliation, emotional distress, sickness, disease or death of any person or damage to or destruction of any tangible property including the loss of use thereof whether or not it is damaged or destroyed, provided that this Exclusion (D) shall not apply to **Loss** for any mental anguish, humiliation or emotional distress when alleged as part of an otherwise covered **Claim**;

5. Workers' compensation

Workers' Compensation, Unemployment, Social Security, Disability Benefits

for any obligation of any **Insured** pursuant to any workers compensation, unemployment insurance, social security, disability benefits or any similar federal, state, or local statutory law or common law anywhere in the world, provided that this Exclusion (E) shall not apply to **Loss** on account of any **Employment Claim for Retaliation**;

6. Employee Benefit Programs

Employee Benefits Program

for any violation of the responsibilities, obligations or duties imposed by any federal, state, or local statutory law or common law anywhere in the world (including the Employment Retirement Income Security Act of 1974 (except section 510 thereof) and the Consolidated Omnibus Budget Reconciliation Act of 1985)... including any:

(4) severance pay arrangement;

provided that this Exclusion (G) *shall not apply to **Loss** on account of any **Employment Claim** for **Retaliation***;

7. Wage & Hour

Wage and Hour

for any violation of the responsibilities, obligations or duties imposed by any federal, state, or local statutory law or common law anywhere in the world (including the Fair Labor Standards Act) or amendments to or regulations promulgated under any such law that governs wage, hour and payroll policies and practices, except the Equal Pay Act,...

provided that this Exclusion (I) shall not apply to **Loss** on account of any **Employment Claim** for **Retaliation**;

8. Breach of Written Employment Contract

Breach of Written Employment Contract

based upon, arising from or in consequence of any breach of any written employment contract, provided that this Exclusion (L) shall not apply to:

(1) **Loss** to the extent an **Insured** would have been liable for such **Loss** in the absence of such written employment contract; or

(2) **Defense Costs**.

EXHIBITS

Sexual Harassment – Important Case Law

In two significant United States Supreme Court decisions, the issue of an employer's liability for sexual harassment committed by a supervising employee, as well as a possible defense available to the employer for the supervising employee acts, was addressed. The following is a brief summary of what we believe are some relevant sections of the cases:

Burlington Industries, Inc. v. Kimberly Ellerth, Decided June 26, 1998

Facts:

Kimberly Ellerth quit her job after 15 months allegedly because she had been subjected to constant sexual harassment by one of her supervisors, Ted Slowik. Ellerth refused all of Slowik's advances, yet suffered no tangible retaliation, and was, in fact, promoted once. Moreover, she never informed anyone in authority about Slowik's conduct, despite knowing Burlington has a policy against sexual harassment.

The opinion of the court, which was a 7 to 2 majority, was written by Justice Kennedy. He began with the following:

"We decide, whether, under Title VII of the Civil Rights Act of 1964...an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions."

In this case, the lower court had found that:

"Burlington neither knew nor should have known about the conduct. ...the court noted that Ellerth had not used Burlington's internal complaint procedures"

The issue was further refined by Justice Kennedy as follows:

"We must decide, then, whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat"

If imposed, vicarious liability would impute the liability to the employer for the acts of the supervisor and would hold the employer liable even if the employer could demonstrate they had no fault relative to the harassment.

The Court took what might be described as a middle ground. They did hold that an employer may be held vicariously liable, but with a possible defense available to the employer. The following is the court's reasoning as expressed by Justice Kennedy:

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of evidence..... The defense comprise two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."

In the Burlington case, the Court stated that Burlington could still be held vicariously liable for Slowik's harassment but would have the opportunity to prove (with a preponderance of evidence) the two elements of the defense, remanding the case back to the lower court.

Beth Ann Faragher v. City of Boca Raton- Decided on June 26, 1998

In this case, the Court, in an opinion written by Justice Souter (also a 7 to 2 majority), reiterated verbatim the decision in Burlington regarding the vicarious liability of an employer for sexual harassment.

Facts

A lifeguard for the city of Boca Raton, Beth Ann Faragher, after resigning from her position, alleged that her supervisors had created a sexually hostile atmosphere by repeatedly subjecting Faragher and other female lifeguards, to "uninvited and offensive" touching, to lewd remarks, and to speaking of women in offensive terms.

Similar to Burlington, Faragher did not complain to higher management about the actions of her supervisors. However, the facts showed that the city of Boca Raton, although they had a sexual harassment policy in place, had entirely failed to disseminate its policy among the beach employees and that its officials made no attempt to keep track of beach supervisors.

The result is that the Court concluded that Boca Raton did not exercise reasonable care to prevent supervisors' conduct. Therefore, the first element of the outlined defense was missing and the city could not avail itself of the defense.

Some interesting comments were made by Justice Souter that shed some light on the Court's view of sexual harassment. Justice Souter stated:

"Most recently, we explained that Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same or opposite sex.' A recurring point in these opinions is that 'simple teasing', offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' These standards for judging hostility are sufficiently demanding to ensure Title VII does not become a 'general civility code.' Properly applied, they will filter out complaints attacking the 'ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes, and occasional teasing.' We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view."

Conclusion:

Although this is not a clear a victory for employers, it does begin to clarify some issues. Employers should now have some sense of what they need to do to avoid vicarious liability for their supervisors' acts. First, all employers should adopt and regularly communicate a sexual harassment policy to all employees. Second, a non-adversarial internal complaint procedure must be clear to all and the employer must respond promptly and reasonably to such complaints. Finally, the employer must use reasonable efforts to monitor the workplace for incidents of harassment and deal with them promptly and effectively.

It is important to note that the Court did conclude that the defense to an employer's vicarious liability does NOT apply to situations in which the supervisor's actions have "culminated in a tangible employment action, such as discharge, demotion or undesirable reassignment." In such situation, the employer will be held vicariously liable unless they can show the supervisor's action does not constitute sexual harassment or was sex based. Further, these two cases addressed only the employer's vicarious liability for supervisors and not liability for the actions of co-employees.

■ ENDNOTES

¹ Kelly A.M. Bowdren, Esq., *Employment Practices Liability Insurance*, Second Edition, (Boston: Standard Publishing Corporation, 1999) p. 1.

² Ibid p. 3

³ Ibid p. 3

⁴ Ibid p. 3

⁵ Ibid p. 4

⁶ Ibid p. 4

⁷ Ibid p. 4

⁸ Ibid p. 4

⁹ Ibid p. 5

¹⁰ Ibid p. 5

¹¹ Steven H. Adelman and Kevin D. Kelley, *Employment Practices Liability –Summary of federal and state employment statutes* (Princeton: American Re-Insurance Company Corporate Communications and Advertising Department, 2000) p. 7-8

¹² Ibid p. 11-12

¹³ Ibid p. 14-15

¹⁴ Ibid p. 17-19

¹⁵ Ibid p. 30-32

¹⁶ Ibid p. 41-42

