



# **JAMES K. RUBLE SEMINAR**

## **Ruble Graduate Seminar**

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**JAMES K. RUBLE SEMINAR**  
**Ruble Graduate Seminar**  
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## James K. Ruble Seminar

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### Section 1

# **Technology Tangible and Intangible Property Loss Exposures and Risk Finance Solutions**





# **Technology Tangible and Intangible Property Loss Exposures and Risk Finance Solutions**

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## I. INTRODUCTION

### A. Overview

1. Since computer systems, electronic systems, and software are growing increasingly complex, the risks of something going wrong is growing exponentially.
2. When it does, the consequences for the vendor providing the technology product, communications system or services are potentially catastrophic.
3. The cost of defense and potential damages due to non-performance, negligent oversell, fraud, breach of contract increased dramatically in recent years.
4. Technology Errors and omissions incidents arise from a variety of reasons including technological innovation or legal interpretations of "Legal Obligations."
5. As technology product manufacturers' and service providers' client realize that a data breach is awfully expensive and, at best, only partially insured by their own cyber insurance contracts, more lawsuits will be in their future.
6. *Affinity Gaming v. Trustwave Holdings, Inc.*, No. 2:15-cv-02464 (D. Nev. Dec. 24, 2015) is an excellent example.

Trustwave was hired to conduct a forensic investigation and fix the fraudulent credit card activity within its data system for its eleven casinos operating in four states. Trustwave stated that it had the capabilities to and would identify and remedy the causes of the data breach and facilitate Affinity's implementation of measures to prevent future breaches.

The work was incomplete, and Affinity needed to hire a separate forensic specialist to conduct an investigate and rectify the data breach. Affinity alleges that Trustwave had failed to identify the entire extent of the breach and provide corrections. Affinity alleged that Trustwave breached its contract, breached the implied duty of good faith and fair dealing, fraudulent inducement, fraud, constructive/equitable fraud, gross



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negligence, negligent misrepresentation, and violation of Nevada's Deceptive Trade Practices Act.

The court allowed the case to go forward on the breach of contract claim, the fraudulent inducement claim, fraud claim, and constructive/equitable fraud claim.

Does a Commercial General Liability Policy respond?

Does a Cyber Liability Policy respond?

Does a Technology E&O policy respond?

7. The most common technology product or services disputes include:
  - a. Misunderstanding between buyer and seller
  - b. Misrepresentation by vendor to buyer
  - c. Agreement by vendors to perform unreasonable specifications or changes in existing specifications without feasibility studies
  - d. Hold harmless agreements accepted by vendor for buyers risk.
  - e. Failure to state performance obligations in contracts with buyers
  - f. Failure of hardware or software to perform as designed or represented.
  - g. Incompatible hardware and/or software
  - h. Delay
  - i. Intellectual property disputes
  - j. Legal violation
  - k. Security error

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8. Technology Errors and Omissions insurance is intended to respond to negligence, error or omission giving rise to financial loss for a third-party. A service provider's data breach risk can arise from any or all of the following.
  - a. Its failure to prevent a breach of its client's data, which is a third-party exposure and should be covered under an E&O form.
  - b. A breach of its own data, which would not be covered under E&O and is a first party cover just like data breach coverage is in a cyber policy.
  - c. A breach of client data while in its possession, perhaps through a network breach, theft of a laptop, or similar means
9. It will not respond to intellectual property disputes, warranty obligations, cost guarantees, penalties, dishonest acts, fraud, and security breach.
10. It will also exclude bodily injury or property damage, which is normally covered under products liability Coverage A of the Commercial General Liability Coverage Form.

### **B. What is a Technology Loss Exposure?**

1. "Technology Product" means any computer hardware, firmware, software, or related electronic product, equipment, or device, specifically designed, or intended for use in connection with the definition of Technology Services.
2. "Technology Products" means a computer or telecommunications hardware or software product, or related electronic product that is created, manufactured, or developed by the Insured Organization for others, or distributed, licensed, leased or sold by the Insured Organization to others, for compensation, including software updates, service packs and other maintenance releases provided for such products.

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3. Technology Product now includes Artificial Intelligence. Artificial Intelligence or (AI) is the simulation of human intelligence processes by machines, especially computer systems.
4. Technology Product now includes Augmented Intelligence which is an alternative conceptualization of artificial intelligence that focuses on AI's assistive role, emphasizing the fact that it is designed to enhance human intelligence rather than replace it.
5. Technology Product now includes Agents or Sensors. These might be the droids, that are also known as bots or intelligent agents, that are autonomous software programs that are tasked to "sense" through sensors and "act" through actuators, according to their target function. They are often used to mimic human behavior as assistants in a variety of functions. According to Russell & Norvig, there are five classes of agents:
  - a. Simple reflex agents.
  - b. Model-based reflex agents.
  - c. Goal-based agents.
  - d. Utility-based agents.
  - e. Learning agents.
6. **Telecommunications Services**" means the following services:
  - a. Telephone services, including switching services, dial tone access, competitive access provider services, 911 emergency services, reseller services, interconnection services, long distance services, facsimile and interactive facsimile services.
  - b. Enhanced telephone services, including directory assistance services, calling card services, toll free service, call conferencing, call waiting, call forwarding, call return, caller identification, speed dialing, repeat dialing, voice mail services and any service that falls within the meaning of "enhanced services" as described in 47 C.F.R. § 64.702(a).

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- c. Cellular and wireless communication services including paging services, text messaging services and ground-based satellite communications.
  - d. Call center services.
  - e. Provision of cable television services.
  - f. Telecommunications consulting services.
  - g. Voice over Internet Protocol ("VoIP") services; and
  - h. The creation, manufacture, development, distribution, license, lease, sale, or training in the use of any hardware, firmware, software, or related electronic product, equipment or device specifically designed or intended for use in connection with the services described above.
- 7. Technology services are IT services that involve electronic or computer-based networks. Activities such as programming, designing, integrating, testing, repairing, consulting, and processing are considered technology services.
  - 8. Website design is also a type of technology service covered by technology E&O policy forms.
  - 9. The term technology services encompass activities that include domain name registration services, Internet hosting, and Web portal services.
  - 10. Cyber related exposures of technology companies make demand for this coverage stronger than in the past, and lawsuits by hacked clients will make the purchase even more compelling.
  - 11. Lawsuits will become more common.
  - 12. This will increase demand but also increase pressure on rates.
  - 13. However, the Internet of Things is rapidly changing and creating new loss exposures.

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- a. The Internet of Things (IoT) is the network of physical objects or "things" embedded with electronics, software, sensors, and network connectivity, which enables these objects to collect and exchange data.
- b. Usually, the computing or analysis of the sensor data is done close to the sensors. [FOG COMPUTING]. It applies limited data intelligence to distribute the data about the potential problem.
- c. The Internet of Things allows objects to be sensed and controlled remotely across existing network infrastructure, creating opportunities for more direct integration between the physical world and computer-based systems, and resulting in improved efficiency, accuracy, and economic benefit.
- d. Requires dedicated gateways and smartphones are not the answer, unless wearable IoT technology is involved. Requires a more diverse and innovative variety of hardware, software, and networking solutions.
- e. Each thing is uniquely identifiable through its embedded computing system but is able to interoperate within the existing Internet infrastructure.
- f. Experts estimate that the IoT will consist of almost 70 billion objects by 2022. This is a logical next step.
- g. Are your clients installing, servicing, and maintaining items within The Internet of Things which may not be covered under the Commercial General Liability Coverage Form?
- h. What about care, custody, or control exposures (bailment)?
- i. **Example: In the process of adding a software upgrade, an installer erased \$1,800,000 worth of data and was sued by the customer. Where is the coverage?**
- j. Security and privacy are major concerns of IoT and should be a top priority.

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- k. At the device level security work is being done on embedded processors that if compromised, the processor would halt the attacker's ability to intercept data or compromise networked systems.
  - l. At the network level, new security protocols are being developed to ensure end-to-end encryption and authentication of sensitive data, and since with the IoT the data stakes are higher than the internet.
  - m. This requires a full system designed and optimized with security as the central goal.
  - n. What is your client doing about IoT security?
- 14. Do you procure a Manufacturers Errors and Omissions Coverage Form?
  - 15. Do you procure a Technology Errors and Omissions Coverage Form?
  - 16. Do you still need the Commercial General Liability Coverage Form?
  - 17. Do you need Products Recall Package?
  - 18. A technology service provider's data breach risk can arise from any or all of the following and it is worth repeating.
  - 19. Its failure to prevent a breach of its client's data, which is a third-party exposure and should be covered under an E&O form.
  - 20. A breach of its own data, which would not be covered under E&O and is a first party cover just like data breach coverage is in a Cyber policy; and
  - 21. A breach of client data while in its possession, perhaps through a network breach, theft of a laptop, or similar means. [Care, Custody or Control]

### **C. Current State of the Technology Errors and Omissions Marketplace**

1. The Technology E&O Market is an attractive place for insurance companies, as economic growth is faster than other line of insurance. TECH E&O premium is projected to grow by 10.2%.
2. However, the loss exposures are more difficult to evaluate, at least compared with traditional lines of insurance.
3. Coverage has existed for over thirty years, but it is now exploding with technology advances and The Internet of Things.
4. It is estimated that the current marketplace is approximately \$2,200,000,000 to \$2,800,000,000 in premium.
5. There is good reinsurance support for the product line, but reinsurance rates are rising.
6. The tough to market and place clients are financial transaction systems design and build companies, internet service provider companies, adult content provider companies, security-focused companies, and higher educational institutions.
7. Limits from \$250,000 to \$10,000,000 readily available in the marketplace and higher limits to \$50,000,000 available.
8. Care, custody or control of third party's data is a growing coverage enhancement and with all of the data being captured, this is a growing loss exposure. [Privacy Breach of Client Data]
9. Content and/or Media Liability is now being added due to social media approaches, online video productions and the connectivity of The Internet of Things.
10. First party coverage for business interruption and theft which includes extortion and deceptive funds transfer, or social engineering coverage have been made available.

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11. Risk Management services are being added and are being made available to enterprises as part of the coverage or for a fee.
12. Coverage for liability arising out of the design and manufacturing of tangible technology related products, the creation and implementation of intangible related products like software, and the providing of related tangible and intangible property related services continues to grow.
13. The introduction of Artificial Intelligence into machine translation capabilities is growing at a rapid pace and it will impact the security of big data.

As AI capabilities become more powerful and widespread, experts expect the growing use of AI systems to lead to the following changes in the landscape of Cyber Attack Threats.

1. **Expansion of Existing Threats Digital Security:** The costs of attacks may be lowered by the scalable use of AI systems to complete tasks that would ordinarily require human labor, intelligence, and expertise. A natural effect would be to expand the set of actors who can carry out attacks, the rate at which they can carry out these attacks, and the set of potential targets. Labor intensive attacks such as spear phishing will be easier to accomplish.
2. **Introduction of new threats:** New attacks may arise using AI systems to complete tasks that would be otherwise impractical for humans. In addition, malicious actors may exploit the vulnerabilities of AI systems deployed by defenders (Security System Designers). There will be novel attacks that exploit human vulnerabilities such as the use of speech synthesis for impersonation and related voluntary parting. Automated hacking will expand, and data poisoning will increase.
3. **Change to the typical character of threats.** Experts believe there is reason to expect attacks enabled by the growing use of AI to be especially effective, finely targeted, difficult to attribute, and likely to exploit vulnerabilities in the AI systems. Physical security will be attacked by swarms of hundreds if not thousands of micro-drones using autonomous weapon systems to attack the physical machine language systems. [Power Grids, autonomous cars, etc.]



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4. **Attacks to Political Security:** The use of AI to automate tasks involved in surveillance (e.g., analyzing mass-collected data, persuasion (e.g., creating targeted propaganda), and deception (e.g., manipulating video) may expand threats associated with privacy invasion and social manipulation. Experts also expect novel attacks that take advantage of an improved capacity to analyze human behaviors, moods, and beliefs based on available data. These concerns are most significant in the context of authoritarian state but may also undermine the ability of democracies to sustain truthful public debates.

14. The toughest issue is identifying and analyzing the Technology E&O loss exposure that an enterprise may have.
15. Product defects are generally put into four categories for BI, PD, and Damages:
  - a. Design defects.
  - b. Manufacturing defects.
  - c. Marketing defects (Instructions and Warning Labels).
  - d. Product Warranty Defects (Contract Liability).
16. Technology enterprise's failure to prevent a breach of its client's data, creates a third-party exposure and should be covered under a Technology E&O coverage form.
17. Technology enterprise's failure to prevent a breach of its client's data, creates a third-party exposure and should be covered under a technology E&O coverage form.
18. A technology enterprise's breach of its own data does not trigger coverage under a pure Technology E&O coverage form. This type of loss is a first party cover just like data breach coverage in a cyber liability coverage form.
19. Technology enterprise's breach of client data while in its possession, perhaps through a network breach, theft of a laptop, or similar means may or may not be covered under a Technology

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E & O coverage form. This bailment exposure may need to be covered under third party data in a cyber liability coverage form.

### **D. Critical Definitions Necessary**

1. Product defects are generally put into four categories:
  - a. Design defects.
  - b. Manufacturing defects.
  - c. Marketing defects (Instructions and Labels).
  - d. Product Warranty Defects (Contract Liability).
  - e. State Products Liability statutes and common law.
2. Although product defect liability claims call for liability without fault (Strict Liability), a plaintiff may seek to recover based upon allegations and proof of negligent manufacture or negligent design.
3. A claim for negligent manufacture alleges that the manufacturer did not use reasonable care in manufacturing the product.
4. A claim for a design defect under negligence alleges that the product is defective because it was designed without reasonable care.
5. In negligence cases, the plaintiff must show how or why the product was defective.
6. Therefore, a case involving a product defect will often make claims under both negligence and products liability and many courts use a hybrid of products liability and negligence in cases involving product defects.
7. ISO Commercial General Liability Coverage Form Definition of “Your Product” is a critical start. [Same in the CG 00 01 04 13, CG 00 02 04 13, CG 00 37, and CG 0038]

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### 21. "Your product":

#### a. Means:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed, or disposed of by:
  - (a) You;
  - (b) Others trading under your name; or
  - (c) A person or organization whose business or assets you have acquired; and
- (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

#### b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product;" and
- (2) The providing of or failure to provide warnings or instructions.

#### c. Does not include vending machines or other property rented to or located for the use of others but not sold.

- 8. Hanover in their Technology Coverage Form does not limit coverage to defined technology products, services, or activities but follows the ISO definition above. [See Below]

### "Your Product" Means:

1) Any goods or products manufactured, sold, handled, distributed or disposed of by:

- a) A "Named Insured";
- b) Others trading under a "Named Insured's" name; or
- c) A person or entity whose business or assets a "Named Insured" has acquired; and

2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

#### b. Includes:

- 1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- 2) The providing of or failure to provide warnings or instructions in connection with "your product".

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9. ISO Commercial General Liability Coverage Form Definition of "Your Work" is a critical start. [Same in the CG 00 01 04 13]

**22. "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.

10. Hanover in their Technology Coverage Form does not limit coverage to defined technology products, services, or activities but follows the ISO YOUR WORK definition above. [See Below]

**"Your work": a. Means:**

- 1) Work or services performed by a "Named Insured" or on a "Named Insured's" behalf; and
- 2) Materials, parts, or equipment furnished in connection with such work or services.

**b. Includes:**

- 1) Warranties or representations made at any time with respect to the fitness, quality, performance or use of "your work"; and
- 2) The providing of or failure to provide warnings or instructions in connection with "your work".

3) For the purpose of this definition, "your work" also means activities on the "Named Insured's" website.
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11. These definitions are critical along with specific exclusions and endorsements to determine if coverage will be provided for technology related enterprises.

### **E. Current Event Impacting Client Technology Products – Intellectual Property Risk**

1. The first major revision to U.S. patent law since the Patent Act of 1952 was passed by Congress and signed by the President Obama in September 2011.
2. At the highest level, the changes the patent landscape in three significant ways:
  - a. It converts U.S. patent law from a "first-to-invent" regime to a "first-inventor-to-file" regime, harmonizing U.S. practice with other jurisdictions throughout the world.
  - b. It establishes new ways to challenge the patentability of applied-for or already-issued patents through patent review and derivation proceedings.
  - c. It enacts a number of provisions that will make it more difficult for patent holders to enforce their patents.
3. There are some pro-patent holder provisions, such as the elimination of *qui tam* cases for false patent marking, the elimination of best mode as a means to challenge validity, and a 75% reduction in most administrative fees for very small inventive entities as well as for institutions of higher education.
4. Nevertheless, the America Invents Act will likely make it more costly for all companies to secure patent protection, and this burden likely will fall disproportionately on smaller companies and start-ups.

5. Does the company want to protect its intellectual property and the resulting products liability created by the newly patented product becomes an important discussion?

### **F. Loss Examples for Your Consideration:**

1. A software developer has created an off-the-shelf software program for calculating early loan payoffs on auto loans. The software developer sold the program to a number of banks, and it is later discovered that the program makes errors in the borrowers' favor. As a result, it is found that because of these errors, customers were able to pay off their loans for \$12.5 million less than the actual amount owed. Accordingly, the software developer was sued for this amount by the banks to which it sold the software program.
2. A computer manufacturer receives an order for 200 computers from a Fortune 500 company. The computers are then shipped and delivered to the company. But due to a defect in the computers' hard drives, within about a month of use, the hard drives in all of the computer's crash. The computer manufacturer then receives a lawsuit demanding \$10 million—the price of the original order.
3. A computer software company has created an inventory management program for use by large grocery chains. The company advertises its software as highly effective in calling attention to situations where the supply of a product at a given store is low, thus preventing stores from running out of popular products. Two weeks after installing the program for a grocery store client, it is discovered that the software is infected with a virus that has begun erasing the store's inventory data, thus rendering the program useless. The grocery store sues the software company for \$3 million—the number of sales it believes it has lost as a result of the problem with the software.
4. A jury rendered a multi-million-dollar verdict against a computer systems vendor because a system it had sold was inadequate for the customer's needs, causing the customer to go bankrupt. The system failed to achieve speed requirements and other performance criteria promised as to set forth in the contract.

### **G. You are the Jury in this Real Case:**

1. Your client is Zeus Technologies, Inc. which sells computer hardware, software, and services for the installation and maintenance of sold equipment.
2. Zeus successfully bid and won a contract to design and install \$5,000,000 in new servers for Harris Retail, Inc.
3. This installation will connect all 35 brick and mortar stores and will run its new Web 2.0 presence including social media marketing plans.
4. The contract includes the installation of fiber optic cable, connecting all servers, installing security systems that meet the Payment Card Industry Data Security Standard for all transactions, upgrading the web page design to enhance connectivity and advertising, and designing access to a Private Cloud system.
5. Effectively manage active and at rest data storage systems for quick access.
6. The contract also includes the training of all store personnel on the use and access to the system.
7. The installation is complete but ninety (90) days after the launch of the program the technology is not performing as intended.
8. Zeus spends six months trying to fix the glitches in the system, but they have been unsuccessful in getting the system up to the design specifications that all parties agreed upon in the contract.
9. Zeus now refuses to continue working on the system.
10. Harris Retail now files a lawsuit seeking \$10,000,000 in damages including consequential damages stating the following in the complaint.
  - a. Zeus negligently designed the systems and interconnectivity of the computer system upgrade.

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- b. Zeus breached its warranty and representations concerning how the technology services were going to perform.
  - c. Zeus failed to design and install appropriate cloud security to prevent unauthorized access to company and customer information.
  - d. Zeus failed to prevent identity theft and allowed the disclosure of personal confidential information of credit card customers in the system.
  - e. Zeus breached the contract signed by the parties.
  - f. Zeus plagiarized or misappropriated ideas from others in the design of the web site and now Harris is being sued for infringement of copyrights, title, slogans, trade dress, trade name, service mark and service name in a separate lawsuit.
  - g. Zeus refused to correct the deficiencies and Harris incurred forensic expert expenses to repair and secure the system along with notification expenses for the customer data breaches.
  - h. Compensatory damages both special and general.
  - i. Consequential damages which are losses that do not flow directly and immediately from an injurious act, but that result indirectly from the act.
  - j. Punitive damages are also being requested for the willful and wanton act of leaving the client in the lurch so to speak.
11. Does Zeus's Commercial General Liability Coverage Form provide defense and is it legally obligated to pay for this complete operations loss exposure?
- a. Does Coverage A of the CGL cover products liability and completed operations hazard?
  - b. Does Coverage A cover data loss?



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- c. Based on the definitions of "Your Product" and "Your Work" does the coverage form respond?
- d. Is this property damage under Coverage A?

### **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.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

- e. Do not forget the Exclusion j. in Coverage A.

### **j. Damage To Property [EXCLUSION]**

"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;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody, or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

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(6) That particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it. . .

- f. Is there Coverage A "bodily injury" and "property damage" exclusion that may apply to this loss exposure in the Commercial General Liability Coverage Form?

**p. Electronic Data (4-1-2013 CGL)**

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

However, this exclusion does not apply to liability for damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

- g. Is the new mandatory CG 21 06 05 14 Endorsement on the Commercial General Liability Coverage Form?

**EXCLUSION – ACCESS OR DISCLOSURE OF CONFIDENTIAL OR PERSONAL INFORMATION AND DATA-RELATED LIABILITY – WITH LIMITED BODILY INJURY EXCEPTION (CG 21 06 05 14)**

**A.** Exclusion 2.p. of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

**2. Exclusions**

This insurance does not apply to:

**p. Access Or Disclosure Of Confidential Or Personal Information And Data-related Liability**

Damages arising out of:

- (1) Any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card

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information, health information or any other type of nonpublic information; or

- (2) The loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

This exclusion applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of that which is described in Paragraph (1) or (2) above.

However, unless Paragraph (1) above applies, this exclusion does not apply to damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

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

### 2. Exclusions

This insurance does not apply to:

#### **Access Or Disclosure Of Confidential Or Personal Information**

"Personal and advertising injury" arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information.

This exclusion applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of any access to or disclosure of any person's or organization's confidential or personal information.

- h. Does the Commercial General Liability Coverage Form provide coverage for the professional liability errors and omissions exposures in this claim?
- i. Was the CG 22 75 04 13 Professional Liability Exclusion – Computer Software on the policy?
- j. Was the CG 22 77 04 13 Professional Liability Exclusion – Computer Data Processing on the policy?

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- k. Was the CG 22 88 04 13 Professional Liability Exclusion – Electronic Data Processing Services and Computer Consulting or Programming Services on the policy?
  - l. Was the CG 22 91 04 13 Exclusion – Telecommunication Equipment or Service Providers Errors and Omissions on the policy?
  - m. Was the CG 22 98 04 13 Exclusion – Internet Service Providers and Internet Access Providers Errors and Omissions on the policy?
  - n. Was the CG 22 99 04 13 Professional Liability Exclusion – Web Site Designers on the policy?
  - o. To reinforce the Professional Services exclusion in various General Liability endorsements, ISO enhanced the exclusion to expressly address, in part, claims alleging negligence or other wrongdoing in the hiring, employment, training, supervision or monitoring of others by any insured.
  - p. ANY DEFENSE?
- 12. You are the jury in this case, did Harris Retail Inc. demonstrate that the product failed to perform as intended and did Zeus breach its warranties and contract with Harris?
  - 13. Where do we find the necessary coverage for this exposure?
  - 14. Manufacturers E&O and Tech E&O policy provisions should always be reviewed in connection with the insured's CGL policy provisions, especially with respect to new or emerging exposures of concern.
  - 15. Care, Custody or Control of data a significant exposure today.
  - 16. E-business or Cyber Activity Risk or Network Loss Exposures include but is not limited to following activities.

## Technology Related Liability

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17. Technology Errors and Omissions Coverage Form Eligible Risks are useful in assessing and identifying the technology risks facing a client.
18. Tech E&O policy provisions should always be reviewed in connection with the insured's CGL policy provisions, especially with respect to new or emerging exposures of concern.
19. Remember that any corporation, partnership, or individual providing the technology services of systems analysis, software design, computer programming, system installation, training, data processing, system integration, consulting of information retrieval through sensors and other imbedded technology have a need for enhanced coverages.

## II. DEFINITION OF TECHNOLOGY EXPOSURES

**A. E-business or Cyber Activity Risk or Network Loss Exposures include but is not limited to following activities – Technology Errors and Omissions Coverage Form SIC Codes for Eligible Risks are useful in assessing and identifying the technology risks facing a client.**

1. For telecommunications/cable companies who sell or resell local, long distance, paging, data services, internet bandwidth, internet services and cellular services or equipment [SIC 4812, 4813, and 4899]
  - a. Communications lines/bandwidth services
  - b. Companies that consult, design, or recommend telecommunications networks
  - c. Data services
  - d. Data telephone services
  - e. Information security monitoring services

## Technology Related Liability

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- f. Internet access providers, including e-mail services
  - g. Providers (sellers and resellers) of local and long-distance telephone service, paging, cellular and fiber optic services
  - h. Sellers or suppliers of telecommunications equipment
  - i. Video conferencing service providers
  - j. Wireless service companies
2. For companies who manufacture instruments that are controlled electronically and used to measure variables such as temperature, density, pressure, and flow. [SIC 3812, 3822, 3823, 3824, 3825, 3826, and 3829]
- a. Manufacturers of instruments and related products for measuring, displaying, transmitting, guiding, and controlling
  - b. Manufacturers of industrial controls and control accessories
  - c. Manufacturers of instruments used in research and development labs
3. For companies that offer software development, computer programming, data processing, consulting, internet-related services, and information retrieval [SIC 7371, 7372, 7373, 7374, 7375, 7376, 7377, 7378, 7379, and 8243]
- a. Software developers, custom programmers, system integrators and providers of computer consulting and other computer related services
  - b. Internet access and service providers
  - c. Providers of web hosting and web design services
  - d. Computer processing and data preparation services
  - e. Computer maintenance or repair operations

## Technology Related Liability

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- f. Computer rental and leasing firms
  - g. Managers of computer facilities
  - h. Data processing schools and computer training facilities
4. For companies who manufacture products that are used to process or display data, including component parts of those systems [SIC 3357, 3571, 3572, 3575, 3577, 3578, 3625, 3651, 3652, 3661, 3663, 3671, 3672, 3674, 3675, 3676, 3677, 3678, 3679, 3861, and 3944]
- a. Manufacturers of computer chips, wiring, harnesses, cables, electronic connectors, resistors, capacitors, circuit boards and other component parts
  - b. Manufacturers of computers and peripheral equipment such as printers, computer storage devices, display devices, document entry, optical scanning, point-of-sale devices, and office machines
  - c. Telecommunications, broadcasting, and audio and video equipment manufacturers
  - d. Electronic photographic equipment parts manufacturers
  - e. Semiconductor, photovoltaic cell, and solar cell manufacturers
5. For companies who distribute computers, computer peripherals, software, and electronic parts [SIC 5045, 5063, 5065, and 5734]
- a. Wholesalers and distributors of computers, computer peripheral equipment, and computer software
  - b. Wholesalers and distributors of electronic parts and electronic communications equipment
  - c. Computer stores that provide computer integration and related services

## Technology Related Liability

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6. The SIC Codes are a very useful tool in identifying the type of loss exposures that a client may have.
7. Coverage Definition for “Your Product” is important.

### **FF. “Your Product”** [Selective Insurance Company of America]

1. Means
  - a. Any technology or telecommunications goods or products, other than real property, manufactured, sold, handled, distributed, or disposed of by:
    - (1) You;
    - (2) Others trading under your name; or
    - (3) A person or organization whose business or assets you have acquired; and
  - b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such technology or telecommunications goods or products.
2. Includes:
  - a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and
  - b. The providing of or failure to provide warnings or instructions.
3. Does not include vending machines or other property rented to or located for the use of others but not sold.

8. The definition of “Your Work” is also important consideration in applying coverage for the related technology errors and omissions claims facing enterprises.

### **GG. “Your Work” means:** [Selective Insurance Company of America]

1. Technology or telecommunications work or operations performed by you or on your behalf; and
2. Materials, parts, or equipment furnished in connection with such technology or telecommunications work or operations.
3. Includes:
  - a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work;” and



- |  |
|--|
| <p>b. The providing of or failure to provide warnings or instructions.</p> |
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### **B. Types of Technology Product Defects**

1. Under any theory of liability (Negligence, Strict or Contract) the party suing must prove:
  - a. The technology product that caused the injury was defective and
  - b. The defect made the technology product unreasonably dangerous.
2. Four types of defects that might cause injury and give rise to manufacturing or supplier liability:
  - a. Design defects of technology hardware including improper coding for software.
  - b. Manufacturing defects of technology hardware, copying defects of software and installation defect.
  - c. Marketing defects that are provided in instructions or warnings concerning the hardware and software products.
  - d. Warranty contractual defect.
3. Technology Design Defect
  - a. Design defect is some flaw in the intentional design of a product that makes it unreasonably dangerous or it has been genetically altered which makes it unreasonably dangerous.
  - b. Design defect can be from inception of the product.
  - c. Design defect claims can be negligence based or strict liability based.

## Technology Related Liability

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- d. Strict liability may be imposed for an unreasonably dangerous design if the suing party can present evidence that there was a cost-effective alternative design that would have prevented the risk of injury. (Pinto Case)
- e. Strict liability may apply if the product was so unreasonably dangerous that it never should have been manufactured and the availability of a safer design might not be required to hold the designer liable. (Pharmaceutical Cases)
- f. Pritchett v. Cottrell, Inc., and Scott v. Cottrell, Inc., and Fix v. Cottrell – Three separate products liability actions asserting that the ratchet system designed by Cottrell was improperly designed **[Strict liability, Negligence, and Breach of Warranty for Tangible Property but applies to Intangible Property as well]**.
  - 1) All of the wives also brought loss-of-consortium claims as well.
  - 2) All three plaintiffs were employed by JCT as drivers of specially designed car hauling rigs, used generally to haul automobiles from the car manufacturer to the auto dealership.
  - 3) In separate incidents, all three men were injured while operating a ratchet system that was attached to the trailer of their rig and used in securing vehicles to the trailer for transport.
  - 4) The ratchet system was designed by Cottrell and required a great deal of physical force to operate.
  - 5) Each plaintiff manually operated the ratchet system, either to tie down or untie a vehicle on their trailer. In each incident, a sudden release of pressure or tension in the chain occurred and caused each plaintiff to slip or fall causing injury.

## Technology Related Liability

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- 6) Plaintiffs argued through its expert witness that the ratchet and chain tie-down and untying system requires significant manual force to operate.
- 7) The expert testified that Cottrell knew of the significant danger of drivers being injured while tying and untying cargo.
- 8) The expert testified that the technology for alternative devices requiring less manual force has been available for decades and would have prevented the injuries in this case.
- 9) The expert testified that there are feasible, safer, alternative designs, such as tire restraints or hydraulically powered tie-down systems that would have required little or no manual exertion and would have protected the drivers from injury in the event of a sudden release of force in either the tie-down or the untying process.
- 10) Was the product both DEFECTIVE and UNREASONABLY DANGEROUS? [Pritchett v. Cottrell, Inc., No. 06-3459 (8th Cir. 01/23/2008)]

### 4. Technology Manufacturing or Processing Defect

- a. A product has a manufacturing defect when the product does not conform to the designer's or manufacturer's own specifications.
- b. Manufacturing defect cases are often the easiest to prove.
  - 1) Manufacturer's own design standards or processor's quality control standards are used to prove the defect.
  - 2) Marketing standards can also be used to show that the product was defective.

## Technology Related Liability

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- 3) System glitches can be used to show that the product was defective.
- c. The suing party must prove the following (Causation):
- 1) That the product was defective or contained improper source code or coding.
  - 2) That it was defective or miscoded when it left the defendant's hands (manufacturer, wholesaler, or retailer).
  - 3) That the defect in the product was the proximate cause of the harm or illness that the suing party suffered.
  - 4) It is also necessary that the product be expected to and does reach the consumer without substantial change in the condition in which it is sold.
- d. Proving how or why the flaw or defect occurred can be difficult and as such the law applies two special doctrines in Products liability cases.
- 1) "Res Ipsa Loquitur" (The thing speaks for itself)
    - a) Shifts the burden of proof in some product liability cases to the defendants.
    - b) Defect issue would not exist unless someone was negligent.
    - c) If successfully invoked, the suing party is no longer required to prove how the defendant was negligent, rather the defendant is required to prove that it was not negligent.
  - 2) Strict Liability

## Technology Related Liability

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- a) The suing party does not need to prove that a manufacturer or food processor is negligent but only that the product was defective.
  - b) By eliminating the issue of manufacturer or food processor fault, the concept of NO FAULT or STRICT LIABILITY allows the suing party to recover where they otherwise might not.
- 3) Strict Liability requires the suing party to fulfill the following three conditions:
- a) The product has an “unreasonably dangerous” defect or glitch that injured the party as a user or consumer of the product. **[Security System Failed]**
  - b) The defect caused the injury while the product was being used or consumed in a way that it was intended to be used.
    - 1) **2,750 Customer Files were breached, and data included Employee Information, Student Information, Patient Health & Research Information, and Financial Credit Card Information stolen.**
    - 2) **The average total cost of a data breach in the 2021 Ponemon Institute Global study was \$4,240,000**
  - c) The product had not been substantially changed from the condition in which it was originally sold. **[Substantially means in a way that affects how the product performs.]**
- e. Three ways to establish that a product was defective or contaminated when it left the manufacturer's or processor's hands:

## Technology Related Liability

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- 1) By direct evidence – usually using an expert witness.
  - 2) By circumstantial evidence.
  - 3) By eliminating all other likely causes of failure, even if the suing party cannot positively identify what the defect is or how it arose.
- f. The defect can come into existence either in the design of the product, during manufacture or processing, or during handling or shipment of the product or food item.

### 5. Technology Marketing Defects

- a. Improper labeling of products including “use by” dates for food.
- b. Improper inventory control for perishable food items.
- c. Insufficient instructions for use of products including updates and other glitch repairs.
- d. Failure to warn consumers of the products hidden dangers
- e. Negligent or intentional misrepresentation regarding a product can support a product liability claim as well.

### 6. Unavoidably Unsafe Products

- a. Some products simply cannot be made safer without losing their usefulness.

An electric knife that is too dull to injure anyone would also be useless for its intended purpose.

A laptop computer requires a power source even though the power source can cause harm and the ion battery can also cause injury in the laptop.

A prescription drug that increases the potential for healing from another disease but increases the chance of heart failure. (VIOX)

## Technology Related Liability

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Software that runs the laser cutting machinery can have a software glitch that causes it to operate while being maintained by an employee causing an injury. It overrode the mechanical safety system.

Automobile electronic systems are not properly shielded and have inadequate firewalls and are subsequently hacked. [Driverless Cars]

- b. The courts believe that in these situations, product users or consumers are best equipped to minimize risk.
- c. Manufacturers and suppliers of unavoidably unsafe products must give proper warnings of the dangers and risks of their products so that consumers can make informed decisions.
- d. If a drug product or a medical device that can be implanted in the human body, the proper disclosure of injury and harm by the informed Medical practitioner is required.

### 7. Consumer Protection Laws and Agencies that apply to Products Liability Actions

- a. Numerous federal and state statutes, regulations, and safety orders concerning a variety of products assist in proving a product liability action.
- b. Showing that the manufacturer, wholesaler, or retailer violated a statute or other applicable regulation gives the party suing an outstanding advantage in the action.
- c. U.S. Consumer Products Safety Commission is an independent federal agency whose main purpose is to reduce injuries to consumers. The Commission issues consumer product safety alerts.
- d. Occupational Safety and Health Administration publishes numerous regulations and pamphlets on workplace safety and health standards, the use of industrial substances, and safety in industrial and construction operations.

## Technology Related Liability

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- e. Environmental Protection Agency that has the authority for air, water, and pesticide standards and the organization issues many publications on such topics.
- f. U.S. Food and Drug Administration establishes the standards for food, drugs, medical devices, and cosmetics. It approves and has information on drug ingredients along with food and manufacturing methods.
- g. United States Department of Agriculture (USDA) for inspection and quality control concerning food products.
- h. National Highway Traffic Safety Administration develops and issues safety standards for all new cars, conducts research on accident prevention, investigates motor vehicle defects and enforces notification of defects to owner of record.
- i. U.S. Federal Highway Administration is concerned with improving highway safety and conducts highway safety research relating to trucks and busses.
- j. Transportation Research Board will conduct a computerized search and furnish abstracts of engineering articles pertaining to highway topics.
- k. State police or highway patrols might also be able to provide information on regulations concerning the use of equipment of motor vehicles.
- l. State Fire Marshal issues fire safety standards and basic building design and construction standards.
- m. United States Coast Guard sets standards makes factory inspections and conducts investigations of consumer complaints of defective boats. The Coast Guard notifies boat owners when defects are found.



### **C. Types of Technology Products Liability Lawsuits to Expect (Generally a Combination)**

1. Strict Liability for Defects
  - a. Design Defects
  - b. Manufacturing Defects
  - c. Marketing Defects
  - d. Warranty Defects
2. Negligence
  - a. Requires a duty
  - b. Breach of Duty
  - c. Damages
  - d. Actual and Proximate Cause of the damages is from the breach.
  - e. Strict liability for defective products does not replace claims based on negligence.
  - f. There is distinction between two theories:
    - 1) Strict liability claims focus on condition of product, while negligence focuses on conduct of defendant.
    - 2) In strict liability, plaintiff must establish product was in defective condition and unreasonably dangerous to consumer; in negligence, plaintiff must show product was unreasonably dangerous because manufacturer failed to use reasonable care. Lovick v. Wil-Rich, 588 N.W.2d 688 (Iowa 1999).

## Technology Related Liability

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### 3. Contractual – Breach of Warranty Claim

- a. A breach of warranty action for product-caused harm is independent of principles of negligence and strict liability and changes the often-difficult problems of proof which arise in negligence cases.
- b. Both negligence and strict liability are actions in tort, while warranty is an action in contract.
- c. An action in tort eliminates certain obstacles which are present in an action for breach of warranty, such as the notice requirement imposed by UCC Section 2-607(3)(b) and the requirement of privity (direct contractual relationship).
- d. Compensation for economic loss cannot be recovered in an action based on negligence or on the theory of strict liability but can be recovered in an action for breach of warranty.
- e. A breach of warranty claim is subject to a different statute of limitations than that applicable to negligence claims, in that a cause of action for breach of warranty may accrue at an earlier time, governed by the date of the sale, rather than the time of the injury.
- f. A breach of warranty claim is generally subject to a 4-year statute of limitations, and the period begins to run from the date of the sale, not the date of the injury, which might theoretically take place after the period has run.

### **D. Types of Economic Recovery from Technology Products Liability Suits**

- 1. Recovery for disfigurement
- 2. Future Medical Expenses
- 3. General damages such as pain and suffering and loss of enjoyment of life after the accident or injury.

## Technology Related Liability

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4. Household services
5. Loss of consortium
6. Loss of consortium of a child
7. Loss of enjoyment of life
8. Loss of society and companionship in a wrongful death case
9. Lost earning capacity
10. Lost wages and business income through e-commerce portals
11. Current Medical expenses
12. Medical Surveillance or Medical Monitoring
13. Mental anguish for invasion of privacy
14. Pain and suffering and Permanent disability
15. Average Total Cost of Ransomware breach \$4,620,000
16. Loss of data from breach of security failure including mitigation of data breach with an average per record cost of \$161.
17. Property damage to hardware and supporting equipment
18. Regulatory hearing expenses with fines and penalties
19. Forensic expenses to determine extent of unauthorized access and the rectification expenses to fix the glitch
20. Infringement of intellectual property rights
21. Breach of contract
22. Defamation and intrusion damages caused by systems unauthorized access breaches

- 23. Present cash value of a lump sum amount
- 24. Special Damages

### **E. Technology Product Liability Defenses**

- 1. Failure to identify the supplier or manufacturer of the product.
  - a. Courts allow an exception to this defense called the – Market Share Liability Exception.
  - b. Generally applied in defective medications but can apply to software and apps.
  - c. Where the suing party cannot identify which of the pharmaceutical companies that supply a drug supplied the drug he or she took, each manufacturer will be held liable according to its percentage of sales in the area where the injury occurred.
- 2. State of the Art Defense
  - a. What was foreseeable at the time of manufacture or processing? [Zero Trust Architecture in Place]
  - b. The level of pertinent scientific and technical knowledge existing at the time of manufacture or processing.
- 3. Component Parts Doctrine exempts a manufacturer from liability arising from a finished product that incorporates a component supplied by another manufacturer. This is important for a Technology Risk involved with The Internet of Things. (Restatement Third of Torts, Products Liability, Section 50)
  - a. A component manufacturer is subject to liability only when the component itself has a defect that results in the injury.
  - b. A component manufacturer is subject to liability when they play a material role in integrating the component into the finished product whose defect causes the injury.

## Technology Related Liability

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- c. This is an important defense for technology related products.
- 4. Medical Device Amendments of 1976 (MDA) Defense for technology products in the Medical Field.
  - a. The statute from Congress provides that a State shall not “establish or continue in effect with respect to a device intended for human use any requirement” . . . “(1) which is different from, or in addition to, any requirement applicable under [federal law] to the device, and . . . (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under” relevant federal law. 21 U.S.C. 360k(a)
  - b. Class III medical devices may not enter the market until they have undergone an FDA review.
  - c. This FDA review includes design, labeling, and manufacturing specifications and the FDA determines that those specifications provide a reasonable assurance of safety and effectiveness.
  - d. Manufacturers may not make changes to such devices that would affect safety or effectiveness unless they first seek and obtain permission from the FDA.

Charles Riegel and his wife Donna Riegel brought suit against Medtronic, Inc., after a Medtronic catheter ruptured in Charles Riegel’s coronary artery during heart surgery. The catheter is a Class III device that received FDA pre-market approval. The Riegels alleged that the device was designed, labeled, and manufactured in a manner that violated New York common law.

The allegations include strict liability, breach of implied warranty, and negligence in design, testing, inspection, distribution, labeling, marketing, and sales of the catheter.

1. Are these allegations covered under the typical CGL Coverage Form? Do we have defense and a legal obligation to pay under this contract?
2. Does the Supreme Court agree that the MDA’s pre-emption clause bars common law claims challenging the safety or effectiveness of a medical device marketed in a form that received pre-market approval from the FDA?

## Technology Related Liability

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- e. The Supreme Court rejects the Riegel's contentions that the duties underlying the state tort claims are not pre-empted because general common law duties are not requirements maintained "with respect to devices."
  - f. The Supreme Court stated that the MDA's pre-emption clause bars common-law claims challenging the safety or effectiveness of a medical device marketed in a form that received pre-market approval from the FDA.
  - g. Riegel v. Medtronic, Inc. (No. 06-179), 451 F.3d 104.
- 5. Altered Product Defense – If the suing party substantially altered the product after it left the manufacturer's control, and the alteration caused the suing parties injury.
  - 6. The suing party misuses the product in an unforeseeable way, and his or her misuse of the product caused the injuries alleged. Comparative or Contributory negligence.

### **F. Statute of Limitations Defense**

- 1. Under the legal rule known as the "statute of limitations" any lawsuit arising from an accident or injury must be filed within a certain time limit or the injured person's legal claim will be barred and his or her right to sue will be lost forever.
- 2. Every State has enacted its own statute of limitations, requiring personal injury suits to be filed in court within a set time after the incident or injury.
- 3. The specific limit prescribed by each state ranges from one year in Kentucky and Tennessee to six years in Maine and North Dakota.
- 4. In some states, the type of personal injury claim may also affect the time limit.
  - a. Certain defamation cases allowed longer time
  - b. Claims involving minors start at age eighteen

## Technology Related Liability

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- c. For medical malpractice claims may be a shorter time
5. While a statute of limitations may declare that a personal injury lawsuit must be filed within a certain amount of time after an accident or injury, that time period usually does not begin to run until the moment when the person filing suit knew or should reasonably have known that they had suffered harms and the nature of the harm.

Negligence cause of action for defective heart pacemaker accrued when damage occurred (knowledge that it was faulty), not when recipient later learned that other possible defects existed. Spickes v Medtronic, Inc., 275 Ark 421, 631 SW2d 5 (1982).

6. Under statutes pertaining to asbestos-related injuries or diseases, workers' causes of action against manufacturers of asbestos products accrued when they became disabled, meaning loss of time from work, not when they earlier learned that they had asbestos-related injury or illness. Blakey v Superior Court, 153 Cal App 3d 101, 200 Cal Rptr 52 (1984, First Dist).
7. In action against manufacturer of roofing materials, based in part on alleged product defects which caused roof to leak, cause accrued when roof first leaked; subsequent leaking did not constitute continuing defect which would extend time when injury "was first sustained." Beckenstein v Potter & Carrier, Inc., 191 Conn 150, 464 A2d 18, 37 UCCRS 158 (1983).
8. Action against manufacturer of Dalkon Shield, by woman who was injured because of its use, accrued when she discovered, or reasonably should have, the existence of the injury or damage. Condon v A. H. Robins Co. (1984) 217 Neb 60, 349 NW2d 622.
9. Invasion of Privacy or Breach of Security Event accrues at the time that discovery of the unauthorized use or unauthorized access to the data takes place and not when the notice is forwarded to potential parties concerning the potential invasion. [287 Days – Average number of days to identify and contain a data breach]

## Technology Related Liability

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10. In products liability action on theory of negligence and strict liability by owner of apartment complex against manufacturer of plumbing fittings that were allegedly defective in design, manufacture, and installation, trial court erred in granting summary judgment for defendant on ground that action was barred by four-year statute of limitations where complaint (instituted in June 1981) alleged that defects were first discovered in December 1977 and where statute of limitations did not begin to run until plaintiff either learned of defect or should have done so in exercise of due diligence; issue of whether plaintiff knew or should have known about defect at early date was question of fact that should have left for trier of fact. Oak Grove Investors v Bell & Gossett Co., 99 Nev 616, 668 P2d 1075 (1983).
11. Cause of action against manufacturer of wire surgical suture, for injury caused by defective suture, accrued when plaintiff discovered, through exploratory subsequent surgery that suture was defective and not when he determined identity of manufacturer thereof. Britt v Arvanitis, 590 F2d 57 (1978, CA3 NJ app. NJ law).
12. The delay in discovery must be one that is reasonable under the circumstances and it is up to the court to determine.
13. Statutes of Limitations must coordinate with the Statute of Repose for construction defect claims (Completed Operations) and Products Liability claims.
14. Statute of Repose is a statute that bars a suit a fixed number of years after the defendant acts in some way as by designing or manufacturing a product, even if the period ends before the plaintiff has suffered any injury.
15. The discovery periods under the Statute of Repose range from 4 years to 20 years.
16. Moreover, the scope of what is covered and who is protected by the statute varies widely from state to state but it impacts both your work and your product-related exposures for damages, bodily injury, and property damage.



## Technology Related Liability

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17. Some state statute examples follow for your reference. Please always read your state statutes.

### California:

§ 337.15. Action for latent deficiency in construction or survey of real property or injury arising out of such deficiency; Ten years

- (a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:
  - (1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.
  - (2) Injury to property, real or personal, arising out of any such latent deficiency.
- (b) As used in this section, "latent deficiency" means a deficiency which is not apparent by reasonable inspection.
- (c) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to subdivision (b) of Section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.
- (d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.
- (e) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.
- (f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.
- (g) The 10-year period specified in subdivision (a) shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever first occurs:
  - (1) The date of final inspection by the applicable public agency.
  - (2) The date of recordation of a valid notice of completion.

## Technology Related Liability

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(3) The date of use or occupation of the improvement.

(4) One year after termination or cessation of work on the improvement.

The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement.

§ 337.1. Patent deficiency in real property improvement design, survey, construction, etc., and resulting injury to property or person; Four years

(a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:

(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;

(2) Injury to property, real or personal, arising out of any such patent deficiency; or

(3) Injury to the person or for wrongful death arising out of any such patent deficiency.

(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of such improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) As used in this section, "patent deficiency" means a deficiency which is apparent by reasonable inspection.

(f) Subdivisions (a) and (b) shall not apply to any owner-occupied single-unit residence.

## Technology Related Liability

### Connecticut:

A 7-year statute of repose covers actions in contract, tort, or otherwise against architects, professional engineers, or land surveyors for deficiencies in the design, planning, contract administration, supervision, observation of construction, land surveying in connection with construction, or construction of improvements to real property. The repose period is triggered by substantial completion of the improvement. Tort injuries that occur during the 7th year after substantial completion, have an extra 1 year from the date of the injury to bring an action to recover damages for injury or wrongful death, but in no event may such tort action be brought more than 8 years after the substantial completion of the improvement in question. The repose limitations, however, cannot be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring action. (Conn. Gen. Stat. § 52-584a (2009).)

### Washington – Washington Product Liability Act (RCW Chapter 7.72):

- a.** Product Statute of Repose – there is a rebuttable presumption that the product is beyond its useful safe life if it is more than 12 years old.
- b.** Statute of Limitations: Three years from the date of discovery (or when should have been discovered).

### Oregon – Oregon (ORS §30.905):

- a.** Product Statute of Repose – A product liability civil action must be commenced before the latter of:
  - i)** Ten years after the date on which the product was first purchased for use or consumption; or
  - ii)** The expiration of any statute of repose for an equivalent civil action in the state in which the product was manufactured, or, if the product was manufactured in a foreign country, the expiration of any statute of repose for an equivalent civil action in the state into which the product was imported. ORS §30.905(2).
- b.** Statute of Limitations – A product liability action must be commenced not later than two years from the date of discovery (or when should have been discovered). ORS §30.905(1)

### Idaho – Idaho (IC §6-1300, et seq.):

- a.** Product Statute of Repose – there is a rebuttable presumption that the product is beyond its useful safe life if it is more than 10 years old.
- b.** Statute of Limitations: Property damage claim must be brought within two years from the time of the occurrence, act, or omission (see IC Sections 6.1403 and 5-219).

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### New Jersey:

A 10-year statute of repose governs actions in contract, tort, or otherwise for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death to recover damages for deficiencies in the design, planning, supervision, or construction of improvements to realty or for any injury to property or persons arising out of the defective or unsafe conditions of such improvements. The limitation does not apply to persons who own, possess, or control the improvement when the injury occurs. Governmental units are not barred from acting based on a writing that expressly provides for a longer period. Moreover, actions based on willful misconduct, gross negligence, or fraudulent concealment in connection with the improvements or actions based on environmental remediation laws (including all asbestos-related contracts) are not subject to the time limitations in the repose statute. (N.J. Stat. Ann. § 2A:14–1.1 (West 2009).)

### Pennsylvania:

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 realty. 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. (42 Pa. Cons. Stat. § 5536 (2009).)

18. **Most Tort claims will never fail subject to the statute of limitations because they involve sudden and accidental accidents that injury or harm can quickly be identified.**

## **G. Underwriting Technology Risks**

1. Underwriting technology E&O insurance is similar to underwriting miscellaneous professional liability (MPL) insurance.
2. This is because the types of businesses and individuals covered by technology E&O policies vary so widely, as is also the case with MPL policies.
3. In addition, both MPL and technology E&O underwriters are also both confronted with the challenges of keeping up with rapidly

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evolving loss exposures and having to price coverage with limited or even nonexistent loss data.

4. Pricing Technology E&O Policies
  - a. Given the lack of loss data for many of the businesses and services covered by technology E&O forms, pricing is subjective and heavily dependent on an underwriter's individual judgment concerning any particular risk.
  - b. Premiums are developed by charging a rate per \$1,000 of gross receipts.
  - c. Although not typically subject to audit, policy premium is adjusted annually to reflect changes in actual exposure.
  - d. Some insurers price technology E&O risks by grouping them into a number of hazard classes, charging the same rate to each risk within the same hazard class.
  - e. For example, if an insurer placed internet search engine providers and e-mail service providers in the same hazard class, they would both be charged the same rate per \$1,000 of revenue (assuming the same policy limit).
  - f. Once a rate is established, it must be modified to account for several factors, including (1) limits; (2) deductible; (3) policy territory; (4) extent of prior acts coverage; and (5) claim history.
5. The technology firm's (or individual insured's) experience level will also be a key factor in underwriting the policy.
6. Thus, an underwriter's pricing of a policy for an individual who has previously worked as a computer consultant, for example, will be lower than for a person who has had no formal experience in this area.
7. Specific factors relevant to individual risks sometimes call for premium adjustments, as well.

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8. Given the diversity of technology E&O professionals and services, insurers' rating structures do not always reflect the subtle differences between apparently similar operations.
9. For example, a loading might be applied to a 50-person custom software development company that specializes in creating software for Fortune 500 firms.
10. In contrast, a two-person operation catering to the software needs of small businesses may receive a credit, based on the fact that compared to most technology consultants, its exposure to claims is much lower.
11. There are several other key underwriting considerations that should be considered when writing and pricing technology E&O policies, including:
  - a. Loss control/prevention or Quality Control programs.
  - b. Membership in professional organizations.
  - c. Staff workload.
  - d. Types of jobs performed and for whom.
  - e. Use of independent contractors.
  - f. Loss experience.
  - g. The insured's own perception of the exposures confronted; and
  - h. Extent of contractual transfers and guarantees.
12. Risk Management Interventions that should be considered.
  - a. Contracts or warranties should be as encompassing as possible. Specifications, delivery terms, warranty limitations and remedies should be clearly defined. Modifications or

## Technology Related Liability

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changes should be made in writing to reduce the consequence of dispute.

- b. Legal counsel should review all vendor contracts to be sure they contain a clear recourse separate from any state limitations. [See Non-Insurance Transfer Section following]
- c. Testing of the product and the installation is mandatory. A technology entity should anticipate uninformed or reckless customers. Using outside testing or certification vendors may be useful.
- d. Satisfying government standards does not preclude a finding of liability, but it is an affirmative demonstration of the technology entities efforts to meet a recognized standard.
- e. Documentation and Record Keeping is essential. Collecting information related to a potential problem/glitch and documenting the information demonstrates good faith. The more documentation related to reactions or steps to rectify a problem will prove an affirmative statement of due care if examined in connection with a litigation.
- f. Review of merchandising material, sales procedures, and literature is essential. Review of procedures, selection standards and training of sales personnel or distributors should also be included in the plan.
- g. Establish a proactive policy on customer service and relations.
- h. Provide careful warnings of known risk related to the product or completed project.

### **III. TECHNOLOGY ERRORS AND OMISSIONS RISK FINANCE SOLUTIONS**

#### **A. Introduction of Risk Finance Solutions**

## Technology Related Liability

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1. Coverage for liability arising out of the design and manufacturing of technology related products, the creation and implementation of software, and the related services offered to enterprises, a specialty coverage has evolved.
2. Technology Errors and Omissions Coverage can be purchased for:
  - a. Technology consultants
  - b. Systems integrators
  - c. Application service providers
  - d. Internet service providers
  - e. Internet retailers
  - f. Network electronics manufacturers
  - g. Medical technology manufacturers
  - h. Telecom companies
3. Enterprises that are looking for Technology Errors and Omissions coverage are presented with a choice of buying individual policies that supplement their core General Liability policy, or a policy that includes both Commercial General Liability and Technology Errors and Omissions Coverage.
4. Please remember that many Commercial General Liability Coverage Forms have professional liability exclusionary endorsements as specified in CLM rules Classification Table and they will apply to the following types of risks. [Errors and Omissions Exclusions]
  - a. Computer Consulting or Programming

Professional Liability Exclusion – Electronic Data Processing Services and Computer Consulting or Programming Services  
CG 22 88 04 13



## Technology Related Liability

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b. Computer Data Processing

Professional Liability Exclusion – Computer Data Processing  
CG 22 77 04 13

c. Computer Manufacturing

Professional Liability Exclusion – Computer Software  
CG 22 75 04 13

d. Computer Software Manufacturing

Exclusion – Property Damage to Electronic Data (Computer Software Manufacturer) CG 22 89 07 98

e. Internet Access Providers

Exclusion – Internet Service Providers and Internet Access Providers Errors and Omissions CG 22 98 04 13

f. Telecommunications Equipment Providers Telecommunications Service Providers

Exclusion – Telecommunications Equipment or Service Providers Errors and Omission CG 22 91 04 13

g. Web-Site Designers

Professional Liability Exclusion – Web-Site Designers  
CG 22 99 04 13

5. In my experience, most enterprises purchase separate policies, although a handful of carriers offer a combination of the two.
6. Tech E&O policy provisions should always be reviewed in connection with the insured's CGL policy provisions.
7. The Bodily Injury and Property Damage Limitations must be examined closely. Where will the coverage land and where will the defense come from?

## Technology Related Liability

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8. Must match the carriers with their Target Markets to make sure that coverage responds to the transactions and products that the enterprise creates and with its services provided to the end user.
- a. Admiral wants all enterprises that focus on the delivery of technology services to their clients.
  - b. AIG wants all technology, network, media, and telecommunications enterprises.
  - c. Allied World/Darwin wants to write businesses providing technology services including, application service providers, business process service providers, custom software developers, database marketing providers, E-commerce online retailers, Internet service providers, IT Consultants, online media providers, prepackaged software providers, security software providers, training and education services, and web hosting services.
  - d. ARCH wants all technology classes including media and telecommunications, IT, and business consulting.
  - e. Ascent Underwriting wants information technology, software development, Internet media, publishing, broadcasting, advertising, marketing information services/sites, content providers, ASP's, computer consulting, and other related professionals.
  - f. AXA/XL wants all technology service providers and product manufacturers.
  - g. Beazley wants all technology business segments.
  - h. CFC Underwriting wants all providers of technology services and products.
  - i. Chubb wants all technology product and service providers including electronics and telecommunications equipment and component manufacturing.

## Technology Related Liability

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- j. CNA wants to write all technology service providers and technology hardware manufacture including, consulting, software reseller, training and education consultants, data processing operations, office automation design and consulting, archiving operations both fixed site and web based, maintenance service contractors for hardware and software, outsourcing service operations, imaging and digital services, website development consultants, website hosting and maintenance, system database management, software design and implementation, internet consulting, webpage design, multiple website hosting, custom programming, custom software development, system integration, computer hardware manufacturing, and telecommunication services.
- k. Corvus wants all provider of technology-based products and services.
- l. Hanover Insurance Company wants to write all sizes of entities that provide information technology products and services, electronics, and telecommunication products manufacturing and telecommunication service providers.
- m. The Hartford wants operations that design, develop, and produce or provide technology products or services for others.
- n. Hiscox wants a wide range or technology risks including technology products and services.
- o. Hudson wants technology product and services enterprises that are small to midsize below \$500 million in sales.
- p. Markel wants all technology professional service providers.
- q. One Beacon wants technology Service Companies, Electronic Manufacturing Companies, Telecommunications Companies, Medical Technology Companies, and Integration Contractors.

## Technology Related Liability

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- r. Philadelphia wants to write general software developers, web designers, internet consultants, computer consultants, trade software consultants, programmers, data processors, systems design and analysis, network management, maintenance and installation of hardware and software, and out-sourcing.
- s. RLI wants technology professional liability for information technology professionals.
- t. Selective Insurance Company of America wants to write computer systems designers, custom software developers, pre-packaged software developers, IT consultants, systems integrators, website developers, internet service providers, local exchange providers, VOIP providers, wireless data networking, telecommunications resellers, telecommunication equipment manufacturers, switching and routing equipment, modems manufacture, wholesalers for equipment and manufactures for equipment like computers, computer peripherals, electronic components, instruments, measuring equipment, and microchips.
- u. Tokio Marine HCC PLG wants to write technology service providers, technology and communications system consultants, design implementation and support, data storage, network systems management, etc.
- v. Travelers want to write the errors and omissions risks of companies of all sizes in the following technology market segments: (1) Information technology companies; (2) Electronics manufacturing companies; (3) Medical technology companies; and (4) Telecommunications companies.
- w. Zurich wants to write all providers of technology and telecommunications products and services including consulting and staffing

## Technology Related Liability

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9. There are no standard coverage forms and the Agent/Broker Team must read the coverage forms carefully and review any available endorsements.

### **B. Non-Insurance Transfer Issues [Contractual Considerations]**

1. Companies and individuals that sell technology products and/or provide technology services should consider attempting to negotiate, within the contracts governing these products and services.
2. Technology professionals may be able to reduce/limit/transfer their potential liability by contractual means.
3. Following are a number of suggested indemnity provisions to accomplish this when developing language contained within contracts for services.
4. General indemnity clause:
  - a. The contract should state that indemnification for losses by the technology professional is limited to bodily injury and damage to tangible personal property and that data is *not* considered to be tangible personal property.
  - b. If a technology professional were to accidentally erase a client's data, there would be no liability for the tech firm, if such an indemnity agreement were in place.
  - c. Getting more difficult to get this language.
5. Intellectual Property Indemnity clause. The contract should state that the technology professional will not be liable for intellectual property infringement claims arising out of:
  - a. Products that have been manufactured to the specifications of the customer.

## Technology Related Liability

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For example, assume a client provides detailed instructions to a technology consultant about the content of a website that the consultant has been hired to design. If, as a result of these specifications, the client is sued for infringing on the trademarks of a competitor, the contract should state that the consultant is absolved of any liability under these circumstances.

- b. Unauthorized alteration of the product by the customer.

Assume that after a website design firm has turned over its design to a client, the client modifies it substantially and, within this modification, includes defamatory material about a competitor that disparages the competitor's products. Accordingly, the contract should require the client to hold the website designer harmless if the competitor sues the designer.

- c. Continued use of the product by the customer, after the technology professional has provided notice of potential Intellectual Property infringement.

There are sometimes situations in which a technology professional has designed a product that, for example, unintentionally infringes on an existing patent. Assume that a technology professional, after designing a product for a client, recognizes such an infringement and immediately advises the client to stop using the product. If the client fails to do so, a contract provision to this effect will substantially reduce the technology professional's liability.

- 6. Pure financial loss indemnity clause. The technology professional should resist contract provisions requiring the professional to provide an indemnity for pure financial losses. That is loss of revenues suffered by a customer due to an inoperative system.
- 7. Realistically, however, it may not be possible to negotiate a contract provision of this kind.
- 8. Accordingly, the technology professional should attempt to limit his or her liability for pure financial losses to:
  - a. Seek an "available-insurance-only" recourse clause. Here, the technology professional's liability for pure financial losses is capped at the amount for which his or her liability

## Technology Related Liability

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insurance policy will indemnify a client that suffers a loss as a result of the professional's products or services.

- b. Seek a specific monetary cap. The contract could note a specific maximum amount for which the technology professional can be held liable to the client. In other words, a stipulated monetary limit could be agreed upon for loss arising from the tech professional's products/services.
  - c. Seek a loss limited to a specific period of time. Here, for instance, an agreement could be made that limits the technology professional's liability to losses occurring within a specific period, such as 1 year, following the installation of a system of computers or a software program for a client.
9. Watch out for "Breach of Privacy Indemnity Clauses."
- a. If the contract contains an indemnity for breach of privacy, the technology professional should attempt to have it removed by negotiation.
  - b. If such removal is not possible, the technology professional should attempt to limit his or her exposure to financial loss by means of:
    - 1) An insurance-only recourse clause, or
    - 2) Specific monetary cap (i.e., by noting this amount in the limitation of liability clause).
    - 3) Loss limited to a specific period (e.g., within 1 year of installation of the system or component part).
10. Confidentiality Breach Clauses or Non-Disclosure Clauses can be separate or part of the Intellectual Property Indemnity Clauses.
11. Insurance Coverage Clauses (Insurance Recourse) for Technology Errors and Omissions coverage and Commercial General Liability coverage with specific limits, waiver of subrogation, primary non-contributory, and additional insured status.

### C. Risk Finance Coverage Analysis – Technology E & O

1. Broad Insuring Agreement is required to maximize coverage by naming as many liability perils as possible.

**To pay on behalf of any Insured:**

**Damages and Claims Expenses, in excess of the Each Claim Deductible, which the Insured shall become legally obligated to pay because of any Claim first made against any Insured and reported to the Underwriters during the Policy Period or Optional Extension Period (if applicable) arising out of any act, error or omission on or after the Retroactive Date set forth in Item 6. of the Declarations and before the end of the Policy Period in the course of providing or managing Computer Systems security by the Insured or by any person, including an independent contractor, for whose act, error, or omission the Insured Organization is legally responsible that results in:**

1. the inability of a third party, who is authorized to do so, to gain access to Computer Systems or your Technology-based Services;
2. the failure to prevent Unauthorized Access to Computer Systems that results in:
  - a. the destruction, deletion, or corruption of electronic data on Computer Systems;
  - b. Theft of Data from Computer Systems; or
  - c. denial of service attacks against Internet sites or computers; or
3. The failure to prevent transmission of Malicious Code from Computer Systems to third-party computers and systems.

Beazley AFB Media Tech®

2. More traditional Insuring Agreement Language:

**A. Errors and Omissions Liability — Insuring Agreement [Selective Insurance]**

1. We will pay those sums that the insured becomes legally obligated to pay as “damages” caused by a “wrongful act” to which this coverage applies. We will have the right and duty to defend, using counsel of our choice, any “suit” in connection with such “claim.” We may, at our discretion, investigate and/or settle any “claim” or “suit.” Our right and duty to defend “suits” ends when we have exhausted the Limits of Insurance available, as provided in **SECTION III — LIMITS OF INSURANCE**. This insurance does not apply to “wrongful act(s)” which occurred before the Retroactive Date, if any, shown in the Declarations or which occur after the “policy period.” If no Retroactive Date is shown in the



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Declarations, this policy applies to “wrongful act(s)” occurring prior to the expiration of the policy, subject to all other terms and conditions of this policy.

2. This insurance applies to “damages” only if the “claim” or “suit” arises out of “your product” provided to others or “your work” provided or performed for others.
3. This coverage only applies if:
  - a. The “damages” are caused by a “wrongful act(s)” that takes place in the “coverage territory”.
  - b. The “claim” or “suit” is first made against any insured and reported to us in writing, in accordance with Paragraph **4.** below, during the “policy period” or any Extended Reporting Period we provide under **SECTION VII — EXTENDED REPORTING PERIODS.**
4. A “claim” will be deemed to have been made at the earlier of the following times:
  - a. When notice of such “claim” is received and recorded by you or by us, whichever comes first; or
  - b. When the insured informs us of a circumstance or incident occurring during the “policy period,” but before a “claim” is made, in accordance with the requirements of **SECTION VI, Conditions, D. Awareness Provision.**

3. The definition of Technology Products and Technology Services must be carefully analyzed to determine that all enterprise professional activities are covered.

**Technology Products** means computer or telecommunications hardware, software, firmware, or related electronic equipment, including the design, development, manufacturing, assembly, distribution, licensing, leasing, sale, installation, repair, or maintenance thereof.

**Technology Services** means:

1. information technology consulting and information systems or network analysis, design, programming or integration;
2. database design and the caching, collecting, compiling, processing, mining, or recording or analysis of data; and
3. other related services, including:
  - a. information system outsourcing;
  - b. **Website** design, programming or maintenance;
  - c. information system or **Website** hosting;

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- d. **Internet** access services;
- e. **Internet** search or navigational tool provision;
- f. electronic mail services;
- g. electronic data destruction services; and
- h. application software services delivery.

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- 4. Some insuring agreements incorporate coverage for Invasion of Privacy and Regulatory Proceedings which broadens the coverage further by adding broad definitions in the form. Some provide coverage through endorsement.
  - a. Coverage Trigger may be the failure to secure data for third party clients as well as for the insured's own data which is not covered under E&O but under Cyber first party coverages.
  - b. Coverage Trigger may be loss caused by employee.
  - c. Coverage Trigger may be from acts by persons other than insureds in the coverage form.
  - d. Coverage Trigger may be loss resulting from theft or disappearance of private property such as media or laptop or other mobile devices while in the care, custody, or control of the insured.
- 5. In the CNA Enterprise Professional Solutions Coverage Form, they will offer up to \$15,000,000 in limits for Network Damage, Privacy Injury and Privacy Regulation Proceeding.

**Network Damage** means:

- A.** the unscheduled and unplanned inability of an authorized user to gain access to the Network;
- B.** the **Unauthorized Access** to, destruction, addition to, deletion, alteration, removal, disclosure or copying of any third-party's information residing on the

## Technology Related Liability

**Network**, including trade secrets or other intellectual property of such third party;

- C. the suspension or interruption of the **Network**;
- D. the transmission of a **Computer Virus** to the **Network**; or
- E. a **Denial of Service Attack**.

**Privacy Injury** means any unauthorized disclosure of or inability to access **Non-public Personal Information** or **Non-public Corporate Information** in violation of:

- A. the **Insured Entity's Privacy Policy**;
- B. any federal, state, foreign or other law (including common law), statute or regulation governing the confidentiality, integrity, or accessibility of information, including but not limited to, the Health Insurance Portability and Accountability Act of 1996, Gramm-Leach-Bliley Act, Children's Online Privacy Protection Act, or the EU Data Protection Act; or
- C. any federal, state, or other law or regulation, whether domestic or foreign, prohibiting unfair methods of competition, unfair or deceptive trade practices, or consumer fraud.

**Privacy Regulation Proceeding** means a civil, administrative, or regulatory proceeding against an **Insured** by a federal, state, or foreign governmental authority alleging violation of any law referenced under the definition of **Privacy Injury** or a violation of a **Security Breach Notice Law**.

CNA Enterprise Professional Solutions

- 6. The types of Data that are covered must be carefully reviewed to determine what is covered under the Data Privacy Coverage.
  - a. Coverage for personal information including employees and third-party corporate information in any format – digital, paper, microfiche, etc. [Non-electronic]
  - b. The definition of Personal Information must be carefully reviewed to make sure that all information is covered.

### **Personal Information means:**

- (1) an individual's name, social security number, medical or healthcare data, other protected health information, driver's license number, state identification number, credit card number, debit card number, address, telephone number, account number, account histories, or passwords; and

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- (2) other nonpublic personal information as defined in Privacy Regulations; in any format.

Personal Information shall not include information that is lawfully made available to the general public for any reason, including but not limited to information from federal, state, or local government records.

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### 7. First Party Coverage – Business Interruption and System Failure

- a. May or may not be offered by the insurance company.
- b. May be included in the coverage form or added by endorsement.

Business Interruption cover triggered by a **Network Event**. **Network Event** includes system failure.

Network Event mean loss sustained by you in connection with your computer network(s) arising from a:

- 1. Security event;
- 2. Privacy event;
- 3. Computer virus;
- 4. Malicious code; or
- 5. System failure.

Ascent Underwriting

### 8. Theft (First Party) Coverage

- a. May or may not be offered by the insurance company.
- b. May be included in the coverage form or added by endorsement.
- c. Can cover Theft of Data or digital data recovery which can include data restoration coverage. [Check limits]

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- d. Can cover the Theft of Economic Value of Intellectual Property. [Read coverage carefully]
  - e. Can cover theft of money or securities which may include social engineering coverages or impersonator coverages. Need to coordinate with the Crime Coverages and/or Cyber Crime coverages on the Cyber Liability policy.
  - f. Theft of finished goods or work in process usually through a Cyber Crime endorsement on the policy.
  - g. Extortion coverage for ransomware and denial of service.
  - h. Theft of Computing resources such as VOIP telephone and bandwidth services. Can be called cyber vandalism coverage.
  - i. No standard approach or coverage language. Read carefully.
9. Who is and Insured needs to be very broad because there will be a heavy exposure for sub-contractors and/or vendors that will require coverage.
- a. Some forms use ISO Commercial General Liability standard language. [Edition varies]
  - b. Some forms use special language designed by the insurance company.

- |   |
|---|
| <ul style="list-style-type: none"><li>1. The Named Insured;</li><li>2. Subsidiaries of the Named Insured, but only with respect to Wrongful Acts which occur while they are a Subsidiary;</li><li>3. any past, present, or future principal, partner, officer, director, trustee, <u>employee, leased employee or temporary employee</u> of the Named Insured or <u>Subsidiary</u>, but only with respect to the commission of a Wrongful Act committed within the scope of such person's duties performed on behalf of the Named Insured or Subsidiary; and</li><li>4. <u>Independent contractors of the Named Insured or of a Subsidiary</u> who are natural persons, but only with respect to the commission of a Wrongful Act</li></ul> |
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within the scope of such person's duties performed on behalf of the Named Insured or Subsidiary.

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10. Some carriers will provide blanket additional insured but only if required by a written contract.

Insured means:

- (1) a Company;
- (2) any past, present, or future officer, director, trustee, employee, or leased worker of a Company acting in their capacity as such (and in the event a Company is a partnership, limited liability partnership or limited liability company, then any general or managing partner or principal thereof acting in their capacity as such); and
- (3) any entity which a Company is required by contract to add as an Insured under this SPL Coverage Section, but only for the Wrongful Acts of a Company.

"Company" means the Named Entity and any Subsidiary thereof.

AIG (Chartis) Specialty Risk Protector

11. Then there are very detailed and comprehensive Who Is An Insured language that requires a careful reading.

- a. Any **Named Insured**;
- b. Agents or independent contractors, but only for **Technology and Telecommunications Products and Professional Services** provided within the scope of their written contract with a **Named Insured**. The agent or independent contractor is an insured only if the executed written contract with a **Named Insured**:
  - 1) Specifies the actual services to be performed on a **Named Insured's** behalf;
  - 2) Provides that the provision of **Technology and Telecommunications Products and Professional Services** will be under the supervision of a **Named Insured**;
  - 3) States that a **Named Insured** will indemnify the agents or independent contractors for the **Technology and Telecommunications Products**

**and Professional Services** performed or produced on a **Named Insured's** behalf; and

- 4) Is executed before an **Anomaly** occurs.

Subject to **SECTION C – LIMIT OF LIABILITY AND RETENTION**, the most **we** will pay on behalf of agents or independent contractors is the lesser of the Limit of Liability shown in the Declarations or the Limit of Liability required under the contract.

- c. Clients that a **Named Insured** has agreed in a written contract to include as an additional insured for **Claims** arising out of an **Anomaly** in **Technology and Telecommunications Products and Professional Services**, but only if:

- 1) An **Anomaly** is committed by a **Named Insured** in the provision of **Technology and Telecommunications Products and Professional Services** to the client;
- 2) The written contract with the client is executed before the **Anomaly** occurred; and
- 3) There is no allegation of independent misconduct by the client.

Subject to **SECTION C – LIMIT OF LIABILITY AND RETENTION**, the most **we** will pay on behalf of the client is the lesser of the Limit of Liability shown in the Declarations or the Limit of Liability required under the contract;

- d. Past or present **Employees**, but only while performing duties related to the conduct of a **Named Insured's** business;
- e. Past or present, partner, executive officer, director, or manager but only with respect to their duties as partner, executive officer, director, or manager of a **Named Insured's** business;
- f. Members or stockholders of a **Named Insured** but only as respects their liability as members or stockholders; and
- g. If any **Named Insured** is a person or persons:
  - 1) Executors, administrators, or legal representatives of a **Named Insured** in the event of death, incapacity, or bankruptcy, but only while performing their duties in this capacity;
  - 2) A **Named Insured's** lawful spouse or **Domestic Partner**, solely for liability arising from any **Anomaly** a **Named Insured** committed without the participation of such lawful spouse or **Domestic Partner**; or

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- 3) A Named Insured's** heirs, assigns and legal representatives in the event of death, incapacity, or bankruptcy to the extent that the **Named Insured** would have been covered.

Hanover Technology Professional Advantage Plus

12. The Limits of Liability will range from \$250,000 to \$10,000,000 and varies by insurance company with excess limits available.
13. The insurance companies may provide standard deductibles starting at \$2,500 with no maximum.
14. Some insurance companies will provide a Self-Insured Retention with limits starting at \$25,000.
15. Some insurance companies may also have a coinsurance requirement as well.
16. Some coverage forms include coverage for data breach remediation expenses to restore lost data.
17. Some coverage forms will provide data breach remediation expense through an endorsement only with its one separate limit for the event.
18. The definition of damages varies from company to company.

**G. "Damages" means:** [Selective Insurance Company]

1. Monetary damages or "pre-judgment interest" awarded against an insured on that part of the judgment we pay; and
2. Punitive or exemplary damages where permitted by law; and
3. A monetary settlement with an accompanying release of liability signed at a minimum by the claimant or the claimant's legal representative; and
4. Statutory attorney fees.

**"Damages" does not include:**

1. Fees, compensation, remuneration, consideration, or charges for "your product" or "your work";



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2. Civil, criminal, administrative or other fines or penalties;
3. Equitable relief, injunctive relief, declarative relief or any other relief or recovery other than money; or
4. Judgments or awards because of acts deemed uninsurable by law;

19. The definition of damages in some insurance coverage forms will include reimbursement or indemnification for fines and penalties and others will endorse the coverage.

**In the CHUBB/ACE DigiTech® definition of damages, it excludes taxes, fines, penalties, or sanctions imposed against the named insured. However, when Privacy Liability and Network Security Liability is added, the policy provides a carve-back for Regulatory Fines and a Consumer Redress Fund through its definitions.**

**Regulatory Fines** means any civil monetary fine or penalty imposed by a federal, state, local or foreign governmental entity in such entity 's regulatory or official capacity pursuant to its order under a **Regulatory Proceeding**. **Regulatory Fines** shall not include any civil monetary fines or penalties that are not insurable by law, criminal fines, disgorgement of profits or multiple damages.

**Consumer Redress Fund** means a sum of money which the **Insured** is legally obligated to deposit in a fund as equitable relief for the payment of consumer claims due to an adverse judgment or settlement of a **Regulatory Proceeding**.

**Consumer Redress Fund** shall not include any sums paid which constitute taxes, fines, penalties, injunctions, or sanctions.

Limit of Liability: **Privacy** Regulations subject to the Regulatory Proceeding Limit of Liability. **Consumer Redress Fund** subject to the Privacy or Network Security Limit of Liability.

Policy can also be endorsed to provide affirmative coverage for PCI Fines.

20. The coverage forms or endorsements will need to be modified to provide indemnification or reimbursement for Electronic Stored Information (ESI) Discovery Expenses and may need to include sanctions coverage for the failure to provide ESI information in a court action.

## Technology Related Liability

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21. Some coverage forms will provide coverage for Privacy Regulations and Statutes Coverage as part of the coverage form or through a separate endorsement.

**Privacy Regulations means any of the following statutes, including any amendments thereto or regulations there under, associated with the control and use of personally identifiable financial, medical, or other sensitive information:**

1. Health Information Technology for Economic and Clinical Health Act (HITECH) (American Recovery and Reinvestment Act of 2009);
2. Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191);
3. Gramm-Leach-Bliley Act of 1999;
4. California Security Breach Notification Act (CA SB 1386), CA AB 211 and CA SB 541;
5. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)), but solely for alleged unfair or deceptive acts or practices in or affecting commerce;
6. Massachusetts 201 CMR 17;
7. the Identity Red Flags under the Fair and Accurate Credit Transactions Act of 2003; and
8. any similar state, federal or foreign identity theft or privacy protection statute.

Zurich Pro Plus Professional, Technology, and Media Insurance Policy

22. Some coverage forms will include coverage for violation of a regulatory act and the resulting regulatory proceeding expenses.

**Regulatory Proceeding means:**

1. a formal investigation of an Insured by an administrative or regulatory agency or similar governmental body concerning a Privacy Event; or
2. an administrative adjudicative proceeding against an Insured by an administrative or regulatory agency or similar governmental body for a Privacy Wrongful Act or Security Wrongful Act, including an appeal thereof, commenced by the Insured's receipt of a subpoena, investigative demand, complaint, or similar document.

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## Technology Related Liability

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23. Some coverage forms exclude violation of statutes.

**This insurance does not apply to any “damages,” “claims” or “suits”:**

- 2. For willful violation of any federal, state, or local statute, ordinance, rule, or regulation committed by or with the knowledge and consent of any insured.**

24. The definition of “Damages” can be very short like Chubb that states “Damages the insured becomes legally liable for” to very long descriptions that require the broker/agent too carefully read the language in CNA Enterprise Professional Solutions.

“Damages” mean settlements, judgments, or awards (including any award of prejudgment and post-judgment interest on a judgment) for which the Insured is legally obligated to pay on account of a covered Claim.

However, Damages shall not include:

- A.** criminal or civil fines, sanctions, penalties, or taxes imposed by law except that this shall not include Privacy Regulation Fines;
- B.** matters which may be deemed uninsurable under the law pursuant to which this Policy shall be construed;
- C.** any amount for which an Insured is absolved from payment by reason of any covenant, agreement, or court order;
- D.** fees, costs, and expenses paid or incurred or charged by any Insured, no matter whether claimed as restitution of specific funds, financial loss, set-off or paid in the form of service credits or coupons or other noncash consideration by the Insured; or any lost investment income;
- E.** the Insured’s production costs, or the Insured’s cost of reprinting, recalling, recovering, shipping, correcting, reprocessing, restoring, repairing, replacing, or reproducing erroneous, damaged, or lost tangible property or material;
- F.** funds, monies, or securities that an Insured transferred or failed to transfer; or
- G.** liquidated damages pursuant to a written contract or agreement in excess of the Insured’s liability caused by a Wrongful Act.

Notwithstanding the foregoing paragraph, Damages shall include (subject to this Policy’s other terms, conditions, and limitations, including but not limited to

## Technology Related Liability

exclusions relating to profit or advantage, deliberate fraud, or deliberate criminal acts), punitive, exemplary, and multiplied damages. Enforceability of this paragraph shall be governed by such applicable law that most favors coverage for such punitive, exemplary, and multiple damages. As used herein, “applicable law” means the law of any of the following jurisdictions:

1. where the Claim seeking such Damages is brought or where such Damages are awarded or imposed;
2. where the Wrongful Act giving rise to the Claim occurred;
3. where the Insureds subject to such Damages are incorporated, have their principal place of business, or reside; or
4. where the Insurer is incorporated or has its principal place of business.

25. Carefully review the definitions of Claims, Personal Injury and Advertising Injury in the coverage forms to determine the need for a Media Liability endorsement or standalone coverage form.

C. “Claim” means an oral or written demand for “damages” in connection with a “wrongful act.”

26. The Definition of Defense Expenses and how the Self-Insured Retention applies has become very important in these coverage forms.

Defense Costs means all reasonable and necessary fees charged by an attorney appointed by the Insurer (unless otherwise provided for by this policy), as well as all other reasonable and necessary fees, costs and expenses (including premiums for any appeal bond, attachment bond or similar bond arising out of a covered judgment, but without any obligation to apply for or furnish any such bond) incurred in the defense or investigation of a Claim by the Insurer or by an Insured with the Insurer’s written consent.

Defense Costs shall not include:

- (i) compensation of any natural person Insured; or
- (ii) any fees, costs or expenses incurred prior to the time that a Claim is first made against an Insured.

AIG (Chartis) Specialty Risk Protector

## Technology Related Liability

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- 27. The Agent/Broker Team and Risk Manager need to review the conditions sections of the Claims Made Contracts concerning claims reporting and extended reporting period to properly manage the coverage if changing carriers.
- 28. Most of the coverage forms have retroactive dates which can be moved to cover prior acts. Some carriers will provide an endorsement to provide coverage for unknown prior acts.
- 29. The coverage territory can be from U.S., U.S. Territories, Canada, Puerto Rico to limited Worldwide coverage as long as the suit is brought to the above.
- 30. Some carriers provide true worldwide coverage and that may be the preference for most clients.

**F.** “Coverage Territory” means anywhere in the world with the exception of any country or jurisdiction which is subject to trade or other economic sanction or embargo by the United States of America.

- 31. Exclusions vary from insurance company to insurance company and must be reviewed to determine the best coverage for the enterprise.
  - a. Bankruptcy exclusion with varying modifications.
  - b. Dishonest, Fraudulent, Criminal and/or Malicious Act Exclusion with varying buy back endorsements available.

**1.** Directly or indirectly arising out of any dishonest, fraudulent, criminal, or malicious act or omission by any insured.

- c. Intentional Acts Exclusion.
- d. Expected or Intended Damages Exclusion with varying modifications.
- e. Securities and Exchange Exclusion. [Electronic Trading Platforms and Computer Models]

## Technology Related Liability

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- f. Unfair Competition Exclusion with varying modifications.
- g. Piracy Exclusion but coverage is available under a Media Liability endorsement of stand-alone coverage form.
- h. Punitive Damages Exclusion with varying modifications.
- i. Product Recall Exclusion with the ability to purchase an endorsement.
- j. Remember that business enterprises are required to conduct product recalls when they have put a product into the stream of commerce that can or has already caused a safety issue that was not anticipated when the product was originally designed or manufactured.
- k. The number of product recalls are on the rise. Coverage for Voluntary and Involuntary Recalls must be considered.
- l. Product recall insurance provides the enterprise indemnification for their financial loss resulting from the recall of the product (e.g., recall costs, loss of profit, replacement costs, etc.).
- m. Coverage also includes an option for third party costs (e.g., customer loss of gross profit, customer extra expenses, etc.), but the insurance company typically does not remit payment to the third party but instead reimburses the insured for losses sustained.
- n. Cessation of Support for Products or Services Exclusion with varying modifications.
- o. Direct Property Damage Exclusion with the ability to purchase an endorsement. [Coordinate with CGL]
- p. Direct Bodily Injury Exclusion with the ability to purchase an endorsement. [Coordinate with CGL]

## Technology Related Liability

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- q. Loss of Use of Property Exclusion with the ability to purchase an endorsement.
32. There are several special Products Liability Related Exclusions that may impact the coverages under the Technology Errors and Omissions Coverage Form.
- a. Contingent Bodily Injury and/or Property Damage Exclusion but coverage can be added by endorsement.
  - b. Breach of Warranty or Guarantee of Performance Exclusion that requires a careful read to determine how the exclusion will apply.
  - c. Hardware Exclusion but an endorsement can be purchased if that is part of the services or products provided.
33. There are several Service and Security Related Exclusions that may impact the coverages under the Technology Errors and Omissions Coverage Form.
- a. Contractual Liability Exclusion must be carefully reviewed and modified if necessary.
  - b. Performance Delay Exclusion.
  - c. Cost Estimate for Services Exceeded Exclusion.
  - d. Security Breach or Unauthorized Access Exclusion.
  - e. Failure to Prevent Virus or Malicious Code Exclusion.
  - f. Failure to Prevent Theft of Data Exclusion.
34. There are several Cyber Liability Exclusions that may impact the coverages under the Technology Errors and Omissions Coverage Form.
- a. Personal Injury Exclusion with coverage available through endorsement.

## Technology Related Liability

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- b. Advertising Injury Exclusion with coverage available through a Media Liability Endorsement.
- c. Infringement of Patent, Copyright or Trademark Exclusion with coverage available through a Media Liability Endorsement.
- d. Public Key Infrastructure Exclusion that is absolute. The term used to describe technology that enables secure online transactions.

### **D. Technology Errors and Omissions Coverage Conclusion**

- 1. Some carriers provide Risk Management Services such as claims services and some loss control.
- 2. Several of the carriers have created a Media Liability Endorsement that can be incorporated with this coverage form.
- 3. A Technology Errors and Omissions endorsement can be attached to Stand-Alone Media Liability Coverage Forms and Cyber Liability Coverage Forms. [Check with your carriers.]
- 4. Technology E&O is an important coverage line, supporting the risk strategies of a key component of the U.S. (and world) economy.
- 5. Smaller technology products or services companies have been reluctant in the past to buy E&O coverage but that is changing.
- 6. Large technology companies are purchasing with large SIRS and some do not think they need the coverage.
- 7. However, exploding product design innovations and invasion of privacy risk has created new opportunities that challenge enterprise risk management programs today.
- 8. Remember that Technology Errors and Omissions Insurance (Tech E&O) is a type of insurance designed to cover providers of technology *services* or *products*.



## Technology Related Liability

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- a. For example, data storage companies and website designers provide *technology services*, while computer software and computer manufacturers offer *technology products*.
  - b. Tech E&O policies cover both liability and property loss exposures.
  - c. Major liability insuring agreements include losses resulting from: (1) technology services, (2) technology products, (3) media content, and (4) network security breaches.
  - d. Key property insuring agreements provide coverage for extortion threats, crisis management expense, and business interruption.
- 9. Tech E&O insurance is often confused with cyber and privacy insurance.
  - 10. In contrast to tech E&O coverage, cyber and privacy insurance is intended to protect *consumers* of technology products and services.
  - 11. Nevertheless, cyber and privacy insurance policies do offer a number of the same insuring agreements as tech E&O policies.

### **E. Technology Errors and Omissions Coverage Market**

- 1. Admiral Insurance Company – Admiral Pro Delta TEC, Technology E&O and Cyber Liability
- 2. AIG – Specialty Risk Protector
- 3. Allied World/Darwin – Privacy/403 SRVS PRO
- 4. ARCH – ARCH NETSAFE® 2.0
- 5. ARGO-Pro – iPRP – Information and Professional Risk Playbook SM
- 6. ASCENT Underwriting – Ascent Cyber-Pro

## Technology Related Liability

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7. AXIS Pro – Axis Insurance Company – TechNet Solutions
8. Beazley – Lloyds Syndicate – AFB Media Tech® – Professional and Technology Based Services, Technology Products, Computer Network Security, and Multimedia and Advertising Liability.
9. CFC Underwriting – TECH 2.9
10. Chubb – ACE Insurance Company – Chubb DigiTech® Enterprise Risk Management Policy
11. CNA Insurance Company – TECH COMPLETE
12. Endurance – Endurance Premier Professional Liability and Network Risk Insurance Policy
13. Euclid Managers – Hudson Insurance Company and Hudson Specialty Insurance Company – HyperDrive® 2.0
14. Hanover Insurance Company – Hanover Technology Professional Advantage Plus
15. The Hartford Insurance Company – FailSafe TERA®
16. Hiscox Syndicate – Lloyds – Hiscox Clear Tech
17. Ironshore Specialty Insurance Company – TechDefender™
18. Liberty International Underwriters – LIU Tech Insurer
19. Markel – Evanston Insurance Company and Essex Insurance Company – InfoPro
20. NAS – Lloyds of London – Techguard Form
21. One Beacon – Information Technology Solutions – Professional and Technology Services, Technology Products, Media and Network Liability, Network Security, Privacy, Website Media Liability
22. Philadelphia Indemnity Insurance Company – Cover Pro

## Technology Related Liability

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- 23. RLI – Technology Professional Policy TECH
- 24. Selective Insurance Company of America – Technology Errors & Omissions Coverage Form
- 25. Tokio Marine HCC – Technology and Data Security Liability Policy
- 26. Travelers Property and Casualty Company of America – CyberFirst Technology Errors and Omissions Liability Coverage Form
- 27. XL Catlin – XL Cyber and Technology Liability Policy
- 28. Zurich American Insurance Company and Steadfast Insurance Company – Zurich Pro Plus Professional, Technology, and Media Insurance Policy





# James K. Ruble Seminar

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## Section 2

# **Products Liability**

# **The Forgotten Coverage**



# **PRODUCTS LIABILITY THE FORGOTTEN COVERAGE**

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## I. INTRODUCTION

### A. Quick Definitions Before Getting Started

1. Product defects are put into four categories:
  - a. Design defects.
  - b. Manufacturing defects.
  - c. Marketing defects (Instructions and Warning Labels); and
  - d. Warranty Defects.
2. Although product defect liability claims call for liability without fault (Strict Liability), a plaintiff may seek to recover based upon allegations and proof of negligent manufacture or negligent design or negligent instructions or warning labels.
3. A breach of warranty claim will be a contract claim as well.
4. A claim for negligent manufacture alleges that the manufacturer did not use reasonable care in manufacturing the product.
5. A claim for a design defect under negligence alleges that the product is defective because it was designed without reasonable care.
6. In negligence cases, the plaintiff must show how or why the product was defective.
7. The Insurance Policies Needed for Products Liability Defense and Damage Payments are:
  - a. Commercial General Liability for Bodily Injury and Property Damage.
  - b. Manufacturers Errors and Omissions or Technology Errors and Omissions for Damages (Professional Liability Included).



## Products Liability the Forgotten Coverage

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- c. Manufacturers Errors & Omissions and Technology Errors and Omissions Insurance Coverage is needed if your client's product or installation has the potential to cause third party economic loss without causing bodily injury or property damage.
- d. The CGL policy must have a bodily injury or property damage to trigger coverage.
- e. If no one is hurt and no property is damaged the CGL policy will not provide defense or pay related damages.
- f. The possibility of CGL coverage is further removed by the "damage to impaired property – property not physically injured exclusion" that is included in the CGL policy.
- g. The impaired property exclusion removes coverage for an insured product or work that fails to perform its intended or warranted function, but subsequently does not cause bodily injury or property damage.
- h. Technology E&O and Manufactures E&O insurance is designed to fill a gap in product liability.
- i. It provides coverage for a legal obligation to pay the financial damages caused by and arising out of the insured's products and services.
- j. A customer sues your client for economic loss because your client's product failed to perform as intended.

Your client's product regulates portion control. It is incorrectly calibrated, and the customer's product is dispensed in higher volume than intended causing the customer a loss of profit, expense to correct the issue and downtime.

There is no bodily injury or property damage and therefore no coverage under a CGL policy.

An E&O policy would respond to the claim for financial risk.

## Products Liability the Forgotten Coverage

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Was the product a Technology Intangible Product failure (Software) or a Tangible Property Failure?

Which form covers the exposure is dependent upon the coverage form language.

8. Therefore, a case involving a product defect will often make claims under both negligence and strict products liability and many courts use a hybrid of products liability and negligence in cases involving product defects.

### **B. Current Event Impacting Client Products – Intellectual Property Risk**

1. The first major revision to U.S. patent law since the Patent Act of 1952 was passed by Congress and signed by the President in September 2011.
2. At the highest level, the Smith-Leahy America Invents Act (H.R. 1249) changes the patent landscape in three significant ways:
  - a. It converts U.S. patent law from a "first-to-invent" regime to a "first-inventor-to-file" regime, harmonizing U.S. practice with other jurisdictions throughout the world.
  - b. It establishes new ways to challenge the patentability of applied-for or already-issued patents through patent review and derivation proceedings.
  - c. It enacts a number of provisions that will make it more difficult for patent holders to enforce their patents.
3. There are some pro-patent holder provisions, such as the elimination of *qui tam* cases for false patent marking, the elimination of best mode as a means to challenge validity, and a 75% reduction in most administrative fees for small inventive entities as well as for institutions of higher education.
4. Nevertheless, the America Invents Act will make it costlier for all companies to secure patent protection and this burden will fall disproportionately on smaller companies and start-ups.

## Products Liability the Forgotten Coverage

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5. Does the company want to protect its intellectual property and the resulting products liability created by the newly patented product becomes an important discussion?

### C. The Nature of Product Liability Today

1. In 2017, there were 41,221 product liability cases commenced in US District Courts – Civil Judicial Business 2017.
2. 96/7% of these product liability cases were for personal injury: 6% Asbestos, 4% Motor Vehicle, 2% Airline, 1% Marine, and 87% all other.
3. The personal injury claims arose from anything a person eats, ingests, wears, uses or comes into contact with. As well as an alleged failure or defect of a related component part of a product.
4. The excessive costs of litigating product liability claims have led plaintiffs' attorneys to pursue lawsuits with a greater possibility of a large award or settlement.
5. Liability can attach under many theories including negligence, express warranty, implied warranty, strict liability, absolute liability, Industry liability for all makers of a product, Insidious or progressive harm and Successor liability due to merger or acquisition
6. **Negligence:**
  - a. Claims may be based upon defective or unreasonably dangerous design, improper manufacture, or failure to provide suitable instructions or warn of danger.
  - b. Non-compliance with a product safety statute or administrative regulation renders a product *per se* defective under the *Restatement (Third)*, whereas compliance with government or industry standards is not necessarily a successful basis for defense; standards may reflect minimal care or industry lobbying rather than reasonable safety.
  - c. Compliance is a factor to be "property considered" in determining whether a product is defective.

## Products Liability the Forgotten Coverage

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- d. In most jurisdictions, "state-of-the-art design" (meaning that hazards could neither have been foreseen nor corrected with the technology then in existence) is a valid defense, even to strict liability.

### 7. **Express warranty:**

- a. Claims may arise from a breach of an express warranty.
- b. An express warranty can take the form of an oral statement, a written warranty, or an advertising claim.

### 8. **Implied warranty:**

- a. According to the *Uniform Commercial Code*, products that are sold usually carry an implied warranty, meaning that the product must be merchantable and fit for its intended purpose.
- b. If it causes an injury, the product is presumed to be unfit, even though no negligence can be proved.

### 9. **Strict and absolute liability:**

- a. Courts have increasingly turned to strict liability, which eliminates the need to prove negligence.
- b. In recent decades, it has been irrelevant that the manufacturer exercised due care in producing the product.
- c. However, elements of "reasonableness" have now returned to "strict liability" doctrine in an increasing number of jurisdictions.
- d. Under absolute liability (which applies when handling dangerous subjects such as dynamite or wild animals), essentially no defenses exist.
- e. In contrast, under strict product liability, certain defenses are available, such as:

## Products Liability the Forgotten Coverage

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- 1) The product was not defective or unreasonably dangerous.
- 2) The defendant altered the product, and the alteration caused the injury.
- 3) The defendant misused the product in spite of clear warnings, and the misuse caused the injury.
- 4) The defendant did not make or alter the product or express any warranties.

### 10. Industry liability for all makers of a product

- a. If a product causes harm that does not surface for many years, claimants may have forgotten or be unable to identify the specific manufacturer.
- b. The court may then allocate damages to the industry as a whole – payment to be based on the market share of each company.
- c. The following case demonstrates.

#### ***Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).**

The product that brought about the "market share liability" ruling of industry-wide liability was DES, a drug taken by pregnant women, which later proved to cause uterine cancer in their female offspring. Sindell, the claimant in this California landmark case, won a substantial award, even though she did not know which market brand of DES, all of which were chemically identical, her mother had taken.

Rather than deny recovery, the court held all manufacturers of the drug collectively liable. The case was followed by a flood of suits directed at various industries, but the theory (which is an exception to the normal tort rule that a plaintiff must prove that the defendant caused the injury) has not been uniformly adopted. Even where adopted, it has been limited to cases in which:

- a. The products were fungible.

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## Products Liability the Forgotten Coverage

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<p>b. A group of specific manufacturers identifiable as having produced a substantial share of the product are joined as defendants.</p>
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### 11. **Insidious or progressive harm:**

- a. Claims against an industry as a whole often involve gradual injury caused over a prolonged period of time by toxic substances.
- b. Such substances include asbestos, DES, formaldehyde (causing irritation of the lungs and bronchials), benzene (linked to blood disorders and chromosome damage), radiation, PCB (a chemical linked to cancer), lead (a cause of poisoning), tobacco, coffee, vinyl chloride (a gas linked to cancer) and agent orange (a defoliant used in Vietnam).
- c. Insidious injuries develop gradually over many years, and when they finally surface, the large class of claimants can cause catastrophic losses and claims-adjusting nightmares.
- d. Asbestosis is a case in point, involving thousands of claims and billions of dollars in legal costs alone.

### 12. **Successor liability due to merger or acquisition:**

- a. When a company, or part of it, is acquired by another, liability for pre-acquisition claims (even from products made years before) may be imputed to the successor company.
- b. State law usually determines the extent of liability if a company is acquired by merger.
- c. If only the assets of a firm are acquired, obligations of the firm are usually not transferred unless legislation to the contrary exists.
- d. Differences in state laws and their impact on insurance coverage necessitate careful evaluation of any acquisition.
- e. Coverage for Successor Liability must be considered.

## Products Liability the Forgotten Coverage

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*Redmond v Teledyne*, 2017 U.S. Dist. Lexis 87026 (N.D.N.Y.6/7/17)

Plaintiff Daniel Redmond, who lost a thumb in 2012 while working as a machinist at UPSCO, Inc. The pipe cutting machine he was using was manufactured 56 years earlier by Landis Machine Company.

The Landis Machine Company folded in 1968, but its assets were acquired by Teledyne Machine Corp., which one-month later changed its name to Landis Machine Co. Five months after that, Landis Machine Company merged into Teledyne Argonaut Corp, which changes its name several days later to Teledyne Mid-American Corp.

This company merged into Teledyne Industries, Inc. in December 1975.

Two years later, Teledyne Industries, Inc. sold its pipe-making assets, including the Landis assets, to Barth Industries. Teledyne Industries, Inc. changed its name to TDY Industries, Inc. on December 9, 1999. On January 2, 2012, TDY Industries, Inc. converted to an LLC and on November 4, 2013, TDY Industries, LLC sold the remaining assets of its Landis division of Kennametal.

The machine that injured Redmond had been purchased in refurbished condition by his employer in 2010. The pipe-cutting machine had been owned by an unknown number of previous owners in its 50-plus years of existence.

Redmond sued among others, the final owner of the Landis assets, Kennametal, and the latter moved for summary judgment, claiming it was not the successor of the Landis Machine Co. that manufactured the pipe cutter that injured Redmond.

New York's Court of Appeals stated in another case *Schumacher v. Richards Shear Co.*, 59N.Y.2d239 (1983) that "a corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability; (2) there was a consolidation or merger of seller and purchaser; (3) the purchasing corporation was a mere continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape such obligations."

Redmond asserted that the second and third exceptions applied in this case.

**What is your decision based upon these facts?**

**Grant the summary judgment or let it go on to trial?**

### **D. You are the Jury in this Real Case Applying the Above Information:**

1. Your client manufactures the “ThermaCare® HeatWrap” an over-the-counter pain reliever, to alleviate muscle soreness.
2. Ms. Rachel Broussard and her husband, Mr. Francis Broussard sue your client pleading that under the Louisiana Products Liability Act, La. Rev. Stat. Ann § 9:2800.51-60 (LPLA) that Ms. Broussard’s HeatWrap injury was a violation of the law, and that Mr. Broussard has claims for loss of consortium.
3. Ms. Broussard suffers from myelomeningocele, a devastating congenital condition that leaves part of her malformed spinal cord exposed at a lesion around the level of her fifth (5<sup>th</sup>) lumbar disc.
4. Because of her condition, Ms. Broussard has chronic pain, poor circulation, and markedly decreased sensation in parts of her body below the lesion, including her buttocks and lower extremities.
5. On February 27, 2004, Ms. Broussard bought a ThermaCare® HeatWrap, to alleviate muscle soreness in her lower back.
6. The box of the ThermaCare® HeatWrap touted that the heatwrap could be “[u]sed anytime day or night, even while [the user is] sleeping.”
7. Moreover, it claimed that the heatwrap was “[u]ltra thin, comfortable, discreet under clothing, [so that] no one knows [that the user is] wearing it.”
8. In addition to the Box Instruction, there are extensive warnings on each individualized pouch that further qualified the promotional language on the box. The extensive warnings stated as follows:
  - a. “Ask a doctor before use if you have diabetes, poor circulation, rheumatoid arthritis, or if pregnant.”
  - b. Additionally, the pouch warned consumers not to use the wrap “on areas of the body where heat cannot be felt,” and



## Products Liability the Forgotten Coverage

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that “when using this product,” users should “[p]eriodically check [their] skin: (a) if [their] skin is sensitive to heat, (b) if [their] tolerance to heat has decreased over the years.”

- c. The package inserts warned that consumers who “may be particularly sensitive to heat” should take various precautions, including “[p]eriodically check[ing] [their] skin while wearing ThermaCare®” and “[w]ear[ing] ThermaCare® over a thin layer of clothing instead of directly against the skin.”
- 9. On February 29, 2004, Ms. Broussard used the ThermaCare® HeatWrap, strapping it around her lower back against her skin before falling asleep.
  - 10. When she awoke, Ms. Broussard found that the heatwrap had slipped to her buttocks and had caused severe burns on her left buttock.
  - 11. On February 16, 2005, the Broussards filed suit against your client, and this is the first time that your client knows that there was a claim.
  - 12. Is this a covered claim under a standard CGL contract to provide defense and pay what your client is legally obligated to pay?
    - a. Is there bodily injury or property damage alleged?
    - b. Was the product in the marketplace for consumption by the general public?
    - c. Does the product meet the definition of “your product” under the CGL?

### **21. "Your product":**

#### **a. Means:**

- (1)** Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

## Products Liability the Forgotten Coverage

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- (a) You;
  - (b) Others trading under your name; or
  - (c) A person or organization whose business or assets you have acquired; and
- (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
- b. Includes:
  - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance, or use of "your product;" and
  - (2) The providing of or failure to provide warnings or instructions.
- c. Does not include vending machines or other property rented to or located for the use of others but not sold.

d. Are there any related exclusions that may reduce, limit, or eliminate coverage in the CGL?

e. This is not a product recall exposure and the exclusion does not apply.

13. To recover under the LPLA, the Broussards must establish that their damages "were proximately caused by a characteristic of the product that renders it unreasonably dangerous," and that their damages "arose from a reasonably anticipated use of the product." La. Rev. Stat. Ann § 9:2800.54(A).

14. You are the jury in this case. Did Ms. Broussard demonstrate that the product is unreasonably dangerous?

**Courts use various definitions of "unreasonably dangerous" including a product that is more dangerous than an ordinary consumer would expect, or a product whose risks are so great that a reasonable seller would not place the product on the market, or a product design whose risks outweigh its benefits.**

15. Did Ms. Broussard fail to show that her use of the Therma Care Heatwrap was anticipated use?

## Products Liability the Forgotten Coverage

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16. Did Ms. Broussard violate extensive warnings when she used the wrap?
17. Did Ms. Broussard use the heatwrap on her lower back despite having decreased sensitivity to heat below the level of her fifth lumbar disc?
18. In Louisiana, a plaintiff who used a product in a manner that violates clear and express warnings must show that their use was anticipated only by presenting evidence that the manufacturer had reason to know that these warnings were ineffectual. [A Marketing Defect Claim]
19. The court stated that Mrs. Broussard failed to present evidence that P&G knew or should have known that despite the warnings: (1) consumers that have decreased sensitivity to heat are using the ThermaCare® Heatwrap; (2) consumers suffering from poor circulation are using the ThermaCare® Heatwrap without first consulting their doctor; or (3) consumers who are particularly sensitive to heat are ignoring the recommended precautions.
20. DO you agree with the court decision?
21. What decisions would you give and how much for the plaintiff?
22. Broussard v. Procter & Gamble Co., No. 07-30069 (5<sup>th</sup> Circuit 02-13-20080).

### **D. You Are the Jury in This Case**

1. Your client is Zeus Technologies, Inc. that sells computer hardware, software, and services for the installation and maintenance of sold equipment.
2. Zeus successfully bid and won a contract to design and install \$5,000,000 in new servers for Harris Retail, Inc.
3. This installation will connect all thirty-five brick and mortar stores and to run its new Web 2.0 presence including social media marketing plans.

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4. The contract includes the installation of fiber optic cable, connecting all servers, installing security systems that meet the Payment Card Industry Data Security Standard for all transactions, upgrading the web page design to enhance connectivity and advertising, and designing access to a Private Cloud system.
5. The contract also includes the training of all store personnel on the use and access to the system.
6. The installation is complete but ninety (90) days after the launch of the program the technology is not performing as intended.
7. Zeus spends six months trying to fix the glitches in the system, but they have been unsuccessful in getting the system up to the design specifications that all parties agreed upon in the contract.
8. Zeus now refuses to continue working on the system.
9. Harris Retail now files a lawsuit seeking \$10,000,000 in damages stating the following complaints:
  - a. Zeus negligently designed the systems and interconnectivity of the computer system upgrade.
  - b. Zeus breached its warranty and representations concerning how the technology services were going to perform.
  - c. Zeus failed to design and install appropriate cloud security to prevent unauthorized access to company and customer information.
  - d. Zeus failed to prevent identity theft and allowed the disclosure of personally identifiable information of credit card customers in the system.
  - e. Zeus breached the contract signed by the parties.
  - f. Zeus plagiarized or misappropriated ideas from others in the design of the web site and now Harris is being sued for infringement of copyrights, title, slogans, trade dress, trade

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name, service mark and service name in a separate lawsuit;  
and

- g. Zeus refused to correct the deficiencies and Harris incurred forensic expert expenses to repair and secure the system along with notification expenses for the customer data breaches.

10. Does Zeus's Commercial General Liability Coverage Form provide defense and is it legally obligated to pay for this completed operations loss exposure?

- a. Is this property damage under Coverage A?

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.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

- b. Is there an exclusion that may apply to this loss exposure, or a mandatory endorsement as now required by ISO and showing up on many CGL renewals?

**CG 21 06 05 14**

**EXCLUSION – ACCESS OR DISCLOSURE OF CONFIDENTIAL OR  
PERSONAL INFORMATION AND DATA-RELATED LIABILITY – WITH  
LIMITED BODILY INJURY EXCEPTION**

*(Applies to Coverage A and Coverage B)*

**A. Exclusion 2.p. of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:**

**2. Exclusions**

This insurance does not apply to:

**p. Access Or Disclosure Of Confidential Or Personal Information And Data-related Liability**

Damages arising out of:

- (1)** Any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information; or
- (2)** The loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

This exclusion applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of that which is described in Paragraph **(1)** or **(2)** above.

However, unless Paragraph **(1)** above applies, this exclusion does not apply to damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

**B. The following is added to Paragraph 2. Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:**

**2. Exclusions**

This insurance does not apply to:

**Access OR Disclosure Of Confidential Or Personal Information**

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“Personal and advertising injury” arising out of any access to or disclosure of any person’s or organization’s confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information.

This exclusion applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of any access to or disclosure of any person's or organization's confidential or personal information.

- c. Was there the CG 22 75 04 13 Professional Liability Exclusion for Computer Software on the policy?
- d. Was there the CG 22 77 04 13 Professional Liability Exclusion for Computer Data Processing on the policy?
- e. Was there the CG 22 88 04 13 Professional Liability Exclusion for Electronic Data Processing Services and Computer Consulting or Programming Services on the policy?
- f. Was there the CG 22 91 04 13 Professional Liability Exclusion for Telecommunication Equipment or Service Providers Errors and Omissions on the policy?
- g. Was there the CG 22 98 04 13 Professional Liability Exclusion for Internet Service Providers and Internet Access Providers Errors and Omissions on the policy?
- h. Was there the CG 22 99 04 13 Professional Liability Exclusion for Web Site Designers on the policy?
- i. These endorsements exclude supervision and training.
- j. ANY DEFENSE?

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11. You are the jury in this case, did Harris Retail Inc. demonstrate that the product failed to perform as intended and did Zeus breach its warranties and breach its contract with Harris?
12. Does the Manufacturers Errors and Omissions Coverage Form or Technology Errors and Omissions Coverage Form provide defense in this Product's Liability Claim?

## II. DEFINITION OF PRODUCT LIABILITY

### A. Introduction

1. Defective or dangerous products are the cause of thousands of injuries every year in the United States.

Product Liability is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause. Although the word "product" has broad connotations, product liability as an area of law is traditionally limited to products in the form of tangible personal property but it is now expanding with "The Internet of Things."

2. Product Liability Law which reflects the legal rules concerning who is responsible for defective or dangerous products, is different from negligence-based law.
3. Product liability refers to a manufacturer or seller being held liable for placing a defective product into the hands of a consumer or the food industry putting contaminated food into the marketplace.
4. According to the Center for Disease Control and Prevention, seventy-six million cases of food borne illness occur each year resulting in 325,000 hospitalizations and 5,000 deaths.
5. Potentially liable parties in the chain include:
  - a. Product manufacturer or food industry entities such as the farmer, organic farmer, or initial food processor.
  - b. Manufacturer of component parts, secondary food processor or ingredient processor.



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- c. Wholesaler, distributor, and food wholesaler
- d. Retail stores, farmer's markets, restaurants, grocery stores and convenience stores, food stands, food carts, mobile food trucks, caterers, etc.

**Food contamination risks require an analysis of the ingredient sources, suppliers including additive providers, processing plant locations, foreign health and safety regulations, supply chain positioning or structure, and customer base when dealing with whom may be potentially liable for food borne illness and food contamination claims.**

- 6. The Products Liability Law requires that a product meet the ordinary expectations of the consumer.
- 7. When a product has an unexpected defect or danger, the product cannot be said to meet the ordinary expectations of the consumer.
- 8. There is no Federal Product Liability Law, but the FDA is working towards developing regulatory control to get safe food to our tables.
- 9. Product Liability Claims are based on State Law
  - a. Negligence
  - b. Strict Liability
  - c. Contract Law for breach of warranty under the Uniform Commercial Code

### **B. Responsible Parties**

- 1. For Product Liability to arise, the PRODUCT MUST HAVE BEEN SOLD in the marketplace or for food sold and/or consumed at the distribution point.
- 2. Historically the courts required a "Privity of contract" between the seller and the buyer of the product. (A purchase relationship needed to exist)

## Products Liability the Forgotten Coverage

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3. In most states today, the privity requirement no longer exists.
4. The injured person does not have to be the purchaser of the product in order to recover except for food products which require consumption.
5. Today, any person who foreseeably could have been injured by a defective or dangerous product can recover for his or her injuries as long as the product was sold to someone.
6. Liability for product defect flows to any party in the product's chain of distribution.
  - a. Manufacturer, grower, or processor of the product
  - b. Wholesalers of the product
  - c. Retail seller of the product
  - d. Party who assembles, installs, or cooks the product
7. For strict liability to apply, the sale of the product must be made in the regular course of the supplier's business.
  - a. Garage sale would not be liable in a strict liability action
  - b. An item for the charity bakes sale in a strict liability action

### **C. Types of Product Defects**

1. Under any theory of liability (Negligence, Strict or Contract) the party suing must prove
  - a. The product that caused the injury was defective and
  - b. The defect made the product unreasonably dangerous.
2. Four types of defects that might cause injury and give rise to manufacturing or supplier liability.

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- a. Design defects including genetically altered food products
  - b. Manufacturing defects or growing defects or processing defects
  - c. Marketing defects or improper food preparation defects that are provided in instructions or warnings concerning the product.
  - d. Warranty Defect (Contractual Liability)
3. Design Defect
- a. Design defect is some flaw in the intentional design of a product that makes it unreasonably dangerous, or it has been genetically altered which makes it unreasonably dangerous.
  - b. Design defect can be from inception of the product.
  - c. Design defect claims can be negligence based or strict liability based.
  - d. Most food borne illness or food contamination claims tend to be negligence based but strict liability can apply.

**Topps Meat Company, in business for seventy (70) years, closed its doors after being forced to issue the fifth largest beef recall in U.S. History by the Federal Government and the California regulatory authorities.**

**This was after undercover video proved the inconsistent practices of meat processing occurring at the plant. In addition, the medical monitoring claims from consumers involved with the consumed beef are extremely high.**

- e. Strict liability may be imposed for an unreasonably dangerous design if the suing party can present evidence that there was a cost-effective alternative design that would have prevented the risk of injury. (Pinto Case)

## Products Liability the Forgotten Coverage

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- f. Strict liability may apply if the product was so unreasonably dangerous that it never should have been manufactured and the availability of a safer design might not be required to hold the designer liable. (Pharmaceutical Cases)
- g. Pritchett v. Cottrell, Inc., and Scott v. Cottrell, Inc., and Fix v. Cottrell – Three separate products liability actions asserting that the ratchet system designed by Cottrell was improperly designed [Strict liability, Negligence, and Breach of Warranty].
  - 1) All of the wives also brought loss-of-consortium claims as well.
  - 2) All three plaintiffs were employed by JCT as drivers of specially designed car hauling rigs, used to haul automobiles from the car manufacturer to the auto dealership.
  - 3) In separate incidents, all three men were injured while operating a ratchet system that was attached to the trailer of their rig and used in securing vehicles to the trailer for transport.
  - 4) The ratchet system was designed by Cottrell and required a great deal of physical force to operate.
  - 5) Each plaintiff manually operated the ratchet system, either to tie down or untie a vehicle on their trailer. In each incident, a sudden release of pressure or tension in the chain occurred and caused each plaintiff to slip or fall causing injury.
  - 6) Plaintiffs argued through its expert witness that the ratchet and chain tie-down and untying system requires significant manual force to operate.
  - 7) The expert testifies that Cottrell knew of the significant danger of drivers being injured while tying and untying cargo.

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- 8) The expert testifies that the technology for alternative devices requiring less manual force has been available for decades and would have prevented the injuries in this case.
- 9) The expert testified that there are feasible, safer, alternative designs, such as tire restraints or hydraulically powered tie-down systems that would have required little or no manual exertion and would have protected the drivers from injury in the event of a sudden release of force in either the tie-down or the untying process.
- 10) Was the product both DEFECTIVE and UNREASONABLY DANGEROUS? [Pritchett v. Cottrell, Inc., No. 06-3459 (8th Cir. 01/23/2008)]

### 4. Manufacturing or food processor defect

- a. A product has a manufacturing defect when the product does not conform to the designer's or manufacturer's own specifications.
- b. Manufacturing defect cases are often the easiest to prove.
  - 1) Manufacturer's own design standards or processor's quality control standards are used to prove the defect.
  - 2) Marketing standards can also be used to show that the product was defective.
- c. The suing party must prove the following (Causation)
  - 1) That the product was defective or contaminated.
  - 2) That it was defective or contaminated when it left the defendant's hands (manufacturer, wholesaler, or retailer).

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- 3) That the defect in the product was the proximate cause of the harm or illness that the suing party suffered.
  - 4) It is also necessary that the product be expected to and does reach the consumer without substantial change in the condition in which it is sold.
- d. Proving how or why the flaw or defect occurred can be difficult and as such the law applies two special doctrines in Products liability cases.
- 1) “Res Ipsa Loquitur” (The thing speaks for itself)
    - a) Shifts the burden of proof in some product liability cases to the defendants.
    - b) Defect issue would not exist unless someone was negligent.
    - c) If successfully invoked, the suing party is no longer required to prove how the defendant was negligent, the defendant is required to prove that it was not negligent.
  - 2) Strict Liability
    - a) The suing party does not need to prove that a manufacturer or food processor is negligent but only that the product was defective.
    - b) By eliminating the issue of manufacturer or food processor fault, the concept of “NO FAULT” or STRICT LIABILITY allows the suing party to recover where they otherwise might not.
  - 3) Strict Liability requires the suing party to fulfill the following three conditions

## Products Liability the Forgotten Coverage

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- a) The product has an “unreasonably dangerous” defect or contamination that injured the party as a user or consumer of the product.
- b) The defect caused the injury while the product was being used or consumed in a way that it was intended to be used.
- c) The product had not been changed from the condition in which it was originally sold.  
(Substantially means in a way that affects how the product performs)
- e. Three ways to establish that a product was defective or contaminated when it left the manufacturer’s or processor’s hands.
  - 1) By direct evidence – usually using an expert witness
  - 2) By circumstantial evidence
  - 3) By eliminating all other causes of failure, even if the suing party cannot positively identify what the defect is or how it arose.
- f. The defect can come into existence either in the design of the product, during manufacture or processing, or during handling or shipment of the product or food item.

### 5. Marketing Defects

- a. Improper labeling of products including “use by” dates for food.
- b. Improper inventory control for perishable food items.
- c. Insufficient instructions for use of products or how to prepare the food.
- d. Failure to warn consumers of the products hidden dangers

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- e. Negligent or intentional misrepresentation regarding a product can support a product liability claim as well.

### 6. Unavoidably Unsafe Products

- a. Some products simply cannot be made safer without losing their usefulness.

**An electric knife that is too dull to injure anyone would also be useless for its intended purpose.**

**A prescription drug that increases the potential for healing from another disease but increases the chance of heart failure. (VIOX)**

- b. The courts believe that in these situations, product users or consumers are the best equipped to minimize risk.
- c. Manufacturers and suppliers of unavoidably unsafe products must give proper warnings of the dangers and risks of their products so that consumers can make informed decisions.
- d. If a drug product or a medical device that can be implanted in the human body, the proper disclosure of injury and harm by the informed medical practitioner is required.

### 7. Consumer Protection Laws and Agencies that apply to Products Liability Actions

- a. Numerous federal and state statutes, regulations, and safety orders concerning a variety of products assist in proving a product liability action.
- b. Showing that the manufacturer, wholesaler, or retailer violated a statute or other applicable regulation gives the party suing an outstanding advantage in the action.
- c. U.S. Consumer Products Safety Commission is an independent federal agency whose main purpose is to reduce injuries to consumers. The Commission issues consumer product safety alerts.



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- d. Occupational Safety and Health Administration publishes numerous regulations and pamphlets on workplace safety and health standards, the use of industrial substances, and safety in industrial and construction operations.
- e. Environmental Protection Agency that has the authority for air, water, and pesticide standards and the organization issues many publications on such topics.
- f. U.S. Food and Drug Administration establishes the standards for food, drugs, medical devices, and cosmetics. It approves and has information on drug ingredients along with food and manufacturing methods.
- g. United States Department of Agriculture (USDA) for inspection and quality control concerning food products.
- h. National Highway Traffic Safety Administration develops and issues safety standards for all new cars, conducts research on accident prevention, investigates motor vehicle defects and enforces notification of defects to owner of record.
- i. Federal Highway Administration is concerned with improving highway safety and conducts highway safety research relating to trucks and busses.
- j. Transportation Research Board will conduct a computerized search and furnish abstracts of engineering articles pertaining to highway topics.
- k. State police or highway patrols might also be able to provide information on regulations concerning the use of equipment of motor vehicles.
- l. State fire marshal's issue fire safety standards and basic building design and construction standards.
- m. United States Coast Guard sets standards makes factory inspections and conducts investigations of consumer complaints of defective boats. The Coast Guard notifies boat owners when defects are found.

### **D. Types of Products Liability Lawsuits to Expect (Generally a Combination)**

1. Strict Liability for Defects
  - a. Design Defects
  - b. Manufacturing Defects
  - c. Marketing Defects
2. Negligence
  - a. Requires a duty
  - b. Breach of Duty
  - c. Damages
  - d. Actual and Proximate Cause of the damages is from the breach.
  - e. Strict liability for defective products does not replace claims based on negligence.
  - f. There is distinction between two theories:
    - 1) Strict liability claims focus on condition of product, while negligence focuses on conduct of defendant.
    - 2) In strict liability, plaintiff must establish product was in defective condition and unreasonably dangerous to consumer; in negligence, plaintiff must show product was unreasonably dangerous because manufacturer failed to use reasonable care. Lovick v. Wil-Rich, 588 N.W.2d 688 (Iowa 1999).
3. Contractual – Breach of Warranty Claim

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- a. A breach of warranty action for product-caused harm is independent of principles of negligence and strict liability and changes the often-difficult problems of proof which arise in negligence cases.
- b. Both negligence and strict liability are actions in tort, while warranty is an action in contract.
- c. An action in tort eliminates certain obstacles which are present in an action for breach of warranty, such as the notice requirement imposed by UCC § 2-607(3)(b) and the requirement of privity (direct contractual relationship).
- d. In, some jurisdictions the compensation for economic loss cannot be recovered in an action based on negligence or on the theory of strict liability but can be recovered in an action for breach of warranty.
- e. A breach of warranty claim is subject to a different statute of limitations than that applicable to negligence claims, in that a cause of action for breach of warranty may accrue at an earlier time, governed by the date of the sale, rather than the time of the injury.
- f. A breach of warranty claim is subject to a 4-year statute of limitations, and the period begins to run from the date of the sale, not the date of the injury, which might theoretically take place after the period has run.

### **E. Types of Economic Recovery from Products Liability Suits**

- 1. Recovery for disfigurement
- 2. Future Medical Expenses
- 3. General damages such as pain and suffering and loss of enjoyment of life after the accident or injury.
- 4. Household services

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5. Loss of consortium
6. Loss of consortium of a child
7. Loss of enjoyment of life
8. Loss of society and companionship in a wrongful death case
9. Lost earning capacity
10. Lost wages
11. Current Medical expenses
12. Medical Surveillance or Medical Monitoring
13. Mental anguish
14. Pain and suffering
15. Permanent disability
16. Present cash value of a lump sum amount
17. Special Damages

### **F. Product Liability Defenses**

1. Failure to identify the supplier or manufacturer of the product.
  - a. Courts allow an exception to this defense called the “Market Share Liability Exception.”
  - b. Generally applied in defective medications
  - c. Where the suing party cannot identify which of the pharmaceutical companies that supply a particular drug supplied the drug he or she took, each manufacturer will be held liable according to its percentage of sales in the area where the injury occurred.

## Products Liability the Forgotten Coverage

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### 2. State of the Art Defense

- a. What was foreseeable at the time of manufacturer or processing?
- b. The level of pertinent scientific and technical knowledge existing at the time of manufacture or processing.

### 3. Component Parts Doctrine exempts a manufacturer from liability arising from a finished product that incorporates a component supplied by another manufacturer. (Restatement Third of Torts, Products Liability, Section 50)

- a. A component manufacturer is subject to liability only when the component itself has a defect that results in the injury.
- b. A component manufacturer is subject to liability when they play a material role in integrating the component into the finished product whose defect causes the injury.

### 4. Medical Device Amendments of 1976 (MDA) Defense.

- a. The statute from Congress provides that a State shall not “establish or continue in effect with respect to a device intended for human use any requirement” . . .
- b. “(1) which is different from, or in addition to, any requirement applicable under [federal law] to the device, and . . .
- c. (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under” relevant federal law. 21 U.S.C. 360k(a)
- d. Class III medical devices may not enter the market until they have undergone an FDA review and approval.
- e. This FDA review includes design, labeling, and manufacturing specifications and the FDA determines that those specifications provide a reasonable assurance of safety and effectiveness.

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- f. Manufacturers may not make changes to such devices that would affect safety or effectiveness unless they first seek and obtain permission from the FDA.

Charles Riegel and his wife Donna Riegel brought suit against Medtronic, Inc., after a Medtronic catheter ruptured in Charles Riegel's coronary artery during heart surgery. The catheter is a Class III device that received FDA pre-market approval. The Riegels alleged that the device was designed, labeled, and manufactured in a manner that violated New York common law.

The allegations include strict liability, breach of implied warranty, and negligence in design, testing, inspection, distribution, labeling, marketing, and sales of the catheter.

1. Are these allegations covered under the typical CGL Coverage Form? Do we have defense and payment of legally obligated to pay under this contract?
2. Does the Supreme Court agree that the MDA's pre-emption clause bars common law claims challenging the safety or effectiveness of a medical device marketed in a form that received premarket approval from the FDA?

- g. The Supreme Court rejects the Riegel's contentions that the duties underlying the state tort claims are not pre-empted because general common law duties are not requirements maintained "with respect to devices."

- h. The Supreme Court stated that the MDA's pre-emption clause bars common-law claims challenging the safety or effectiveness of a medical device marketed in a form that received pre-market approval from the FDA.

- i. Riegel v. Medtronic, Inc. (No. 06-179), 451 F.3d 104.

5. Altered Product Defense – If the suing party altered the product after it left the manufacturer's control, and the alteration caused the suing parties injury.
6. The suing party misuses the product in an unforeseeable way, and his or her misuse of the product causes the injuries alleged.  
[Comparative Negligence]

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7. Inability to prove an alleged occurrence has been a powerful defense for insurance companies against its insured clients. Be careful in this area. Advanced Environmental Recycling Technologies v. AISLIC, 09-11075 10-22-2010

### **G. Statute of Limitations Defense**

1. Under the legal rule known as the “statute of limitations” any lawsuit arising from an accident or injury must be filed within a certain time limit or the injured person’s legal claim will be barred and his or her right to sue will be lost forever.
2. Every State has enacted its own statute of limitations, requiring personal injury suits to be filed in court within a set time after the incident or injury.
3. The specific limit prescribed by each state ranges from one year in Kentucky and Tennessee to six years in Maine and North Dakota.
4. In some states, the type of personal injury claim may also affect the time limit.
  - a. Certain defamation cases allowed longer time
  - b. Claims involving minors start at age eighteen
  - c. Medical malpractice claims may be a shorter time
5. While a statute of limitations may declare that a personal injury lawsuit must be filed within a certain amount of time after an accident or injury, that time period usually does not begin to run until the moment when the person filing suit knew or should know that they had suffered harms and the nature of the harm.

Negligence cause of action for defective heart pacemaker accrued when damage occurred (knowledge that it was faulty), not when recipient later learned that other possible defects existed. <u>Spickes v Medtronic, Inc.</u> , 275 Ark 421, 631 SW2d 5 (1982).
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6. Under statutes pertaining to asbestos-related injuries or diseases, workers cause of action against manufacturers of asbestos

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products accrued when they became disabled, meaning loss of time from work, not when they earlier learned that they had asbestos-related injury or illness. Blakey v Superior Court, 153 Cal App 3d 101, 200 Cal Rptr 52 (1984, First Dist).

7. In action against manufacturer of roofing materials, based in part on alleged product defects which caused roof to leak, cause accrued when roof first leaked; subsequent leaking did not constitute continuing defect which would extend time when injury "was first sustained." Beckenstein v Potter & Carrier, Inc., 191 Conn 150, 464 A2d 18, 37 UCCRS 158 (1983).
8. Action against manufacturer of Dalkon Shield, by woman who was injured because of its use, accrued when she discovered, or reasonably should have, the existence of the injury or damage. Condon v A. H. Robins Co. (1984) 217 Neb 60, 349 NW2d 622.
9. In products liability action on theory of negligence and strict liability by owner of apartment complex against manufacturer of plumbing fittings that were allegedly defective in design, manufacture, and installation, trial court erred in granting summary judgment for defendant on ground that action was barred by four-year statute of limitations where complaint (instituted in June, 1981) alleged that defects were first discovered in December, 1977 and where statute of limitations did not begin to run until plaintiff either learned of defect or should have done so in exercise of due diligence; issue of whether plaintiff knew, or should have known about defect at early date was question of fact that should have left for trier of fact. Oak Grove Investors v Bell & Gossett Co., 99 Nev 616, 668 P2d 1075 (1983).
10. Cause of action against manufacturer of wire surgical suture, for injury caused by defective suture, accrued when plaintiff discovered, through exploratory subsequent surgery that suture was defective and not when he determined identity of manufacturer thereof. Britt v Arvanitis, 590 F2d 57 (1978, CA3 NJ app. NJ law).
11. The delay in discovery must be one that is reasonable under the circumstances and it is up to the court to determine.



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12. Statutes of Limitations must coordinate with the Statute of Repose for construction defect claims (Completed Operations) and Products Liability claims.
13. Statute of Repose is a statute that bars a suit a fixed number of years after the defendant acts in some way as by designing or manufacturing a product, even if the period ends before the plaintiff has suffered any injury.
14. The discovery periods under the Statute of Repose range from 4 years to 20 years.
15. Moreover, the scope of what is covered and who is protected by the statute varies widely from state to state.
16. **PLEASE NOTE: Most Tort claims will never fail subject to the statute of limitations because they involve sudden and accidental accidents that injury or harm can quickly be identified.**

### III. PRODUCTS-COMPLETED OPERATIONS LIABILITY COVERAGE FORMS

#### A. The ISO Portfolio of General Liability Coverage Form has numerous options for solving a client's products liability exposures.

1. Products/Completed Operations Liability Coverage Form CG 00 37 04 13 – Occurrence Form
2. Products/Completed Operations Liability Coverage Form CG 00 38 04 13 – Claims Made Form
3. Commercial General Liability Coverage Form CG 00 01 04 13 – Occurrence Form
4. Commercial General Liability Coverage Form CG 00 02 04 13 – Claims Made Form

### **B. Technology Products and Completed Operations Coverage Forms Vary from Company to Company.**

1. Chubb/ACE Insurance Company
  - a. ACE DigiTech®
  - b. INtegrity+
  - c. Digital technology and professional liability insurance program with third party network risk.
2. Admiral Insurance Company – Technology Professional Liability Coverage
3. Allied World/Darwin – Tech 404®
4. AXIS – Media Professional – TechNet Solutions
5. Beazley – Lloyds Syndicate
  - a. AFB Media Tech®
  - b. Professional and Technology Based Services, Technology Products, Computer Network Security, and Multimedia and Advertising Liability.
6. AIG (Chartis) – National Union Fire Insurance Company of Pittsburgh and Chartis Specialty Insurance Company – Chartis Specialty Risk Protector
7. CNA Insurance Company
  - a. Enterprise Professional Solutions
  - b. Technology and Professional Liability, Media Liability, and Network Security and Privacy Liability
8. Euclid Managers – Hudson Insurance Company and Hudson Specialty Insurance Company

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- a. HyperDrive™
- b. Technology Liability
- 9. Hanover Insurance Company – Hanover Technology Professional Advantage Plus
- 10. The Hartford Insurance Company – FailSafe TERA®
- 11. Hiscox Syndicate – Lloyds – Hiscox Technology Protection
- 12. Ironshore Specialty Insurance Company – TechDefender™
- 13. Markel – Evanston Insurance Company and Essex Insurance Company
  - a. InfoPro
  - b. Information Technology Professional Liability and Data Breach and Privacy Liability
  - c. Data Breach Loss to Insured and Electronic Media Liability Insurance
- 14. NAS – Lloyds of London – Techguard Form
- 15. One Beacon
  - a. Professional and Technology Services, Technology Products, Media and Network Liability, Network Security, Privacy, Website Media Liability.
  - b. Direct or through wholesaler
- 16. Philadelphia Indemnity Insurance Company
  - a. Cover Pro
  - b. Computer, Technology and Consultants

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17. Professional Liability Insurance Services, Inc. – Lloyds of London – Technology Professional Liability Insurance
18. Safeonline – Lloyds of London – SafeEnterprise
19. Selective Insurance Company of America
  - a. Technology Errors & Omissions Coverage Form – SIC Codes 7371, 7372, 7373, 7374, 7375, 7376, 7377, 7378, 7379, 4813, 4841, 4899, 8748, 3661, 3663, 3571, 3572, 3575, 3577, 3578, 3579, 3671, 3672, 3674, 3675, 3676, 3677, 3678, 3679, 3695, 3823, 3825, 3826, 3827, 3829, 3860, 3861, and 5045
  - b. Cycurity
20. Travelers Property and Casualty Company of America – CyberFirst Technology Errors and Omissions Liability Coverage Form
21. Zurich American Insurance Company and Steadfast Insurance Company – Zurich Pro Plus Professional, Technology, and Media Insurance Policy

### **C. ISO Stand Alone Products/Completed Operations Coverage Forms CG 00 37 04 13 and CG 00 38 04 13 Comparison to Commercial General Liability Coverage Forms**

1. These two policy forms closely track the two Commercial General Liability Coverage Forms.
2. CGL Coverage A Exclusions contain the same wording as in the Stand-Alone Products/Completed Operations Coverage Forms
  - a. Expected or Intended Exclusion
  - b. Contractual Liability Exclusion
  - c. Liquor Liability Exclusion
  - d. Workers Compensation Exclusion

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- e. Employers Liability Exclusion
  - f. War Exclusion
  - g. Damage to Property
  - h. Damage to Your Product Exclusion
  - i. Damage to Your Work Exclusion
  - j. Damage to Impaired Property or Property Not Physically Injured Exclusion
  - k. Recall of Products, Work, or Impaired Property Exclusion
  - l. Electronic Data Exclusion
  - m. Please note that there is no Pollution Exclusion in the stand-alone coverage form.
3. Policy Form Conditions are the same as in the Commercial General Liability Coverage Forms
- a. Bankruptcy
  - b. Duties in the Event of Occurrence, Claim or Suit
  - c. Legal Action Against Us
  - d. Other Insurance
  - e. Premium Audit
  - f. Representations
  - g. Separation of Insureds
  - h. Transfer of Rights of Recovery
  - i. When We Do Not Renew

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- 1) This needs to be modified for a heavy products liability exposure.
- 2) Need time for re-marketing the account.

### **9. When We Do Not Renew.**

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

4. Policy Form Definitions are the same as in the Commercial General Liability Coverage Forms.
  - a. Auto
  - b. Bodily Injury
  - c. Coverage Territory
  - d. Employee
  - e. Executive Officer
  - f. Impaired Property
  - g. Insured Contract
  - h. Leased Worker
  - i. Loading or Unloading
  - j. Mobile Equipment
  - k. Occurrence
  - l. Products-completed operations hazard
  - m. Property Damage

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- n. Suit
- o. Temporary Worker
- p. Your Product
- q. Your Work

### **D. The Use of the Stand-Alone Products/Completed Operations Coverage Forms CG 00 37 and CG 00 38 versus the Commercial General Liability Coverage Forms**

1. The most frequent reasons that premises – operations exposures and the products – completed operations exposures are insured separately.
  - a. Client has a Heavy Products Exposure and coverage is not offered in the standard market. (Aviation and Drug Related Exposures)
  - b. Client may require different Occurrence Limits for either the premises – operations coverage or the products – completed operations coverage. (May be a requirement of the Excess Liability Carrier.)
  - c. Client can get Occurrence Based premises – operations coverage but can only get Claims Made products – completed operations coverage
    - 1) This can create an Excess Concurrence Problem with the Excess Carrier.
    - 2) Generally, should build a separate Excess Program for the products – completed operations coverage.
    - 3) If a separate Excess Program is designed, remember to explain that product coverage is not included in the premises – operations Excess Program for premium savings.

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2. When separate products – completed operations policy is purchased by the client, the Commercial General Liability Coverage Form should be endorsed with the CG 21 04 – Exclusion Products – Complete Operations Hazard.
  - a. In *Tayarie Trayshaun Baker v. National Interstate Insurance Company* the California 2<sup>nd</sup> District Court of Appeal ruled that the exclusion applied to a bus company's work that allegedly led to a fatality occurring off premises.
  - b. National declined to provide defense and settle the case for Four Winds because they negligently inspected, repaired, serviced, and maintained the bus based upon the completed operations exclusion.
  - c. The court determined that the policy did exclude coverage for injuries arising from Four Winds work.

### **CG 21 04 – Exclusion Products – Complete Operations Hazard.**

**This endorsement modifies insurance provided under the following:**

#### **COMMERCIAL GENERAL LIABILITY COVERAGE PART.**

**This insurance does not apply to "bodily injury" or "property damage" included within the "products-completed operations hazard"**

3. The following sections of the outline will evaluate key sections of the ISO Policy Forms concerning products – completed operations exposures and these sections apply to all four ISO Coverage Forms.

## **IV. PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE FORM AND COMMERCIAL GENERAL LIABILITY COVERAGE FORM COVERAGE TRIGGERS**

- A. **Insuring Agreement Products Liability Coverage Triggers – CGL Coverage A Bodily Injury and Property Damage Coverage Form And Stand Alone Products/Completed Operations Coverage Form CG 00 37 04 13**



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1. Insuring Agreement paragraph “a” of the Commercial General Liability (CGL) Coverage A and Insuring Agreement paragraph “a” of the Products/Completed Operations Liability Coverage Form sets out the parameters of the two basic elements of products liability coverage.
  - a. Indemnity
  - b. Defense
2. The insurer promises to pay money damages that the insured is legally obligated to pay to a third party because of bodily injury or property damage.
3. The insurer promises to defend the insured, if it chooses, against allegations of liability for such bodily injury or property damage, or alternatively to make a settlement of a claim against the insured for such bodily injury or property damage.
4. Damages payable are the legal remedies represented by the payment of money.
5. Compensatory Damages for Products Liability Claims
  - a. Special Damages – Economic Loss
  - b. General Damages – Non-economic Loss
6. Policy will not respond to “Injunctive Relief” which may occur when a Governmental Agency pursues an action for a dangerous product.

### **SECTION I – COVERAGES PRODUCTS/COMPLETED OPERATIONS**

#### **Bodily Injury and Property Damage Liability**

##### **1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" included within the “products-completed operations hazard” to which

## Products Liability the Forgotten Coverage

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

However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

7. Although the cost of complying with Governmental Regulatory Orders has sometimes been held to constitute damages, particularly within the context of the enforcement of environmental laws.
8. Products Liability fines and penalties typically would not fall within the ordinary meaning of "damages" either since they do not have as their purpose the compensation of any person for loss or injury.
9. This view has been expressed by a number of courts asked to decide whether a civil fine or other monetary penalty qualifies as "damages" under a general liability policy specifically in Products Liability and Environmental Liability actions.
10. Punitive Damages sought in Products Liability Actions
  - a. There is nothing in the CGL Coverage Form and the Products/Completed Operations Liability Coverage Form that refers specifically to punitive or exemplary damages.
  - b. In the absence of any such language, the CGL insuring agreement is broad enough to be applicable to them, since they are "sums" that the insured is "legally obligated to pay as damages."

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- c. Damages is not a defined term in either coverage form.
- d. Each state court will determine if Punitive or Exemplary Damages are insurable.

<b>Jurisdiction</b>	<b>Directly Assessed Punitive Damages</b>	<b>Vicariously Assessed Punitive Damages</b>
Alabama	Insurable	Insurable
Alaska	Insurable	Insurable
Arizona	Insurable	Insurable
Arkansas	Insurable, Except Intentional Acts	Insurable
California	Not Insurable	Insurable
Colorado	Not Insurable	Undecided
Connecticut	Not Insurable	Insurable
Delaware	Insurable	Insurable
Florida	Not Insurable	Insurable
Georgia	Insurable	Insurable
Hawaii	Insurable	Insurable
Idaho	Insurable	Insurable
Illinois	Not Insurable	Insurable
Indiana	Not Insurable	Insurable
Iowa	Insurable	Insurable
Kansas	Not Insurable	Insurable
Kentucky	Insurable, Except Intentional Acts	Insurable
Louisiana	Insurable, Except Intentional Acts	Insurable
Maine	Not Insurable	Insurable
Maryland	Insurable	Insurable
Massachusetts	Not Insurable	Undecided
Michigan	Insurable	Insurable
Minnesota	Not Insurable	Insurable

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<b>Jurisdiction</b>	<b>Directly Assessed Punitive Damages</b>	<b>Vicariously Assessed Punitive Damages</b>
Mississippi	Insurable	Insurable
Missouri	Insurable	Insurable
Montana	Insurable, Except Intentional Acts	Insurable
Nebraska	Not Applicable	Not Applicable
Nevada	Insurable, Except Intentional Acts	Insurable
New Hampshire	Insurable	Insurable
New Jersey	Not Insurable	Insurable
New Mexico	Insurable	Insurable
New York	Not Insurable	Not Insurable
North Carolina	Insurable	Insurable
North Dakota	Insurable, Except Intentional Acts	Insurable
Ohio	Not Insurable	Not Insurable
Oklahoma	Not Insurable	Insurable
Oregon	Insurable, Except Intentional Acts	Insurable
Pennsylvania	Not Insurable	Insurable
Rhode Island	Not Insurable	Undecided
South Carolina	Insurable	Insurable
South Dakota	Undecided	Undecided
Tennessee	Insurable, Except Intentional Acts	Insurable
Texas	Undecided	Insurable
Utah	Not Insurable	Not Insurable
Vermont	Insurable	Insurable
Virginia	Insurable, Except Intentional Acts	Not Applicable
Washington	Insurable	Insurable
West Virginia	Insurable	Insurable

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Wisconsin	Insurable	Insurable
Wyoming	Insurable	Insurable
District of Columbia	Undecided	Undecided

11. Median Products Liability Judgments – The following Table shows median awards from Bureau of Justice Statistics published by the U. S. Department of Justice for 2008 (most recent statistics available)

Types of Liability Cases	Non-Punitive Damages	Punitive Damages
Products Liability Asbestos	\$309,000	\$1,100,000
Products Liability Breast Implant	\$1,108,000	
Other Products	\$176,000	\$471,000

12. The potential causes for the Products Liability Claim must be from Bodily Injury or Property Damage to the Third Party and the injury must meet these definitions to trigger coverage.

- a. Bodily Injury definition:

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

- 1) The definition implies that the injury must involve physical rather than purely mental harm for coverage to apply. The Product harmed or injured the party.
- 2) Some courts have held that mental injuries, such as anguish, emotional trauma, and the like are contemplated by the definition.
- 3) In such rulings there is usually a link to either a physical event causing the mental injury or else a mental injury which results in physical injury. (Ulcers or high blood pressure)

## Products Liability the Forgotten Coverage

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b. Property Damage definition:

- 1) Note that the policy definition covers liability for loss of use of property whether that property is damaged or not in addition to physical injury to property.
- 2) Data stored in any form of electronic media does not qualify as tangible property and any loss of such data cannot, therefore, constitute covered "property damage."
- 3) However, coverage for loss of use to tangible property like computer hardware is covered.
- 4) Many CGL risks with an identifiable loss exposure to claims of having destroyed or damaged someone else's electronic data are already subject to exclusionary endorsements which impacts their Products Liability coverage under the CGL.
- 5) Computer software designers and manufacturers, consultants, providers of data processing services, and other insureds in computer-related businesses routinely have exclusions added to their CGL policies eliminating coverage for damage to electronic data.
  - a) CG 22 75 04 13 Professional Liability  
Exclusion Computer Software
  - b) CG 22 77 04 13 Professional Liability  
Exclusion Computer Data Processing
  - c) CG 22 88 04 13 Professional Liability  
Exclusion Electronic Data Processing Services  
and Computer Consulting or Programming  
Services
  - d. CG 22 89 04 13 Exclusion Property Damage to  
Electronic Data (Computer Software  
Manufacturer)

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- e) These exclusionary endorsements eliminate coverage for all "property damage" arising out of the listed business or professional services.
  - f) This includes loss of use of computer equipment when the software or other stored data necessary for the equipment's operations is damaged or destroyed.
  - g) Remember the CG 21 06 05 14 exclusion endorsement applies to the Products/Completed Operations Coverage Form and CGL and impacts coverage.
  - h) The computer equipment itself is unquestionably "tangible property" and the loss of use of such property that has not been physically injured is itself a category of defined "property damage" and would therefore be excluded by the endorsements.
13. Any Products Liability Bodily Injury or Property Damage that is not excluded is covered under the CGL Coverage Form and the Products/Completed Operations Coverage Form.
14. The Duty to Defend a Products Liability Action is interpreted by the Courts as follows.
- a. The insurer's duty to defend is broader than its duty to indemnify and it extends beyond claims that are actually covered to those that are merely potentially covered but no further.
  - b. In an action where all the claims are at least potentially covered, the insurer has a duty to defend.
  - c. In an action where none of the claims is even potentially covered, the insurer does not have any duty to defend. This freedom is implied, rather than explicit, in the policy language.

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- d. In a "mixed" action, where some of the claims are at least potentially covered and the others are not, the insurer has a duty to defend as to the claims that are at least potentially covered but does not have a duty to defend as to those claims that are not potentially covered.
- e. These principles address the insurer's duty to defend in the sense that such a duty entails the actual payment of defense costs.
- f. Court can apply the FOUR CORNER TEST to determine if there is a duty to defend a Products Liability Action.
  - 1) Under this test, the insurer compares the policy with the complaint in the underlying action.
  - 2) If such comparison reveals that the insurer would be required to pay a judgment in the event the allegations in the complaint were sustained, the insurer must defend the complaint.
  - 3) Any doubts would be resolved in favor of the insured.
- g. Court can apply the "Extrinsic Facts Test" to determine if there is a duty to defend a Products Liability Action.
  - 1) Under the "Extrinsic Facts Test," the duty to defend is determined by examining the policy, the complaint, and all facts known to the insurer from any source.
  - 2) In the majority of jurisdictions where this view prevails, the court would perform a traditional four corners analysis first and then the court would examine any additional information known (or knowable) to the insurer.
- h. The insurer has the following five courses of action open to it when a legitimate issue of coverage exists in a Products Liability Action under the CGL or the Products/Completed Operations Liability Coverage Form.



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- 1) It could flatly refuse to investigate, defend, or take any part in negotiations with the claimant or his or her counsel.
- 2) It could secure a non-waiver agreement from the insured to permit the insurer to make all necessary investigations while conducting the defense.
- 3) It can serve the insured with a "reservation of rights" indicating that it will investigate and defend the action, while reserving the right to refuse to pay a judgment against the insured if a valid bar to coverage exists.
- 4) It may file a declaratory judgment action seeking a judicial determination of its rights and obligations at an early stage of the case.
- 5) It may defend the claim without reservation and pay up to the policy limits in a judgment returned against the insured.

### **B. Occurrence Policy Insuring Agreement Coverage A – Bodily Injury and Property Damage for Products Liability Coverage and Stand-Alone Products/Completed Operations Liability Coverage Form CG 00 37 04 13**

1. Paragraph b. of the Coverage A insuring agreement differs between the occurrence form (CG 00 01) and the claims – made form (CG 00 02).
2. Paragraph b. of the Stand-Alone Products/Completed Operations Liability Coverage Form differs between the occurrence form (CG 00 37) and the claims-made form (CG 00 38)
3. This paragraph establishes the outer parameters within which coverage under the policy may apply with respect to causation, geography, and time.
4. A Products Liability claim under an Occurrence Policy will require that the injury or damage must also have taken place during the policy period.

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5. Note that the key to triggering coverage under the occurrence form is when the injury or damage takes place.

### **CG 00 37 04 13 and CG 00 01 04 13 [Read the Same]**

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

6. This paragraph establishes the outer parameters within which coverage under the policy may apply with respect to causation, geography, and time.
7. A Products Liability claim under an Occurrence Policy will require that the injury or damage must also have taken place during the policy period.
8. What does during the policy period mean for a products liability claim?

ABC Manufacturing, Inc., your client just called to tell you that Larger Corporation are purchasing him. Larger Corporation will make an asset purchase for the entire injection plastic mold machinery manufacturing processes owned your client. Larger Corporation will not indemnify ABC Manufacturing, Inc. Your client announces that this is an excellent time for him to retire since the manufacturing operations are being moved to the headquarters of Larger Corporation. He retires after the sale closes and he no longer purchases any insurance coverages.

Three years after the sale, an injection plastic mold machine malfunctions during a normal maintenance procedure conducted as per the instructions provided. The machine removes the left arm of the maintenance technician and both the Workers Compensation Carrier, and the injured Technician have filed a lawsuit seeking damages for this machine manufactured seven years before the sale of the company.

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Will your ex-client have coverage under the numerous Commercial General Liability Coverage Forms with Products and Completed Operations coverage purchased up to the sale of the company? Will defense be granted?

- a. The loss occurred three years after the client ceased purchasing insurance coverages.
- b. ABC Manufacturing, Inc. must demonstrate three criteria on the based on the past CGL insuring agreements to assert coverage.
  - 1) That it is legally obligated to pay certain sums as damages because of "bodily injury"
  - 2) That the "bodily injury" was caused by an "occurrence" (i.e., an accident)

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

- 3) That the "bodily injury" took place during the policy period of its CGL policy
- c. ABC Manufacturing can only demonstrate two out of the three conditions for coverage.
- d. Products and Completed Operations Coverage of the CGL does not override the timing issue "during the policy period."
- e. Products and Completed Operations Coverage does not extend the policy period for claims reported after the policy expires.
- f. The fact that a CGL policy existed when the plastic injection mold machine was manufactured does not provide coverage for this claim.

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- g. AN OCCURRENCE BASED CGL OR STAND-ALONE PRODUCTS/COMPLETED OPERATIONS POLICY APPLIES TO THE PLASTIC INJECTION MOLD MACHINE ONLY IF THE BODILY INJURY OR PROPERTY DAMAGE TAKES PLACE DURING THE POLICY PERIOD.
- h. Potential Solutions to the Problem
  - 1) Protection against such claims is usually negotiated as a condition of the purchase, and the source of that protection is usually the insurance program of the organization doing the acquisition.
  - 2) Wholesale or Surplus lines market should be contacted to purchase a Claims Made Contract for previously manufactured equipment.
  - 3) *Continuum from Chubb<sup>SM</sup>* offers the following insurance protection options that should be considered.
    - a) Successor Liability Insurance that helps protect the buyer of a business against the risk of future claims made against them, arising from the prior acts of an acquired company.
    - b) Discontinued Products Liability Insurance that helps protect either the buyer or seller of a business against the risk of claims against them for future occurrences stemming from discontinued products or completed operations.
    - c) Retroactive Limits of Liability Insurance that helps provide protection against future claims that exceed the protection under insurance available for prior years Liability Trigger.
    - d) Conversion Insurance that helps provide protection should a gap in coverage occur

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when a company converts its insurance from a claims-made or reported policy to a more standard occurrence-based policy.

- 4) Self-Insure with set aside funds to pay for legal defense and resulting damages.
  - 5) If ABC Manufacturing, Inc. was on a Claims Made policy, the purchase of Supplemental Extended Reporting Period (SERP) tail coverages would not have helped in this case.
  - 6) Please note below that the SERP only extends the CGL policy to include claims made against an insured during the extended reporting period that result from bodily injury or property damage that took place when the policy was in effect.
- i. The “Key Issue” is that there must be an occurrence which includes an accident to trigger the coverage.

Advanced Environmental Recycling Technologies (AERT) is named in a suit by customers seeking damages based on allegations that AERT’s Choice Dek products were vulnerable to mold, mildew, and fungal growth. The claims were based upon allegations that AERT’s products were defectively designed and manufactured, not suitable for their intended use, and not suitable for use as they were warranted and represented.

The court stated that, “[s]ignificantly, the only damage alleged in the Mold Lawsuits is to the AERT products themselves and to any additional property or people.”

The court determined that the Mold Lawsuits did not allege an occurrence but stated that “[w]e hold that the events alleged in the Mold Lawsuits were not ‘accidents’ under the Umbrella Policies. We conclude that the Mold Lawsuits do not allege an ‘occurrence’ and therefore hold that ASLIC did not have a duty to defend the Mold Lawsuits.”

Advanced Environmental Recycling Technologies, Inc. v American International Specialty Lines Insurance Co. U.S. Ct. of Appeals, 5<sup>th</sup> Cir, no 09-11705 (Oct 2010)

### **C. Claims Made Policy Insuring Agreement Coverage A – Bodily Injury and Property Damage for Products Liability Coverage and Stand-Alone Claims Made Products / Completed Operations Liability Coverage Form**

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1. Paragraph b. of the Coverage A insuring agreement differs between the occurrence form CG 00 01 and the claims-made form CG 00 02.
2. Paragraph b. of the Stand-Alone Products/Completed Operations Liability Coverage Form differs between the occurrence form (CG 00 37) and the claims-made form (CG 00 38)
3. Both forms set the outer parameters within which coverage under the policy may apply with respect to causation, geography, and time.

### **CG 00 38 04 13 and CG 00 02 04 13 [Read the Same]**

- 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";
  - (2) The "bodily injury" or "property damage" did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and
  - (3) A claim for damages because of the "bodily injury" or "property damage" is first made against any insured, in accordance with paragraph c. below, during the policy period or any Extended Reporting Period we provide under Section V – Extended Reporting Periods.

4. Retroactive Date Issues
  - a. The problem with occurrence coverage (from the insurer's perspective) is, as has been explained, the possibility that bodily injury or property damage during the policy period will not produce a claim until several years later.
  - b. A corollary problem with claims-made coverage, the possibility that a claim made during the policy period will stem from BI or PD that occurred years in the past.

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- c. This is a particularly severe problem for claims-made insurers since claims alleging injury or damage from previous years are difficult to investigate and defend.
- d. Bodily injury or property damage that occurred before the RETROACTIVE DATE will not be covered by the policy even if the injury or damage produces a claim during the policy period.

A purchaser of your client's product is injured by that product on September 1, 2010.

The insured purchases a claim made CGL policy that takes effect on January 1, 2011, which is the policy's inception date as the retroactive date as well.

The injured customer does not make a claim against the insured until September 1, 2011, within the statute of limitations.

Even though the claim is made during the claims-made policy period, there will be no coverage under the policy because the bodily injury took place before the policy's retroactive date.

- e. The occurrence definition may create coverage in some instances for products liability exposures that occurred before the Retro Date. (Continuous or repeated exposures)

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

- 1) In the case of injury that takes place over a prolonged period as is true with some claims against pharmaceutical companies brought by claimants who took drugs over a period of months or years, a retroactive date may not operate to eliminate coverage.
- 2) As long as any portion of the bodily injury occurred after the retro date and the bodily injury claim is first made during the policy period, there is a covered occurrence.

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- f. Insurance Services Office Commercial Lines Manual rule 33.C of Division 6 governing the commercial general liability policy limits the ability of insurers to advance a retro date, specifying only four sets of circumstances permits the move.
  - 1) A change of insurer
  - 2) A substantial change in the insured's operations that results in an increased loss exposure
  - 3) Failure of the insured to give the insurer information that the insurer requests, or that was material to the insurer's acceptance of the risk
  - 4) A request for retro date advancement by the insured
- g. When one of these four sets of circumstances exists and the insurer advances the policy's retroactive date, the insurer must inform the policy's first named insured of the availability of an extended reporting period, to cover the resulting coverage gap, and obtain written acknowledgment from the first named insured that this option has been presented.

### 5. Basic Extended Reporting Periods (BERP)

- a. Claims – made coverage requires the insured to maintain policies in effect for as long as claims are anticipated.
- b. This aspect of the coverage creates problems for clients who cannot continue purchasing insurance on precisely the same terms as that already in force to cover these anticipated claims.
  - 1) The insurance company may simply cancel the client's policy.
  - 2) If the client is unable to replace the policy or is able to replace the policy with a new claim – made policy with a new, later retroactive date, there will be gaps in the insured's coverage.



## Products Liability the Forgotten Coverage

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- c. The ISO in an attempt to avoid coverage gaps created by a discontinuity in the provisions of an insured's claims – made coverage, the Claims – Made CGL policy contains provisions that require the insurer to make extended reporting period (ERP) coverage available the conditions.

### **SECTION V – EXTENDED REPORTING PERIODS [CG 00 38 04 13]**

1. We will provide one or more Extended Reporting Periods, as described below, if:
- a. This Coverage Part is cancelled or not renewed; or
  - b. We renew or replace this Coverage Part with insurance that:
    - (1) Has a Retroactive Date later than the date shown in the Declarations of this Coverage Part; or
    - (2) Does not apply to "bodily injury" or "property damage" on a claims-made basis.
2. Extended Reporting Periods do not extend the policy period or change the scope of coverage provided. They apply only to claims for "bodily injury" or "property damage" that occurs before the end of the policy period but not before the Retroactive Date, if any, shown in the Declarations;

Once in effect, Extended Reporting Periods may not be cancelled.

- d. As specified above in Section V of CG 00 38 04 13, client is entitled to an extended reporting period in any of the following situations:

- 1) The policy is canceled or not renewed by the insurer.
- 2) The policy is canceled or not renewed by the insured.
- 3) The insurer renews or replaces the policy with one specifying a later retroactive date.
- 4) The insurer renews or replaces the policy with another policy that has an occurrence or other non-claims-made coverage trigger.

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- e. These are the circumstances in which an insured would find itself facing coverage gaps created by the nature of claims-made insurance.
- f. When one of these situations prevails, the insured is entitled to a basic extended reporting period, which applies automatically for no additional premium and lasts for up to 5 years.

**3.** A Basic Extended Reporting Period is automatically provided without additional charge. This period starts with the end of the policy period and lasts for:

**a.** Five years with respect to claims because of "bodily injury" and "property damage" arising out of an "occurrence" reported to us, not later than 60 days after the end of the policy period, in accordance with paragraph **2.a.** of the DUTIES IN THE EVENT OF OCCURRENCE, OFFENSE, CLAIM OR SUIT Condition in COMMERCIAL GENERAL LIABILITY CONDITIONS (Section **IV**); and

**b.** Sixty days with respect to claims arising from "occurrences" or offenses not previously reported to us.

The Basic Extended Reporting Period does not apply to claims that are covered under any subsequent insurance you purchase, or that would be covered but for exhaustion of the amount of insurance applicable to such claims.

**4.** The Basic Extended Reporting Period does not reinstate or increase the Limits of Insurance.

**6.** Supplemental Extended Reporting Period (SERP)

- a. The BERP provided in CG 00 38 04 13, a claim made CGL client may choose to purchase the CG 27 10 Supplemental Extended Reporting Period Endorsement.
- b. SERP picks up coverage where the BERP ends, which is either 60 days or 5 years, depending on the reporting of the occurrence, and continues forever.
- c. The client must exercise this option within 60 days after the end of the policy period and must pay the required additional premium when it is due.

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5. A Supplemental Extended Reporting Period of unlimited duration is available, but only by an endorsement and for an extra charge. This supplemental period starts when the Basic Extended Reporting Period, set forth in paragraph 3. above, ends.

You must give us a written request for the endorsement within 60 days after the end of the policy period. The Supplemental Extended Reporting Period will not go into effect unless you pay the additional premium promptly when due.

We will determine the additional premium in accordance with our rules and rates. In doing so, we may take into account the following:

- a. The exposures insured;
- b. Previous types and amounts of insurance;
- c. Limits of Insurance available under this Coverage Part for future payment of damages; and
- d. Other related factors.

The additional premium will not exceed 200% of the annual premium for this Coverage Part.

This endorsement shall set forth the terms, not inconsistent with this Section, applicable to the Supplemental Extended Reporting Period, including a provision to the effect that the insurance afforded for claims first received during such period is excess over any other valid and collectible insurance available under policies in force after the Supplemental Extended Reporting Period starts.

- d. Exercising the supplemental extended reporting period option reinstates the policy's limits of liability as regards any claims not covered by the basic extended reporting period such as the 60-day and 5-year ERPs.
- e. In other words, the limits are reinstated only as regards future claims that arise from occurrences not reported to the insurer during or within 60 days after the end of the policy period, unless the claim is first made more than 5 years after the policy termination.

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6. If the Supplemental Extended Reporting Period is in effect, we will provide the supplemental aggregate limits of insurance described below, but only for claims first received and recorded during the Supplemental Extended Reporting Period.

The supplemental aggregate limits of insurance will be equal to the dollar amount shown in the Declarations in effect at the end of the policy period for the Aggregate Limit.

Paragraphs 2. Of Section III – Limits Of Insurance will be amended accordingly. The Each Occurrence Limit shown in the Declarations will then continue to apply, as set forth in paragraphs 3. of that Section.

### **D. Claims Made Policy Insuring Agreement – CGL Coverage A Bodily Injury and Property Damage for Products Liability Coverage and Products/Completed Operations Liability Coverage Form CG 00 38 04 13 – Can Exclude Specific Products Liability Loss Exposures By Endorsement**

1. An Insurance Carrier by using a Claims Made Policy for Products Exposures can be certain that claims are going to be brought during the coverage period of a policy it is about to issue, stemming from occurrences or offenses already known.
2. This knowledge might make insurers reluctant to renew your client's policy when large losses were anticipated from an accident that has already taken place, or a product line that promises to generate multiple products liabilities claims with a focus on Class Action Suits.
3. ISO has promulgated the CG 27 02 Exclusionary Endorsement, "Exclusion of Specific Accidents, Products, Work or Location," that allows an underwriter to eliminate coverage specifically with respect to individual loss exposures such as accidents, products, projects, or business locations.
4. This endorsement allows the underwriter to exclude coverage on renewal for claims arising from a particular accident(s) that is known to have occurred, specific products, specific work completed by the insured, or specific locations owned by the insured.

## Products Liability the Forgotten Coverage

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5. The Endorsement will single out individual loss exposures and because of this ability, it has come to be known within the insurance industry as the "laser beam" endorsement.
6. The endorsement provides the insured with the automatic 5-year and 60-day extended reporting periods and requires the insurer to offer a supplemental extended reporting period for the excluded exposure.
7. Two endorsements CG 27 03 and CG 27 11 are attached to the expiring policy to affect this Supplemental Extended Reporting Period (SERP).
  - a. CG 27 03 Amendment of Section V – Extended Reporting Periods For Specific Accidents, Products, Work or Locations
  - b. CG 27 11 Supplemental Extended reporting Period Endorsement For Specific Accidents, Products, Work or Locations with Amendment of Other Insurance Condition
8. An additional charge of up to 200 percent of the expiring policy premium can be made for the supplemental extended reporting period endorsement.

**E. Occurrence and Claims Made Policy Insuring Agreement – CGL Coverage A – Bodily Injury and Property Damage for Products Liability Coverage and Products/Completed Operations Liability Coverage Form (CG 00 37 and CG 00 38) – Coverage Territory Impacts**

1. For coverage to apply, the alleged injury or damage must have been caused by an occurrence within the coverage territory which means that the agent/broker must be aware of where the products are being sold.

- b.** This insurance applies to "bodily injury" and "property damage" only if:
- 1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

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2. The coverage territory is defined in the policies' definitions, and this is especially IMPORTANT TO PRODUCTS LIABILITY COVERAGE.

"Coverage territory" means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in a. above; or
- c. All other parts of the world if the injury or damage arises out of Goods or products made or sold by you in the territory described in a. above;

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

3. The third clause c. in this definition makes the coverage territory worldwide and subparagraph (1) applies to products of the insured that have been manufactured or sold in the United States, Puerto Rico, or Canada and transported to another area of the world.
4. There is coverage for liability arising from these products no matter where the injury or damage occurs, as long as the suit for damages is also brought in the United States, Puerto Rico, or Canada.
5. CG 24 22 04 13 AMENDMENT OF COVERAGE TERRITORY  
WORLDWIDE COVERAGE
  - a. For Products Liability Exposures, this endorsement replaces the basic policy definition of "coverage territory" with one that refers simply to "anywhere in the world".
  - b. Strict liability for product "defects" is not a purely American concept.

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- 1) Most of the rest of the industrialized world does not view fault as necessary to establish product liability.
  - 2) The scope of products liability may be broader in foreign jurisdictions, although damage awards may continue to be lower abroad.
  - c. The only exceptions to this worldwide coverage apply to countries upon which economic sanctions or trade embargoes have been imposed by the United States government.
  - d. The laws of foreign countries can sometimes interfere with or complicate recovery of insured losses, the endorsement specifically makes provisions for these complications.
    - 1) If local laws prevent the CGL insurer from providing the insured with a defense, then defense costs incurred by the insured will be reimbursed as a supplementary payment.
    - 2) If the insurer is prevented for any reason from paying covered damages on behalf of the insured, the amount of those damages will be reimbursed to the insured.
  - e. If the laws of the country in which the insured is conducting operations require the purchase of specific insurance from an insurance company domiciled in the foreign country, then the CGL policy will function as excess insurance over that foreign insurance and will apply as if such other insurance is in force even if the insured has not purchased or maintained the required foreign insurance.
6. CG 24 23 04 13 AMENDMENT OF COVERAGE TERRITORY  
ADDITIONAL SCHEDULED COUNTRIES
  7. CG 24 24 04 13 AMENDMENT OF COVERAGE TERRITORY  
WORLDWIDE COVERAGE WITH SPECIFIED EXCEPTIONS

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8. May need to have a Foreign Coverage Program that the primary Products/Completed Operations Liability Coverage Form coordinates with for complete defense and damages payments.

**F. Knowledge of Products Liability Claim in the Occurrence Policy Insuring Agreement – Commercial General Liability Coverage Form Coverage A Bodily Injury and Property Damage (CG 00 01 04 13) and Products/Completed Operations Liability Coverage Form (CG 00 37 04 13)**

1. The provisions of paragraphs b. (3), c., and d. make it clear that knowledge on the part of an insured or other specified person of such injury or damage will prevent coverage from being triggered under any subsequent policy.

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

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

2. The provisions of paragraphs c. make it clear that unknown claims on the part of an insured or other specified person of such injury or damage prior to the policy period will be covered.

**c.** "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.



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3. Injury or damage that occurs during a CGL policy period and continues to occur after the expiration of that policy period will nonetheless be covered in its entirety by that policy, subject to policy limits.

d. "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.

4. Those insured persons are as follows: individual named insureds and their spouses; partners and joint venturers in a named insured partnership or joint venture, and their spouses; members and managers of a named insured limited liability company; executive officers, directors, and stockholders of other named insured organizations.
5. Knowledge of injury or damage also means knowledge on the part of an "employee" who has been authorized by the named insured to give or receive notice of an occurrence or claim.
6. Knowledge Manuscript endorsement for policy.

**Knowledge of an occurrence or an offense by your agent, your servant, or your employee will not in itself constitute knowledge to you unless the Director of Risk Management (or individual with similar or equivalent title) or his/her designee, at the address shown in the policy declarations, will have received such notice.**

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7. NOTE: The policy in effect when the insured does come to know of the injury or damage will be the last policy to provide any coverage for any continuation of that injury or damage.
- a. The Occurrence Limits on that policy apply
  - b. The Products Completed Operations Aggregate on that policy applies to the claims.
  - c. The Excess Liability Program in place at that time will also apply.

**G. Care, Loss of Services, Death from a Products Liability Claim in Both Occurrence Policy, and Claims Made Policy Insuring Agreements – Commercial General Liability Coverage Form Coverage A for Bodily Injury and Property Damage (CG 00 01 and CG 00 02) and Products/Completed Operations Liability Coverage Forms (CG 00 37 and CG 00 38)**

1. The provisions in paragraph e. of the occurrence form insuring agreement, and paragraph c. of the claims-made insuring agreement, are for the purpose of including within the scope of bodily injury coverage any damages for care, loss of services, or death.

**CG 00 37 and CG 00 01 [Both Read the Same]**

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. In the case of the claims-made form, the provisions also fix in time which particular CGL policy will respond to a claim for either bodily injury or property damage.

**CG 00 38 and CG 00 02 [Both Read the Same]**

- c. A claim by a person or organization seeking damages will be deemed to have

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been made at the earlier of the following times:

- (1) When notice of such claim is received and recorded by any insured or by us, whichever comes first; or
- (2) When we make settlement in accordance with paragraph a. above.

All claims for damages because of "bodily injury" to the same person, including damages claimed by any person or organization for care, loss of services, or death resulting at any time from the "bodily injury" will be deemed to have been made at the time the first of those claims is made against any insured.

All claims for damages because of "property damage" causing loss to the same person or organization will be deemed to have been made at the time the first of those claims is made against any insured.

### H. Who is Insured Impact

1. Named Insured on the Policy Declarations Page is especially important in providing coverage for past, current, or future products owned by your client.
  - a. Identify all past, current, or future subsidiaries that manufactured or processed products that could create liability.
  - b. It is wise to use a Broad Form Named Insured Endorsement to cover all of these entities.
  - c. Insurance companies will vary on whether they will use the following manuscript language, but it should be negotiated.

The named insured includes all subsidiaries, affiliated, associated, controlled, or allied companies, corporations, or firms now or hereafter constituted in which there is common ownership of more than fifty (50) percent and for which similar coverage is not otherwise more specifically provided. Also included is any individual who owns more than fifty (50) percent of the voting power of any of the above entities.

This insurance shall be excess over any other valid and collectible insurance available to the above entities but only to the extent that the amount of loss exceeds the limit of liability of the other insurance, and then only for an amount not

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exceeding the difference between any higher applicable limit of liability stated in the declarations of this policy and the limit of liability of the other insurance.

The person or organization first named in Item 1 of the declarations, by acceptance of this policy, is authorized to act and agrees to act on behalf of all persons or organizations insured under the policy with respect to all matters pertaining to the insurance afforded by the policy, including the giving or receipt of notice of cancellation, the payment of premiums, and the receiving of return premiums, if any, and of such dividends as may be declared by the insurer.

### 2. Completed Operations exposure for Joint Ventures

- a. Remember that the "Who is Insured" section excludes unnamed joint ventures for contractors.

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

- b. Add a manuscript endorsement to cover the completed operations exposure.
- c. The coverage is excess over any other coverage available under a policy purchased specifically for the joint venture, including the products-completed operations extension.
- d. In this way, the contractor receives the full benefit of the coverage provided by the joint venture, and also has protection under its own policy after the joint venture's coverage expires or is exhausted by claims.
- e. Notice that the coverage granted by this endorsement applies only to the named insured contractor; neither the joint venture itself nor other participants have coverage under this policy.

With respect to "your work," you are an insured for your liability arising out of the conduct of any partnership or joint venture of which you are or were a partner or

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member, even though such partnership or joint venture is not shown as a Named Insured in the Declarations.

This coverage is excess over any available liability insurance purchased specifically to insure the partnership or joint venture.

This coverage will not inure to the benefit of any party except you.

3. In addition, the purpose of the Who is Insured section in the Commercial General Liability Coverage Forms is to enumerate who, other than the named insured(s) listed in the policy declarations and referred to throughout the policy as "you," has insured status without having to be added as an insured by endorsement. Any reference in the policy to the term "insured" includes these organizations or individuals.
4. Additional Insured – Vendors Endorsement – CG 20 15 12 19
  - a. Endorsement gives insured status under a manufacturer's or distributor's CGL policy to certain named persons or organizations with respect to their distribution or sale of the named insured's products and only "applies to the extent permitted by law."
  - b. Similar to the Additional Insured endorsements CG 20 10 and CG 20 37 for contractors contractual requirements.

**A. Section II – Who Is An Insured** is amended to include as an additional insured any person(s) or organization(s) (referred to throughout this endorsement as vendor) shown in the Schedule of this endorsement, but only with respect to liability for "bodily injury" or "property damage" arising out of "your products" shown in the Schedule of this endorsement which are distributed or sold in the regular course of the vendor's business. However:

1. The insurance afforded to such vendor only applies to the extent permitted by law; and
2. If coverage provided to the vendor is required by a contract or agreement, the insurance afforded to such vendor will not be broader than that which you are required by the contract or agreement to provide for such vendor.

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**B.** With respect to the insurance afforded to these vendors, the following additional exclusions apply:

**1.** The insurance afforded the vendor does not apply to:

- a.** "Bodily injury" or "property damage" for which the vendor 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 that the vendor would have in the absence of the contract or agreement;
- b.** Any express warranty unauthorized by you;
- c.** Any physical or chemical change in the product made intentionally by the vendor;
- d.** Repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;
- e.** Any failure to make such inspections, adjustments, tests, or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products.
- f.** Demonstration, installation, servicing, or repair operations, except such operations performed at the vendor's premises in connection with the sale of the product;
- g.** Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor; or
- h.** "Bodily injury" or "property damage" arising out of the sole negligence of the vendor for its own acts or omissions or those of its employees or anyone else acting on its behalf. However, this exclusion does not apply to:
  - (1)** The exceptions contained in Subparagraphs **d.** or **f.**; or
  - (2)** Such inspections, adjustments, tests, or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products

- c.** The product(s) for which the coverage applies must also be specifically identified in the endorsement and coverage is no broader than required by contract. [Licensing Agreement]

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- d. The vendor's endorsement provides products liability coverage for certain vendors who distribute or sell the products in the regular course of their businesses.
- e. Attachment of the endorsement eliminates the vendors' need to purchase separate products liability coverage in connection with the scheduled products as long as the vendor does not conduct any of the excluded operations listed in the endorsement.
- f. More commonly, however, vendors will still have a need to purchase their own products-completed liability coverage to insure exposures arising from other products or operations.
- g. In cases where a vendor does carry a separate CGL or products liability policy, care should be taken that that policy will serve as EXCESS insurance over the coverage provided to the vendor by the vendor's endorsement.
- h. The CG 20 15 12 19 – Excess Provision – Vendors is a standard endorsement for use with either the CGL or the stand-alone products liability coverage form.

**C.** With respect to the insurance afforded to these vendors, the following is added to Section III – Limits Of Insurance:

If coverage provided to the vendor is required by a contract or agreement, the most we will pay on behalf of the vendor is the amount of insurance:

1. Required by the contract or agreement; or
  2. Available under the applicable Limits of Insurance shown in the Declarations;
- whichever is less.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

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- i. Robert Weaver v. CCA Industries, Inc. v. New York Marine & General Insurance Company, No. 07-30597, 5<sup>th</sup> Cir. (May 27, 2008)
  - 1) Plaintiff Robert Weaver brought this lawsuit to recover for injuries he allegedly sustained from ingesting Permathene, a product sold by CCA.
  - 2) In 1995, Weaver began taking Permathene, an over-the-counter diet drug/appetite suppressant which containing phenylpropanolamine (“PPA”).
  - 3) Eleven (11) days after he began taking Permathene, Weaver suffered a hemorrhagic stroke.
  - 4) Weaver contends that the PPA in Permathene caused his stroke.
  - 5) Weaver filed this products liability against CCA, as manufacturer and seller of Permathene.
  - 6) Weaver contends that Permathene was unreasonably dangerous due to defective manufacture and design, Permathene failed to conform to CCA’s express warranty, CCA failed to provide an adequate warning regarding the risks associated with Permathene, and CCA negligently failed to adequately and thoroughly test Permathene.
  - 7) CCA sells and markets Permathene, Phoenix manufactures the product for CCA.
  - 8) Phoenix uses a formula provided by CCA.
  - 9) Phoenix combined the component Permathene ingredients in its factory and then shipped the product in bulk to CCA to be packaged and labeled.
  - 10) CCA marketed Permathene for sale to the general public at retail outlets.



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- 11) Weaver has not asserted any claim against Phoenix directly.
- 12) CCA made demands on Phoenix's insurer, NY Marine, for defense and indemnification of any damages it might have to pay Weaver under the Vendor's Endorsement on Phoenix's Claims-Made Products/Completed Operations Liability Insurance Policy.
- 13) NY Marine declined coverage and the request for defense in July 2002, and again in May 2006.
- 14) CCA was not a named insured under the Phoenix Policy and does not claim coverage on this basis but only under the Vendor's Endorsement only.
- 15) Louisiana Insurance law applies to the interpretation of the policy.
- 16) CCA was a vendor under the endorsement but under Louisiana law, vendor's endorsements "have been interpreted as providing coverage where the vendor is found strictly liable for selling a defective product and excluding coverage where the vendor is found to be independently negligent [sole negligence]."
- 17) Weaver's claim asserts the CCA was independently negligent in a number of respects as well as being strictly liable as per the statute.
- 18) CCA could be held liable under the statute as a manufacturer due to the fact that CCA labels the product and sells it on its own and strict liability will apply.
- 19) NY Marine argues that exclusion 1(b)(iv) excludes coverage for this claim because CCA "labeled" the product after Phoenix sold the product in bulk to CCA.

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- 20) Several cases have stated that if this exclusion is to apply because of relabeling, then the injury must arise out of the relabeling or out of the use of the insured's product as part of another product in order for coverage to be excluded.
- 21) There must be a nexus between the alteration and the injury.
- 22) Should coverage be provided to CCA under Phoenix's policy written by NY Marine?
- 23) Answer: \_\_\_\_\_

j., Please note the limitation of coverage to other organizations that supply components to the final product manufactured or processed by your client.

2. This insurance does not apply to any insured person or organization, from whom you have acquired such products, or any ingredient, part, or container, entering into, accompanying, or containing such products.

- 5. Be careful in naming the insured and adding the additional insureds to the products and completed operations hazards exposures.

### **V. PRODUCTS-COMPLETED OPERATIONS HAZARD – PRODUCTS-COMPLETED OPERATIONS LIABILITY COVERAGE FORM (CG 00 37 and CG 0038) AND COMMERCIAL GENERAL LIABILITY COVERAGE FORM (CG 00 01 and CG 00 02)**

#### **A. Key Definitions for Coverage**

- 1. Your Product
  - a. The term "your product" figures in a number of CGL policy provisions, including damage to the named insured's product arising out of the product, damage to impaired property, and product recall.

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- b. The definition of "your product," together with the definition of "products-completed operations hazard," determines what types of bodily injury and property damage losses fall into the category of products liability losses.

"Your product":

- a. Means:
  - (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
    - (a) You;
    - (b) Others trading under your name; or
    - (c) A person or organization whose business or assets you have acquired; and
  - (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
- b. Includes:
  - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance, or use of "your product;" and
  - (2) The providing of or failure to provide warnings or instructions.
- c. Does not include vending machines or other property rented to or located for the use of others but not sold.

- c. Covers the four major product defect legal actions
  - 1) Design Defects
  - 2) Manufacturing Defects

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- 3) Marketing Defects
- 4) Covers the Contract action for warranty liability as well.

### 2. Your Work

- a. The definition of "your work," together with the definition of "products-completed operations hazard," determines what types of bodily injury and property damage losses fall into the category of completed operations liability losses.
- b. The distinction also allows the policy to apply certain exclusions specifically to the named insured's work or to completed operations and provides a mechanism whereby this coverage can be completely eliminated from the policy by endorsement.

#### "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.

### **B. Key Definition for Establishing Which Aggregate Policy Limit Applies**

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1. The definitions of "products-completed operations," "your product," and "your work" provide a mechanism by which the CGL policy can treat products and completed operations coverage separately from the other coverages.
2. The ISO CGL, by relying on these definitions treats coverage of these exposures uniquely in the following ways.
  - a. It establishes a separate aggregate limit for such losses.
  - b. It makes it possible to exclude coverage of the products-completed operations exposure completely with the Exclusion Products-Completed Operations Hazard Endorsement – CG 21 04 11 85.
  - c. It allows the policy to apply certain exclusions specifically to this coverage, such as the damage to products exclusion and products recall exclusion.
3. The Products Hazard concerns itself only with bodily injury and property damage liability – Coverage A in the CGL and in the stand-alone Products/Completed Operations Liability Coverage Form.

"Products-completed operations hazard":

- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

- a. The first test as to whether bodily injury or property damage falls within the hazard is the location of the occurrence.
- b. To fall within the hazard, the injury or damage must occur away from the insured's premises.
- c. Endorsement can modify this requirement\_  
CG 24 07 01 96, Products-Completed Operations Hazard

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Redefined for insured restaurants because the "product," food, is consumed on premises.

- d. The second test is that the injury or damage must be caused by products that are no longer in the insured's physical possession.
- 4. The Completed Operations Hazard concerns itself only with bodily injury and property damage liability – in Coverage A of the CGL and in the stand-alone Products/Completed Operations Liability Coverage Form.
  - a. All bodily injury and property damage arising out of the insured's completed work where the injury or damage occurs away from premises owned or controlled by the insured.
  - b. The definition includes a three-part test for determining when work is completed.

"Products-completed operations hazard":

- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except: . . .
  - (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
    - (a) When all of the work called for in your contract has been completed.
    - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
    - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

## Products Liability the Forgotten Coverage

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Work that may need service, maintenance, correction, repair, or replacement, but which is otherwise complete, will be treated as completed.

- c. First requirement for completion is that all operations to be performed by or on behalf of the named insured under the contract have been completed.
  - 1) This is at a location other than the client's premises.
  - 2) Machinery removed from the customer's location, repaired, and then replaced at the site is included.
  - 3) Testing of machinery would not fall under the completed operations hazard definition and coverage would come under premises and operations liability coverage.
- d. Second requirement for completion is that all operations to be performed by or on behalf of the named insured at the site of the operations have been completed.
  - 1) Recognizes the possibility of a single contract encompassing several projects at different sites.
  - 2) The completion of all work at any one of these sites will cause losses at that particular site to come under the completed operations hazard.
  - 3) Impacts trade contractors or multiple unit builders where, once it is deemed that the project is complete, any defects that cause bodily injury or property damage are said to be part of the completed operations hazard.

**Ace Electrical has a contract to install upgraded electrical wiring and fiber optic cable in three office buildings for Acme REIT. Once Ace Electrical completed the installation at the first office building, that job is considered completed.**

## Products Liability the Forgotten Coverage

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**Therefore, any bodily injury or property damage that may arise from the first building will be included in the products and completed operations hazard, even though the other two office buildings have not been completed.**

- e. Third requirement for completion states that operations are deemed complete when the portion of the work out of which the loss arises has been put to the use intended.

Circus Builders is constructing a three (3) story building that is intended to be sold as twenty (20) residential condominium units. Even though Circus is still constructing units on the second and third floor, the owner of the building sells four units, and they are occupied by the new owners.

Bodily injury or property damage that may arise out of the four occupied units will be considered to fall within the definition of products and completed operations hazard since the units have been put to their intended use as residential housing. The remainder of the project would not be considered completed since the work has not been completed and there is only one site for this project.

- f. The products and completed operations hazard definition also applies even if the completed work as defined above may need subsequent service, repair, or replacement.
  - a. Subsequent repairs to doors or other items because of a punch list for the occupied units is considered covered under the Circus Builders Products and Completed Operations Hazard Coverage and not operations coverage.
  - b. However, injuries to the occupants while doing the repair work will be under the operations coverage.

### 5. Exceptions to the Products-Completed Operations Hazard Definition

- a. Three exceptions to the "products-completed operations hazard" definition apply to types of claims that would otherwise come within the hazard.



## Products Liability the Forgotten Coverage

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- b. The transportation of insured's product.
  - 1) Coverage for this loss exposure is provided by general liability policies despite the aircraft, "auto," and watercraft exclusion.
  - 2) When the transporting vehicle is not owned or operated by or rented or loaned to any insured coverage provided.

**b.** Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

- 3) A manufacturer of Salsa engages a Common Carrier to transport its product to food wholesalers.
- 4) During the trip some of the Salsa escapes from the Common Carrier's trailer onto the highway, causing a very slippery condition that creates auto accidents that cause bodily injury and property damage to the vehicles.
- 5) The Salsa also created a pollution event that required clean up by the hazmat responders.
- 6) Since the Salsa is a product of the manufacturer and it was no longer in the manufacturer's control, the resulting claims against the manufacturer would NOT BE covered under the Products-Completed Operations Hazard but would be covered under Operations.
- 7) The Pollution Exclusion in the CGL does not apply to the above loss because a Common Carrier was transporting the product.

## Products Liability the Forgotten Coverage

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- 8) The EXCEPTION does keep certain negligent loading and unloading exposures within the definition of Products-Completed Operations Hazard.
- 9) Remember that the Products/Completed Operations Liability Coverage Form does not have a pollution exclusion. (CG 00 37 and CG 00 38)
- 10) The LOADING OR UNLOADING and not the transportation of the property is considered a Completed Operation.

**A client cement contractor overloads a contract carrier truck with sand and gravel for a road project job site. The overloading allowed rocks and small stones to fly out of the truck while moving down the road and injuring several pedestrians.**

**The bodily injury claims would be considered to fall within the Products-Completed Operations Hazard.**

### c. Tools and Equipment Exception

- 1) This exception applies with respect to the existence of tools, uninstalled equipment, or abandoned or unused materials at a job site.
- 2) Bodily injury or property damage arising from the existence of tools and other such items is the subject of premises-operations insurance rather than completed operations insurance.
- 3) This is the case even though such tools or items were used or were intended to be used in performing operations that have since been completed or abandoned away from the premises owned by or rented to the insured.

## Products Liability the Forgotten Coverage

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**b.** Does not include "bodily injury" or "property damage" arising out of:

**(2)** The existence of tools, uninstalled equipment or abandoned or unused materials; or

d. Included in the General Aggregate Exception for the CGL only.

1) A third exception to the definition removes from the products-completed operations hazard losses connected with products or operations that are subject to a so-called product included classification.

2) These classifications are prescribed for use with classes of insured risks for which the products or completed operations liability exposure is minimal or nonexistent.

a) Truckers

b) Premises – Office – Not for Profit

3) No separate premium charge is made for products-completed operations coverage for such classes of risk.

4) All covered losses under policies written for insureds with these classifications are paid under the general aggregate.

**b.** Does not include "bodily injury" or "property damage" arising out of:

**(3)** Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

5) The absence of any specified products-completed operations aggregates in policies written for risks in these classifications sometimes has led to confusion,

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but the language is clear that the loss applies to the General Aggregate Only.

6. Products-Completed Operations Aggregate Limit in the CGL and Aggregate Limit in the Products/Completed Operations Liability Coverage Form.
  - a. This aggregate limit applies to all bodily injury and property damage included in the products-completed operations hazard.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard."
2. The Aggregate Limit is the most we will pay for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

- b. The basic limit contemplated by manual rates is \$200,000, but in practice, it is typically increased to \$1 million or more.
- c. While the basic products-completed operations aggregate limit for rating purposes is the same as the general aggregate limit in the CGL, it is not mandatory that the same amount be selected for the two aggregate limits.
- d. It may be desirable to carry a higher aggregate for one of these coverages than the other in the CGL.
- e. CG 25 02 Amendment of Limits of Insurance.
- f. CG 25 03 Designated Construction Project(s) General Aggregate Limit
  - Applies to ongoing operations only, not products/completed operations hazards

### **C. Commercial General Liability Coverage A Exclusions and Products/Completed Operations Liability Coverage Form Exclusions Impact Coverage**

1. The coverage afforded by a CGL policy is shaped by the interplay of the policy's broad insuring agreement and any relevant exclusions.
2. When interpreting coverage for the products-completed operations hazard, the following exclusions, in particular, should be examined closely.
  - a. Expected or Intended Injury Exclusion (a)
  - b. Pollution Exclusion (f)
  - c. Aircraft, Auto or Watercraft Exclusion (g)
  - d. Mobile Equipment Exclusion (h)
  - e. Damage to Your Product Exclusion (k)
  - f. Damage to Your Work Exclusion (l)
  - g. Damage to Impaired Property or Property Not Physically Injured Exclusion (m)
  - h. Recall of Products, Work, or Impaired Property Exclusion (n)
3. Expected or Intended Exclusion Impact Products Liability

#### **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

## Products Liability the Forgotten Coverage

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injury" resulting from the use of reasonable force to protect persons or property.

- a. Courts have imposed the burden of proof on insurance companies to demonstrate the client's intent.
  - b. Courts require actual expectation on the part of the insured rather than an objective, "reasonably expected" test to apply the exclusion.
  - c. Exclusion does not apply anymore to drug manufacturers that follow FDA approved methods of manufacture, sales, and warnings.
4. CGL Pollution Exclusion Impact to Products Liability Coverage – Please remember that the CG 00 37 and CG 00 38 does not have a Pollution Exclusion.
- a. Off Premise Product Pollution Coverage
    - 1) A claim for bodily injury or property damage caused by an escape of the named insureds toxic product while stored for shipment in a commercial warehouse not owned by or rented to the named insured.
    - 2) The client's product is not waste.

**f. (1) (b)** At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing, or treatment of waste;

- b. Product Transported by Common Carrier Pollution Coverage
  - 1) A claim for bodily injury caused by the escape of the client toxic product from a vehicle owned by a common carrier hired to transport the product.
  - 2) The client's product is not waste.

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**f.(1) c** Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

- (i) Any insured; or
- (ii) Any person or organization for whom you may be legally responsible; or

c. Off Premise Completed Operations Pollution Coverage

- 1) A claim for bodily injury or property damage arising from a pollution incident caused by the insured contractor's faulty installation of a storage tank, pipes, or valves.
- 2) Completed operations losses of this kind are not excluded because they do not occur at a site where the insured is performing operations.
- 3) A claim for property damage caused by the escape of heating oil from a pipeline ruptured by a HVAC contractor doing repair work on a furnace.
- 4) The "pollutant" was not brought to the work site by the contractor.

**f.(1)(d)** At or from any premises, site, or location on which any insured or any contractors or subcontractors working directly or indirectly on any insureds behalf are performing operations if the "pollutants" are brought on or to the premises, site, or location in connection with such operations by such insured, contractor, or subcontractor. However, this subparagraph does not apply to: ...

d. Off Premises Pollution Remedial Completed Operations Pollution Coverage

- 1) A claim for bodily injury or property damage brought against the environmental remediation contractor when the injury or damage arises out of the contractor's completed operations.

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- 2) The contractor has ceased performing remedial operations.
- 3) While coverage for claims of this kind exists in theory despite paragraph f.(1)(e), in practice most remediation contractors' CGL coverage is subject to a separately endorsed "total pollution exclusion" which eliminates coverage of completed operations claims as well.

<b>f.(1)(e)</b>	At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insureds behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".
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- 5. CGL Aircraft, Auto or Watercraft Exclusion (g) Applied to Products Liability Coverage – Please remember that the CG 00 37 and CG 00 38 does not have an Aircraft, Auto or Watercraft Exclusion.
  - a. Exclusion g. precludes coverage for bodily injury and property damage arising out of the ownership, maintenance, use including the operation, loading, or unloading, or entrustment to others of any aircraft, auto, or watercraft, provided it is owned, operated by, rented, or loaned to any insured covered under the policy.
  - b. This exclusionary wording is quite specific as to owned, operated, rented to, or loaned to the insured any autos, watercraft, or aircraft.
  - c. Coverage will apply with respect to some autos, aircraft, and watercraft owned and operated by the insured's independent contractors with respect to whose use of vehicles the insured could become vicariously liable for in a cause of action.
  - d. Therefore, the CGL policy covers the insured's liability for bodily injury or property damage arising from its independent contractor's ownership, operation, and use of autos, aircraft, or watercraft on behalf of the insured.



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- e. The Salsa example above supports this transportation exposure created by vicarious liability of a Common Carrier.
- f. A manufacturer of Salsa engages a Common Carrier to transport its product to food wholesalers.
- g. During the trip some of the Salsa escapes from the Common Carrier trailer onto the highway, causing a very slippery condition that results in auto accidents that cause bodily injury and property damage to the vehicles.

### **g. Aircraft, Auto or Watercraft [Exclusion]**

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

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

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
  - (a) Less than 26 feet long; and
  - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

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**(5)** "Bodily injury" or "property damage" arising out of:

- (a)** The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
- (b)** The operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

6. CGL Mobile Equipment Exclusion (h) Impact to Products Liability Coverage – Please remember that the CG 00 37 and CG 00 38 does not have a Mobile Equipment Exclusion.

- a. The exception to this exclusion that impacts products and completed operations is the transportation of mobile equipment by an independent contractor of the insured.
- b. This vicarious liability for the bodily injury or property damage caused by the mobile equipment would be covered under the CGL policy because the independent contractor's vehicle is not owned by, rented to, or loaned to any insured.
- c. See above concerning the aircraft, auto, or watercraft exclusion provides coverage.
- d. Client's employees do not strap the mobile equipment properly on the flatbed trailer and it rolls off when independent contractor takes the corner too fast causing an accident.
- e. The completed operation is covered.

### **h. Mobile Equipment [Exclusion]**

"Bodily injury" or "property damage" arising out of:

- (1)** The transportation of "mobile equipment" by an "auto" owned or

## Products Liability the Forgotten Coverage

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operated by or rented or loaned to any insured; or

- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

7. Damage to Your Product Exclusion (k) Impact to Products Liability Coverage in the CGL Coverage Forms and the CG 00 37 and CG 00 38 Products/Completed Operations Liability Coverage Forms

### **Damage to Your Product [Exclusion]**

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

- a. This exclusion is intended to apply only to manufacturers and other entities that produce "products" rather than service companies such as general contractors.
  - b. The damage to your product exclusion eliminates liability coverage for property damage to the named insured's products arising from those products or any portion of them.
  - c. The exclusion applies even if portions of the product are produced by an entity other than the named insured.
  - d. The CGL Coverage Form and CG 00 37 and CG 00 38 Coverage Form are designed to cover only property damage done by the insured's product to another object or person.
  - e. Where the only damage was to the insured's own product, the cost of repairing that damage is excluded.
  - f. Note that there is no coverage to any part of the product which includes by definition containers and equipment furnished in connection with the actual product itself and damage caused by improper packaging of a product.
8. Damage to Your Work Exclusion (l) Impact to Completed Operations Coverage in the CGL Coverage Forms and the

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### CG 00 37 and CG 00 38 Products/Completed Operations Liability Coverage Forms

- a. This exclusion applies to completed operations of service and contracting firms much as the products exclusion applies to products of manufacturers, distributors, and retailers.
- b. The purpose of the exclusion is to prevent the CGL Coverage Forms and CG 00 37 and CG 0038 Products/Completed Operations Liability Coverage Forms from functioning as a warranty of the insured's work, just as the products exclusion prevents the policy from serving as a product guarantee.
- c. The exclusion eliminates coverage when property damage to the named insured's work defined as "your work" may be caused by the work itself after the work has been completed.
- d. The scope of the exclusion is governed in part by the policy's definitions of "property damage" and "your work."

#### **Damage to "Your Work" [Exclusion]**

"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.

- e. The policy includes within the concept of "your work"
  - 1) Operations performed by the named insured itself, such as construction work done directly by a general contractor.
  - 2) Operations performed by others on the named insured's behalf, such as construction work performed by the named insured's subcontractor.

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- 3) Therefore, an entire construction project qualifies as "your work" when the named insured is the general contractor in charge of the project.
  - 4) The "damage to your work" exclusion therefore becomes central in coverage disputes involving construction defect claims.
- f. By virtue of the subcontractor exception, the insured client has coverage, despite the exclusion, with respect to the following exposures.
- 1) Property damage to work performed by the insured when the damage results from the work of the insured's subcontractor.
  - 2) Property damage to work performed by the insured's subcontractor when the damage results from that subcontractor's work.
  - 3) Property damage to work performed by the insured's subcontractor when the damage results from work performed by the insured
  - 4) Property damage to work performed by the insured's subcontractor when the damage results from the work of another contractor or subcontractor
- g. The intent of the "Damage to Your Work" exclusion is to eliminate coverage with respect to work that is both
- (1) Performed by the named insured and
  - (2) Damaged by work performed by the named insured.
- h. Unless both elements are present, the exclusion does not apply.
- i. The exclusion applies only with respect to losses that come within the CGL Coverage Forms and CG 00 37 and

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CG 00 38 Products/Completed Operations Liability Coverage Forms definition of the products-completed operations hazard.

j. The cost of repairing or replacing the named insured's work other than completed operations losses may still be excluded or covered under the CGL Coverage Forms and CG 00 37 and CG 00 38 Products/Completed Operations Liability Coverage Forms most probably under the provisions of Property Damage Exclusion.

1) CGL Coverage Form Damage to Property Exclusion j. (5) – “That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or” [This exclusion is not in the CG 00 37 and CG 00 38 Products/Completed Operations Liability Coverage Form because it does not cover operational exposures.]

2) CGL Coverage Form Damage to Property Exclusion j. (6) – “That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.” [This exclusion is not in the CG 00 37 and CG 00 38 Products/Completed Operations Liability Coverage Form because it does not cover operational exposures.]

9. Damage to Impaired Property or Property Not Physically Injured Exclusion impact to Products Liability and Completed Operations Exposure in the CGL Coverage Forms and the CG 00 37 and CG 00 38 Products/Completed Operations Liability Coverage Forms

a. This exclusion is commonly referred to as the business risk exclusion.

b. It is designed to preclude "loss of use" coverage for business risks arising from the insured's failure to perform contractual

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obligations or to perform work in a skillful manner.

- c. Sudden and accidental failure of the product or work after being put to its intended use is covered.

### **Damage to Impaired Property or Property Not Physically Injured [Exclusion]**

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy, or dangerous condition in "your product" or "your work;" or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

- d. The first sentence of the Impaired Property definition sets the tone for coverage.
  - 1) The implication of this wording is that "impaired property" is property that has been physically injured.
  - 2) The impaired property exclusion thus implicitly acknowledges that incorporation of a defective component into another piece of property constitutes physical injury to that property.
  - 3) The exclusion goes on to stipulate that such physical injury even though it constitutes "property damage" is not covered if it meets the conditions set up by the "impaired property" definition.
  - 4) The CGL impaired property exclusion renders moot the question of whether property suffers physical injury when it incorporates a defective component.
  - 5) The exclusion admits that it does so but says that the resulting property damage is not covered anyway, under certain circumstances.

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"Impaired property" means tangible property, other than "your product" or "your work," that cannot be used or is less useful because:

- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate, or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

- c. The repair, replacement, adjustment, or removal of "your product" or "your work"; or
- d. Your fulfilling the terms of the contract or agreement.

10. Recall of Products, Work, or Impaired Property Exclusion Impact to Products Liability Exposures in the CGL Coverage Forms and the CG 00 37 and CG 00 38 Products/Completed Operations Liability Coverage Forms

- a. The exclusion precludes coverage for damages incurred because of the recall, repair, replacement, or loss of use of the named insured's products.
- b. This exclusion applies to work performed by the named insured, such as the costs associated with repairing or replacing faulty or shoddy work done by the named insured.
- c. This exclusion refers to "impaired property," the implication of including this in the exclusion is that the work done, or the product need not be entirely produced by the named insured.
- d. The use of the phrase "impaired property" in the exclusion also makes it clear that the exclusion does not apply if there is physical injury to property.



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### **Recall of Products, Work, or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal, or disposal of:

- (1) "Your product;"
- (2) "Your work;" or
- (3) "Impaired property;"

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy, or dangerous condition in it.

#### e. LIMITED PRODUCT WITHDRAWAL EXPENSE ENDORSEMENT CG 04 36

- 1) This endorsement allows the insured to buy back withdrawal coverage for those expenses.
- 2) The withdrawal must be a response to a known or suspected defect in the insured's product or to an incident of product tampering.
- 3) If, under such circumstances, the insured determines that a withdrawal is necessary, or if such a withdrawal is ordered by the government, limited product withdrawal expense coverage will pay a variety of resulting costs.
  - a) Notification
  - b) Announcements
  - c) Overtime to non-salaried employees
  - d) Warehousing
  - e) Hiring of consultants

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- f) Disposal
  - 4) Excluded from coverage is any withdrawal initiated solely because of the failure of the product to perform as intended unless that failure causes or is expected to cause bodily injury or property damage.
  - 5) The endorsement also will not respond to withdrawals prompted by:
    - a) Copyright or patent infringement or similar intellectual property violations
    - b) Chemical deterioration of the product unless caused by a manufacturing or transportation error, or product tampering
    - c) Expiration of shelf life
    - d) A defect known at the inception of the policy
    - e) Products specifically excluded from the policy by endorsement
    - f) Products that are the subject of a governmental ban before the inception of the policy.
  - 6) Coverage applies only to "product withdrawal expenses" and there is no defense obligation under the endorsement if the insured is sued for withdrawal or recall costs.
- f. Special Product Recall Exposures
- 1) Products Integrity Coverage
    - a) Provides protection for loss of revenue and the extra expense in recalling a product in circumstances where fear can be shown to

## Products Liability the Forgotten Coverage

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exist among the general public or customers.

- b) The cause of fear could arise from a variety of causes
- c) The cause of fear includes but not limited to actual bodily injury or property damage to humans or animals that consume the insureds product.

### 2) Products Tampering Coverage

- a) Coverage is similar to Products Integrity Coverage
- b) It covers the cost to recall, inspect, test, dispose or rehabilitate products following a known or threatened tampering incident.
- c) Includes interruption of business and lost income
- d) There are three entry points at which a foreign object or other contaminant can get into a product.
  - i) During manufacturing
  - ii) While the product is in distribution
  - iii) After purchase

### 3) Malicious Product Tampering (MPT)

- a) The policy language needs to be carefully reviewed.
- b) Any actual, alleged or threatened, intentional, malicious, and wrongful alteration or contamination of the insured products, or the

## Products Liability the Forgotten Coverage

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creation of adverse publicity implying such, whether or not by an employee of the insured, so as to render it unfit or dangerous for its intended use or consumption or to create such impression to the public.

- c) Sometimes it includes product extortion coverage.

### 4) Accidental Product Contamination (APC)

- a) Any inadvertent or unintentional contamination of an insured's product(s), which occurs during or as a direct result of its production, preparation, manufacture, packaging, or distribution that:
  - b) The contamination arises out of:
    - i) Any unintentional or inadvertent action, other than errors in formulation, design, or specifications; or
    - ii) Mislabeling; and
- c) The use or consumption of an insured product(s) has:
  - i) Resulted in or would result in bodily injury of any person(s), within one hundred and twenty (120) days following such consumption or use, or
  - ii) Caused or would cause physical damage to (or destruction of) tangible property.

### 5) Products Extortion Coverage

- a) Similar coverage characteristics as Products

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### Integrity and Product Tampering.

- b) Policy will indemnify the insured for something less than the full paid extortion amount.
- c) Any threat or connected series of threats to commit a Malicious Product Tampering of the insured product(s), for the purpose of demanding extortion monies.

### g. Product Withdrawal Coverage Form CG 00 66 04 13

- 1) Product recall expenses are excluded under the ISO Products/Completed Operations Liability Coverage Form and the Commercial General Liability Coverage Form.
- 2) Coverage of such expenses on a limited basis can be purchased under endorsement CG 04 36, but manufacturers with a significant exposure to product withdrawal losses usually purchase broader coverage under a free-standing policy.
- 3) ISO has now introduced its own version of such a coverage form CG 00 66.
- 4) The form covers Product Withdrawal Expenses (Coverage A) incurred by the insured in withdrawing its own product from the market
- 5) The form covers Product Withdrawal Liability (Coverage B), which pays on the insured's behalf any damages for product withdrawal expenses incurred by a third party.

- h. Several larger manufactures are creating OCIP type programs for products liability.
- i. Includes full wrap up coverage, and it includes coverage for all vendors and suppliers that contribute to the products

## Products Liability the Forgotten Coverage

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manufactured and sold by the entity.

- j. Each supplier and vendor purchase insurance under the program.

### **D. Completed Operations Coverage Problems Under an Owner Controlled Insurance Program (OCIP) or “Wrap Up” Coverage [CG 21 31 versus CG 21 54]**

1. These programs commonly provide full products – completed operations hazard coverage for some period of time after construction is complete.
2. Some programs will provide coverage for a period of twenty-four (24) months, the anticipated life of the construction project and then provides an additional period of coverage for thirty-six (36) to one hundred twenty months for products – completed operations hazard exposures. (May extend to cover the states Statute of Repose)
3. Remember that everyone (General Contractor and Subcontractor) is now relying upon the OCIP Liability Policy to provide protection for the entire project – premises, operations, and completed work.
4. There may not be any coverage for the General or Sub-Contractor under the OCIP program and there is no coverage under their own coverage because the work site is excluded from the policy.
5. Need to trigger defense and payment for legally obligated to pay for potential liability.

## **VI. CONCLUSION**

### **A. Product Liability and Completed Operations Liability can attach under many theories allowed in state courts today.**

1. Negligence
2. Express warranty
3. Implied warranty

## Products Liability the Forgotten Coverage

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4. Strict and absolute liability
5. Industry liability for all makers of a product
6. Insidious or progressive harm (Asbestos and Tobacco)
7. Successor liability due to merger or acquisition
8. To Mitigate the Impact of a Products or Completed Operations lawsuit, the Broker/Agent and Risk Manager should have a comprehensive loss prevention program in place.
  - a. Conscientious documentation of testing and quality control will do much to convince jurors of the manufacturers or contractors good faith.
    - 1) Testing procedures
    - 2) File on each component
    - 3) Instruction Manuals
    - 4) Warning Labels
    - 5) Accident Repair and Feedback
    - 6) Written Claims Handling Procedure
  - b. It may not guarantee dismissal of a case, but it will at least strengthen it against punitive damages and unjustified claims.
  - c. Good Broker/Agents and good Risk Managers stay aware of what is going on in research, development, engineering, and production of their client products, especially those with higher hazards, such as pharmaceuticals, foods, vehicles, machinery, chemicals, ladders, and soda pop bottles.
  - d. They should know or see to it that company procedures to assure safer products are well documented.

## Products Liability the Forgotten Coverage

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- e. They keep informed about new products by reviewing R & D expenditure authorization requests.

### **B. Broker/Agent Responsibility to Understand the Basics of How Products – Completed Operations Coverage will apply for their clients**

- 1. Active knowledge of the program design features.
- 2. Knowledge of Insurance Alternatives
  - a. Self-Insurance
  - b. Government Indemnity for military products
  - c. Federal Risk Retention Groups
  - d. Group Captives and Single Parent Captives
  - e. ISO Coverage Forms and Other Company Forms
  - f. Stand Alone Programs with a Facultative Reinsurer and layered with other Reinsurers.

### **C. Future of Products Liability and Completed Operations Liability**

- 1. Products Liability
  - a. Courts are modifying their decisions based upon the profound influence of the Restatement (Third) Products Liability.
  - b. Future actual court decisions of individual state courts (or federal courts attempting to divine and apply state law of the relevant authority) will mold and shape this area even more.



## Products Liability the Forgotten Coverage

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- c. New court decisions will either revise their product liability precedents to follow the new Restatement, or explicitly explain why they choose not to do so.

### 2. Completed Operations Liability

- a. Most construction defect claims are based on the concept of negligence. Other potential allegations in a construction defect claim include strict liability, breach of contract, breach of warranty, and intentional or negligent misrepresentation.
- b. There is a lack of uniformity in interpreting the CGL policy's scope of coverage for construction defect claims and this has made the determination of coverage challenging for even the most straightforward claim.
- c. Hundreds of cases could be cited both for and against coverage under the CGL for damage arising out of a contractor's shoddy work.
- d. Much of the debate has centered around the issue of whether the CGL policy covers insured contractors for their faulty work.
- e. Many states have taken steps to stem the tide of construction defect litigation.
  - 1) These initiatives are geared toward requiring property owners to provide contractors notice of a construction defect and an opportunity to repair defective work before a lawsuit can be filed.
  - 2) In most states, these statutes apply only to residential property.
  - 3) These statutes go by names such as "right to repair" or "right to cure" laws.
- f. Case law in this area will re-define the completed operations exposure over time.

## Products Liability the Forgotten Coverage

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3. Always add Manufactures Errors or Omissions Coverage or Technology Errors or Omissions Coverage.
  - a. Manufacturers Errors or Omissions (E & O) and Technology Errors or Omissions (E&O) insurance coverage is designed to pick up these gaps in the manufacturers and technology products liability coverage.
  - b. They respond to an insured's legal obligation to pay financial damages to any third party arising out of their negligence in designing or manufacturing their company's product.
  - c. The coverage forms provide for damages resulting from an insured's products, negligent acts and errors or omissions when caused by a material defect including:
    - 1) Property Damage to the product
    - 2) Property Damage to your work
    - 3) Property Damage to impaired property
    - 4) Damages arising as a result of property damage to your work, their product or to impaired property
  - d. Manufacturer's E&O and Technology E&O insurance is written on non-standard coverage forms that vary from carrier to carrier, so you need to be careful in selecting appropriate coverage.
  - e. Many manufacturers and technology companies assume that their commercial general liability insurance policy will cover this exposure. They would be wrong.
  - f. All manufactures and technology companies need to consider the ramifications and potential impact of how an error or omission in the production of their product could cause one (or many) their customers an economic loss.

## Products Liability the Forgotten Coverage

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- g. Most manufactures and technology companies have this exposure and need to better understand how the current general liability program will not be there to protect their balance sheet in the event of this type of loss.
- 4. Always have a Products Recall Program – 1<sup>st</sup> and 3<sup>rd</sup> party coverages.





## James K. Ruble Seminar

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### Section 3

# **The Ins and Outs of Cyber Insurance**



# The Ins and Outs of Cyber Insurance

By:  
Patrick A. Deem, Sr.  
CIC, CRIS

## **Overview**

- I. What is happening – some facts and statistics
- II. A look at exposures (NOT Coverage)
- III. Why all the other traditional policies you sell do not solve your clients ‘cyber’ problems, both from a third party and first party standpoint
- IV. Cyber Insurance
- V. Dissection of a Cyber Insurance Policy’s Definitions, Insuring Agreement, Conditions and Exclusions
- VI. Conclusion



## **I. WHAT IS HAPPENING – SOME FACTS AND STATISTICS**

### **A. Basic Problems from the Insurer's viewpoint**

1. Lack of Data
2. Cyber attacks keep evolving
3. Potential catastrophic accumulation  
(What monetary exposure do I really have?)
4. Tunnel vision on Coverage

### **B. Basic problems from the Insured's viewpoint**

1. Do not understand the risk or their insurance options: Internet of things
2. Cyber risk spread over a wide range of coverages
3. No legal precedence

## Top 10 States by Number of Cybercrime Victims, 2016

Rank	State	Number
1	California	39,547
2	Texas	21,441
3	Florida	21,068
4	New York	16,426
5	Illinois	9,177
6	Maryland	8,361
7	Pennsylvania	8,265
8	Virginia	8,068
9	Ohio	7,052
10	Washington	6,874

(1) Based on the total number of complaints submitted to the Internet Crime Complaint Center via its website from each state and the District of Columbia where the complainant provided state information.

Source: Crime Complaint Center

<https://www.iii.org/fact-statistic/facts-statistics-identity-theft-and-cybercrime>

## Top 10 Writers of Cybersecurity Insurance By Direct Premiums Written, 2016(1)

(\$000)

Rank	Group/Company	Direct premiums written	As a percent of total
1	American International Group	\$228,325	17.0%
2	XL Group Ltd.	\$160,809	12.0%
3	Chubb Ltd.	\$133,599	10.0%
4	Travelers Companies, Inc.	\$92,189	6.9%
5	Beazley Insurance Co.	\$83,908	6.3%
6	CNA Financial Corp.	\$68,476	5.1%
7	BCS Insurance Co.	\$55,411	4.1%
8	AXIS Capital Holdings Ltd.	\$50,273	3.7%
9	Liberty Mutual	\$34,343	2.6%
10	Allied World Assurance Co.	\$32,533	2.4%
<b>Total, Top 10</b>		<b>\$939,866</b>	<b>70.1%</b>
<b>Total (2)</b>		<b>\$1,340,976</b>	<b>100.0%</b>

(1) Includes stand-alone policies and the cybersecurity portion of package policies. Does not include premiums from companies that cannot report premiums for cybersecurity coverage provided as part of package policies.

(2) Direct premium written in the U.S. and its territories, Canada and other foreign territories.

Source: NAIC data, sourced from S&P Global Market Intelligence, Insurance Information Institute.

<https://www.iii.org/fact-statistic/facts-statistics-identity-theft-and-cybercrime>

## Top 10 Writers of Identity Theft Insurance By Direct Premiums Written, 2016(1)

(\$000)

Rank	Group/Company	Direct premiums written	As a percent of total
1	Nationwide Mutual Group	\$36,511	15.9%
2	State Farm Mutual Automobile Ins.	\$28,311	12.3%
3	Travelers Companies, Inc.	\$24,424	10.6%
4	State National Companies Inc.	\$15,697	6.8%
5	Allstate Corp.	\$11,816	5.1%
6	American Family Insurance Group	\$10,576	4.6%
7	Hanover Insurance Group Inc.	\$10,494	4.6%
8	Liberty Mutual	\$10,490	4.6%
9	Erie Insurance Group	\$8,131	3.5%
10	American International Group	\$7,649	3.3%
<b>Total, Top 10</b>		<b>\$164,100</b>	<b>71.4%</b>
<b>Total (2)</b>		<b>\$229,708</b>	<b>100.0%</b>

(1) Includes stand-alone policies and the identity theft portion of package policies. Does not include premiums from companies that cannot report premiums for identity theft coverage provided as part of package policies.

(2) Direct premium written in the U.S. and its territories, Canada and other foreign territories.

<https://www.iii.org/fact-statistic/facts-statistics-identity-theft-and-cybercrime>

The Center says there have been 1,339 breaches in 2017 so far (as of December 27), surpassing 2016 record of 1,093 breaches. There were 174 million records exposed so far in 2017. The business sector accounted for 51 percent of the 2017 breaches and 91 percent of records exposed. These figures do not include the many attacks that go unreported. In addition, many attacks go undetected.

[illegible]

### C. Common attack breaches

1. Advanced Persistent Threat (APT) – a single concentrated attack by allied hackers focused on a single target. It infects a system and lays dormant and leaves few traces when done. These attacks are generally after intellectual property of technology companies
2. Distributed Denial of Service (DDoS) – typically an attack on an Internal Domain. Huge amounts of data flood a system until it is brought to its knees. Legitimate site requests are lost, or the site becomes too slow to function properly. This may not necessarily involve a loss of data, but the cost to its victims is substantial.
3. Cross Platform Malware (CPM) – most malware was targeting Windows operating systems, but CPM attacks target Java, Linux, and OSX operating systems too.
4. Metamorphic and Polymorphic Malware – this malware has the ability to change code as it works its way through a system. Each version of the code makes permanent changes to its code. But each succeeding version functions the same way as the original. The longer it resides on the system, the more difficult it becomes.
5. Phishing – a perpetrator tries to fool someone by sending an email that appears it is from the bank, ISP, Investment Broker, Insurance Broker, or Credit Card Company. They ask the person to visit their website. The URL is false. They have trapped the person once their personal information is entered.

6. Insider and Privilege Misuses and Miscellaneous Errors – These are combined because they have the same application of intent.  
Misuse of privilege can be by an employee, vendor, and/or business partner who is granted privileges and they use those privileges for malicious intent  
Errors can occur from the mistaken posting of private information or forwarding protected information (patient files) to a public website or sending to the wrong recipients.
7. Physical Theft and Loss – This is important since mobile devices are so common. Theft of these devices makes the network very vulnerable. If a hacker is able to penetrate a network, the amount of data available to them is dependent on the response time of the security team and the type of attack. With Physical security, once access to a facility's security is compromised, racks of equipment can be removed and accessed.
8. Social Engineering Fraud – this refers to psychological manipulation of people into performing actions or divulging confidential information. Generally, this is a type of confidence trick for the purpose of information gathering, money fraud, or system access. It differs from a traditional “con” in that it is often one of many steps in a more complex fraud scheme. The FBI has estimated that there was a 270% increase in identified victims and losses from October 2013 to August 2015. There were in excess of 7,066 victims for an estimated loss of \$747 million

## **II. EXPOSURES – NOT COVERAGES**

### **A. Exposures - first party or third party**

1. Almost all businesses use technology to conduct business.
  - a. Wholesalers/retailers
  - b. Financial institutions
  - c. Medical, healthcare industry
  - d. Manufacturers
  - e. Offices – attorneys, engineers, accountants, etc.
  - f. Hospitality Industry – hotels, conference centers, restaurants
  - g. Construction, repair, service providers
  - h. Technology service providers and technology product providers
2. Many businesses have a cyber exposure due to some or all of the following: (not an all-inclusive list)
  - a. Collection of private information on employees, clients, vendors, etc.
  - b. Data storage both active and at rest
    - Data can be found on computer systems and/or software, including but not limited to hard drives, flash drives, disks, CD-ROMs, tapes, laptops, tablets, personal device accessories, and third-party locations (i.e., Cloud).
  - c. Access to the Internet



- d. Web site or social media presence
  - e. Integration, sharing or transmission of data and/or communications with others via the Internet
  - f. E-commerce business transactions
  - g. Credit card transactions
  - h. E&O or Professional liability
  - i. Internet of Things (IOT) and the communication systems through imbedded chips such as Smart Homes, etc.
  - j. State and Federal laws
3. Coverage intended for users of the Internet and other technological products and services. ....
- a. Includes, but is not limited to businesses that have a computer system, send or receive emails, maintain a web site, use various forms of electronic advertisements, use the Internet to transact business or download information, online sales, conduct webinars, blogging, social media, bulletin boards, contract bidding, etc.
  - b. This can also include the collections, transmission and storage of private information on consumers, employees, vendors, etc.
  - c. Care, custody or control of data exposures for others

B. Examples that could lead to a liability (third party) loss.

1. Employees make mistakes and send emails and data to others than the intended individual(s).
2. Employees intentionally send emails to others; however, sometimes the emails contain incorrect, damaging information, or information that violates the privacy of others.
3. Businesses create web sites that contain unauthorized use (infringement) of images, music, and/or documents belonging to others.
4. Businesses create web pages, bulletin boards, chatrooms, and/or post testimonials with content that defames others.
5. Businesses may receive and transmit information that contains a virus that may cause damage to another's computer system or the business enterprises' computer system may be involved in denial of service attacks on third party computer systems and web sites
6. Employees lose or have stolen laptops, PDA's, smart phones, tablets, flash drives, and/or other electronic devices that contain personal information or confidential client information both on business owned devices and employee personal devices.  
[Should have a Mobile Device Management Plan in place.]
7. An unauthorized user (hacker), former employee, or a rogue employee may break into a computer system with intent to steal data, steal intellectual property, and/or distribute information that may hurt other people/businesses. Commonly known as a cyber attack.

8. A business that suffers a denial of service (DoS) attack or a distributed denial of services (DDoS) attack can be accused of breach of contract if clients are denied access to the web site.

DoS can basically be described as an attack from one source for the purpose of preventing or disrupting the use of or access to a computer system.

DDoS can basically be described as an attack from more than one source and/or more than one location at the same time.

9. Bad programming, poor quality control of source coding, or incorrect data entry may cause the loss of information that triggers the release of non-public private information. It could also cause machine language to fail and cause product or installation failures causing damages.
10. Violation of state, federal and other country statutes, especially those associated with non-public personally identifiable financial, health or other sensitive information
  - a. Examples of Federal Statutes:
    - Health Insurance Portability and Accountability Act (HIPAA)
    - The Health Information Technology for Economic and Clinical Health (HITECH) Act
    - Graham-Leach-Bliley Act
  - b. There are data breach notification laws in the majority of states.

C. Examples that could lead to a first party loss.

1. Security breaches can result in costly notification expenses, identity theft expenses, defense expenses, regulatory proceeding expenses, fines and penalties, costs to investigate the source of the breach (forensic investigations), cost of public relations, business interruption, extra expenses, and/or costs to repair and replace data, etc.
2. A virus may cause damage to or loss or use of electronic data.
3. An unauthorized user (hacker), a former employee, or a rogue employee may alter, manipulate, damage or destroy data. Commonly known as electronic vandalism.
4. An unauthorized user (hacker), former employee or a rogue employee may breach a computer system and steal valuable data including intellectual property owned by the enterprise.
5. Unauthorized use that results the theft of money, securities and other tangible property through computer fraud by the employee.
6. A Denial of Service or Distributed Denial of Service attack could result in a loss of income generated from the web site or social media platforms.

7. An unauthorized user (hacker) could breach a computer system and demand a ransom in return for not releasing valuable information (cyber extortion)
8. Loss of reputation and brand due to a security breach.
9. Extra Expenses incurred to recertify the computer system as compliant to the Payment Card Industry Data Security Standard to allow the business to again accept credit cards.
10. Extra Expenses to research and rebuild data bases damaged by mechanical breakdown, electrical disturbances, temperature changes, humidity, theft, and other physical causes.
11. Reimbursement for “Social Engineering” business losses for the voluntary parting of money, securities, and other tangible property using a computer system.
12. Extra Expenses to clean up a business enterprise’s web site infected with malware that slows the system down and inhibits business sales.

**Note:** Keep in mind that not all of the above exposures, first and third party, will be able to be provided insurance protection or may need to be coordinated with other insurance coverages

### III. TRADITIONAL POLICIES LIMITATIONS TO CYBER EXPOSURES

#### A. First Party Policies – Electronic Data

##### 1. Commercial Property Policy (CPP) and Businessowners Policy (BOP) – Additional Coverages

###### a. Electronic Data

#### Building and Personal Property Coverage Form

##### 4. Additional Coverages

...

###### f. Electronic Data

- (1) Under this Additional Coverage, electronic data has the meaning described under Property Not Covered, Electronic Data. This Additional Coverage does not apply to your "stock" of prepackaged software, or to electronic data which is integrated in and operates or controls the building's elevator, lighting, heating, ventilation, air conditioning or security system.
- (2) Subject to the provisions of this Additional Coverage, we will pay for the cost to replace or restore electronic data which has been destroyed or corrupted by a Covered Cause of Loss. To the extent that electronic data is not replaced or restored, the loss will be valued at the cost of replacement of the media on which the electronic data was stored, with blank media of substantially identical type.

CP 00 10 10 12

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- 1) The CPP pays for the cost to replace or restore electronic data which has been destroyed or corrupted by a Covered Cause of Loss.

The BOP has similar wording. A Covered Cause of Loss under an unendorsed ISO BOP is similar to the CP 10 30 Causes of Loss –Special Form.

- 2) If not replaced or restored, the loss will be valued at the cost of replacement of the media on which the electronic data was stored, with blank media of substantially identical type.

## 2. Business Income and Extra Expense – CP 00 30 10 12

### Building and Personal Property Coverage Form

#### 4. Additional Coverages

...

##### f. Electronic Data

- (3) The Covered Causes of Loss applicable to Your Business Personal Property apply to this Additional Coverage, Electronic Data, subject to the following:
- (a) If the Causes Of Loss – Special Form applies, coverage under this Additional Coverage, Electronic Data, is limited to the "specified causes of loss" as defined in that form and Collapse as set forth in that form.
  - (b) If the Causes Of Loss – Broad Form applies, coverage under this Additional Coverage, Electronic Data, includes Collapse as set forth in that form.
  - (c) If the Causes Of Loss form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Electronic Data.
  - (d) The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for loss or damage caused by or resulting from manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, modify, maintain, repair or replace that system.
- (4) The most we will pay under this Additional Coverage, Electronic Data, is \$2,500 (unless a higher limit is shown in the Declarations) for all loss or damage sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss payment on the first occurrence does not exhaust this amount, then the balance is available for subsequent loss or damage sustained in but not after that policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.

CP 00 10 10 12

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- a. No coverage for loss or damage caused by any employee, including a temporary or leased employee, or by an entity retained by the named insured to work on that computer system.
  - Any employee includes temporary or leased employees.
- b. Most paid under the CPP is \$2,500 unless a higher limits is shown in the Declarations.

Most paid under the BOP is \$10,000 unless a higher limits is shown in the Declarations.

### 3. Interruption of Computer Operations – Electronic Data under BOP/Business Income and Extra Expense

#### a. BOP

##### q. Interruption Of Computer Operations

- (1) Subject to all provisions of this Additional Coverage, you may extend the insurance that applies to Business Income and Extra Expense to apply to a suspension of "operations" caused by an interruption in computer operations due to destruction or corruption of "electronic data" due to a Covered Cause of Loss.
- (2) With respect to the coverage provided under this Additional Coverage, the Covered Causes of Loss are subject to the following:
  - (a) Coverage under this Additional Coverage – Interruption Of Computer Operations is limited to the "specified causes of loss" and Collapse.
  - (b) If the Businessowners Coverage Form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage.
  - (c) The Covered Causes of Loss include a computer virus, harmful code or similar instruction introduced into or enacted on a computer system (including "electronic data") or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for an interruption related to manipulation of a computer system (including "electronic data") by any employee, including a temporary or leased employee, or by an entity retained by you, or for you, to inspect, design, install, modify, maintain, repair or replace that system.

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- (1) The BOP coverage extends Business Income and Extra Expense to apply to:
  - Suspension of operations
  - Caused by interruption of computer operations
  - Due to destruction or corruption of electronic data by a Covered Cause of Loss (Specified Causes of Loss as defined and Collapse. A covered cause of loss includes a computer virus, harmful code or similar instruction).
- (2) No coverage for an interruption related to manipulation of a computer system caused by any employee, including a temporary or leased employee, or by an entity retained by the named insured to work on that computer system.



## b. Business Income and Extra Expense

### d. Interruption Of Computer Operations

- (1) Under this Additional Coverage, electronic data has the meaning described under Additional Limitation – Interruption Of Computer Operations.
- (2) Subject to all provisions of this Additional Coverage, you may extend the insurance that applies to Business Income and Extra Expense to apply to a “suspension” of “operations” caused by an interruption in computer operations due to destruction or corruption of electronic data due to a Covered Cause of Loss. However, we will not provide coverage under this Additional Coverage when the Additional Limitation – Interruption Of Computer Operations does not apply based on Paragraph A.4.d. therein.
- (2) With respect to the coverage provided under this Additional Coverage, the Covered Causes of Loss are subject to the following:
  - (a) If the Causes Of Loss – Special Form applies, coverage under this Additional Coverage, Interruption Of Computer Operations, is limited to “specified causes of loss” as defined in that form and Collapse as set forth in that form.
  - (b) If the Causes Of Loss – Broad Form applies, coverage under this Additional Coverage, Interruption Of Computer Operations, includes Collapse as set forth in that form.
  - (c) If the Causes form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Interruption Of Computer Operations.
  - (d) The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for an interruption related to manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, maintain, repair or replace that system.

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- (1) No coverage under this Additional Coverage when the Additional Limitation – Interruption Of Computer Operations does not apply – based on paragraph A.4.d of that Limitation
- (2) When Special Causes of Loss is used – “specified causes of loss” plus Collapse plus Virus is provided
- (3) Any other Causes of Loss endorsed to the policy (Earthquake for example) do not apply to this Additional Coverage

#### **d. Interruption Of Computer Operations**

...

- (4)** The most we will pay under this Additional Coverage, Interruption Of Computer Operations, is \$2,500 (unless a higher limit is shown on the Declarations) for all loss sustained and expense incurred in any one policy year, regardless of the number of interruptions or the number of premises, locations or computer systems involved. If loss payment relation to the first interruption does not exhaust this amount, then the balance is available for loss or expenses sustained or incurred as a result of subsequent interruptions in that policy year. A balance remaining at the end of a policy year does not increase the amount of insurance in the next policy year. With respect to any interruption which begins in one policy year and continues or results in additional loss or expense in a subsequent policy year(s), all loss and expense is deemed to be sustained or incurred in the policy year in which the interruption began.
- (5)** This Additional Coverage, Interruption Of Computer Operations, does not apply to loss sustained or expenses incurred after the end of the "period of restoration", even if the amount of insurance stated in **(4)** above has not been exhausted.

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(4) \$2,500 maximum – annual aggregate limit – unless a higher limit is shown in the Declarations

(5) Amounts available are not available after the end of the "period of restoration"

Caution: Coverage for Computer Operations may be better provided by other coverage forms

4. Commercial Crime Coverage Forms – Loss Sustained Forms and Discovery Forms
  - a. Potential coverage provided by Insuring Agreement Selected
  - b. Employee Theft – Insuring Agreement A.1
  - c. Computer and Funds Transfer Fraud – Insuring Agreement A.6

**6. Computer And Funds Transfer Fraud**

- a. We will pay for:
  - (1) Loss resulting directly from a fraudulent:
    - (a) Entry of “electronic data” or “computer program” info; or
    - (b) Change of “electronic data” or “computer program” within:
      - (i) “Money”, “securities” or “other property” to be transferred, paid or delivered; or
      - (ii) Your account at a “financial institution” to be debited or deleted.
  - (2) Loss resulting directly from a “fraudulent instruction” directing a “financial institution” to debit your “transfer account” and to transfer, pay or deliver “money” or “securities” from that account.
- b. As used in paragraph 6.a.(1), fraudulent entry or fraudulent change of “electronic data” or “computer program” shall include such entry or change made by an “employee” acting in good faith, upon a “fraudulent instruction” received from a computer software contractor who has a written agreement with you to design, implement or service “computer programs for a “computer system” covered under this insuring agreement.

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(1) Covered property is money, securities and other property

(2) Two Components to the Coverage

- (a) Loss resulting from a fraudulent entry of data that causes money, securities or other property to be transferred to another and includes entry by an entry by an employee acting in good faith based on a fraudulent instruction received from the Named Insured’s computer software contractor
- (b) Loss resulting from a fraudulent instruction to a financial institution to transfer money or securities from the insured’s transfer account

4. Insuring Agreement **A.6.** does not cover:

**a. Authorized Access**

Loss resulting from a fraudulent:

- (1) Entry of "electronic data" or "computer program" info; or
- (2) Change of "electronic data" or "computer program" within;  
any "computer system" owned, leased or operated by you by a person or organization with authorized access to that "computer system", except when covered under Insuring Agreement **A.6.b.**

**b. Credit Card Transactions**

Loss resulting from the use or purported use of credit, debit, charge, access, convenience, identification, stored-value or other cards or the information contained on such cards.

**c. Exchanges Or Purchases**

Loss resulting from the giving or surrendering of property in any exchange or purchase.

**d. Fraudulent Instructions**

Loss resulting from "employee" or "financial institutions" acting upon any instruction to:

- (1) Transfer, pay or deliver "money", "securities" or "other property"; or
- (2) Debit or delete your account;  
which instruction proved to be fraudulent, except when covered under Insuring Agreement **A.6.a.(2)** or **A.6.b**

**e. Inventory Shortages**

Loss, or that part of any loss, the proof of which as to its existence or amount is dependent upon:

- (1) An inventory computation; or
- (2) A profit and loss computation

d. Exclusions applicable to Insuring Agreement A.6  
Computer Funds and Transfer Fraud

- (1) Loss from a fraudulent entry by another that has authorized access, not including an employee acting on instructions received from the Named Insured's computer software contractor
- (2) Loss caused by the use of credit, debit or similar cards or the information on them
- (3) Loss from the giving or surrendering of property in any exchange or purchase
- (4) Loss caused by fraudulent instructions except as otherwise provided by this coverage
- (5) Losses based on inventory or profit and loss computations

**5. Conditions Applicable To Insuring Agreement A.6.**

**a. Special Limit Of Insurance For Specified Property**

We will only pay up to \$5,000 for any one "occurrence" of loss of or damage to manuscripts, drawings, or records of any kind, or the cost of reconstructing them or reproducing any information contained in them.

**b. Territory**

We will cover loss that you sustain resulting directly from an "occurrence" taking place anywhere in the world. Territory Condition **E.1.q.** does not apply to Insuring Agreement **A.6.**

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e. Conditions applicable to Insuring Agreement A.6.  
Computer and Funds Transfer Fraud

(1) Special Limit Of Insurance for Specified Property

(a) Subject to \$5,000 per occurrence sublimit

(b) May be endorsed: **Increase Limit For  
Specified Property Subject To Special  
Limit of Insurance – CR 35 04**

(2) Territory (worldwide)

f. **Fraudulent Impersonation – CR 04 17**

- (1) Endorsement adds an additional Insuring Agreement
  - Endorsement provides coverage when the Named Insured in good faith, transfers money, securities or other property in reliance upon a fraudulent transfer instruction
- (2) Fraudulent instruction is purported issued by one or both of the following, as shown on the endorsement's Schedule:
  - (a) The insured, an employee, partner, member, manager, officer, director or trustee of the insured, OR
  - (b) A customer or vendor of the insured, with whom the insured has a written contract
  - (c) **AND** which transfer instruction proves to have been issued by an imposter without the knowledge or consent of the above person
- (3) Insured has a choice of three levels of verification of transactions
  - (a) All transfer instructions must be verified
  - (b) All transactions over a specified amount must be verified
  - (c) Verification is not required
- (4) Coverage territory is anywhere in the world

[illegible]

## IV. CYBER INSURANCE

### A. Purpose

1. Cyber Insurance is designed to protect against liability (third party) and first party claims that occur as a result of damages arising from an insured's cyber exposures.
2. Many Cyber Policies exclude Errors and Omissions due to programming, consulting, and other related services as mentioned in the previous section. It is best to purchase Technology E&O Insurance coverage for those risks in addition to Cyber Insurance.

### B. Cyber Liability Insurance (Third Party)

Liability coverage varies by insurers but many insurers offer coverage in one or more of the three exposure categories plus coverage for expenses related to cyber events that are generally triggered by Limits Of Insurance or Premium on the Declarations

1. **Content Liability** (also known as Web Site Publishing Liability)
  - a. Provides liability coverage due to any actual or alleged error, misstatement or misleading statement posted or published by an insured
    - Beware: Social media may not be covered
  - b. Broader protection than that provided by Coverage B – Personal and Advertising Injury Liability of the CGL
  - c. Coverage may include one or more of the following:
    - (1) Infringement or violation of another's copyright, title, slogan, trademark, trade name, trade dress, service mark or service name
      - (a) Example: Unauthorized use of images or music when creating a web site
      - (b) Coverage is typically not limited to advertisements



(2) Disparagement or defamation (Libel or Slander)

Examples:

- Negative comments are posted on the insured's web site about a competitor's product
- Libelous information or incorrect information is posted on the web site or sent to others via email
- The business owner hosts, owns or exercises control of chatrooms or bulletin boards where disparaging comments about products or other people are posted

2. **Privacy Liability**

- a. Provides liability coverage due to the release of non-public personal information in violation of person's right to privacy
  - (1) Could be Personally Identifiable Information (PII), Personal Financial Information (PFI), or Protected Health Information (PHI)
  - (2) Example: Employee accidentally emails personal information to wrong individual(s) [PII, PFI, or PHI]
- b. Coverage may also include liability due to the release of confidential corporate information
  - Example: Employee loses laptop containing confidential corporate or client information

3. **Security Breach Liability** (also known as Information Security Liability or Network Breach Liability)

Provides liability coverage ( including fines or penalties assessed against the insured) due to any actual or alleged neglect, breach of duty or omission by an insured that could result in the following:

- a. Security breach of a computer system
  - Example: Theft of credit card information by unauthorized users
- b. Transmittal, by e-mail or other means, of a virus to another person or organization
  - Example: Unauthorized user transmits a malicious code that infects the insured's computer system and spreads to other computer systems
- c. Denial of Service attack
  - Example: Hackers prevent authorized users from gaining access to the insured's computer system. Without access those authorized user's own operations/service may fail or suffer.

C. First-Party Losses related to a Cyber related Event

Name and coverage varies by insurers but typically is intended to cover first party or peripheral losses suffered by the named insured due to a covered cyber related event. Some insurers may include as part of their Cyber Liability Insurance Policy or offer separately as an optional coverage.

1. **Security Breach Expense** (also known as Privacy Notification Expense)

- a. Typically includes the costs to notify affected parties and may also include the costs to investigate the cause of a security breach (may be referred to as forensic investigation costs)
- b. May also provide for other reasonable expenses such as Identify theft protection or credit monitoring. Examples:
  - Hotel offers discounted rates and provides \$1 million in Identify Theft Protection to customers who have been affected by a computer security breach
  - A retail store offers free credit monitoring for a year to customers who have been affected by a computer security breach

2. **Business Income And Extra Expense** (may have a need for Extended Period of Indemnity)
- a. Pays for loss due to an interruption to the named insureds computer system resulting from a cyber-related event
  - b. Examples:
    - An online retailer's computer system is down due to denial of service attack and there is loss of revenue
    - Insured's computer system is shut down for repairs due to damage of files by a virus and there is a loss of revenue
3. **Contingent Business Interruption or Dependent Entity** (not offered by many insurers.)
- a. Pays for loss due to an interruption to the named insured's key supplier's computer system resulting from a cyber-related event
  - b. Examples
    - (1) The named insured suffers a business interruption loss because he/she cannot place his/her order with a key supplier whose computer system is shut down due to a virus.
    - (2) Cloud provider fails to protect at rest data and a breach of data occurs.
    - (3) Web site host fails to maintain security on servers for the hosted web sites and entity losses income do to online sales decrease.

4. **Extortion Threat, Ransom Payment Or Rewards Payment**
  - a. Pays for loss due an extortion threat
  - b. Examples:
    - Hacker demands money in return for not releasing stolen credit card information or for de-encryption of quarantined data
    - An outside person or organization threatens to shut down the insured's computer system if the insured does not comply with their demands
5. **Public Relations Expense** (also known as Crisis Management Expense)
  - Pays for the cost of retaining a public relations firm to protect or restore the named insured's reputation due to negative publicity resulting directly from a cyber-related event or security breach
6. **Replacement Or Restoration Of Electronic Data** (also known as cyber vandalism coverage)
  - Typically pays for the cost to replace or restore the named insured's electronic data which has been destroyed or corrupted as a result of a cyber-related event
7. Other first party coverages are available as a result of a cyber-related event are available, but are beyond the scope of this course.

## V. DISSECTION OF A CYBER INSURANCE POLICY'S DEFINITIONS, INSURING AGREEMENT, CONDITIONS AND EXCLUSIONS

A. Typically written on claims-made basis

1. Liability claims

a. Claim made during the policy period or during the applicable Extended Reporting Period.

AND

b. Wrongful acts must have occurred after the retroactive date, if any, shown on Declaration and before the end of the policy period

Policy A (new policy) Retroactive Date: 01/01/2015 Effective dates: 01/01/2015 to 01/01/2016	Policy B Retroactive Date: 01/01/2015 Effective: 01/01/2016 to 01/01/2017
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- Example 1:  
A wrongful act takes place on 11/20/2015.  
Claim made on 12/01/2015.  
Policy A responds to a covered claim.
- Example 2:  
A wrongful act takes place on 12/20/2015.  
Claim made on 01/03/2016.  
Policy B responds to covered claim.

2. First party claims, (if applicable)

- Typically pays for actual loss sustained during the policy period.

## B. Declarations

Information Security Protection Policy Declarations	
In return for the payment of the premium, and subject to all the terms and conditions of this Policy, we agree with you to provide the insurance as stated in this Policy.	
<b>Company Name:</b>	
<b>Producer Name:</b>	
<b>Named Insured:</b>	
<b>Mailing Address:</b>	
<b>Policy Period</b>	
<b>From:</b>	
<b>To:</b>	12:01 AM at the Insured's mailing address shown above
<b>Web Site Address(es):</b>	
<b>Form Of Business</b> (Check appropriate box.):	
<input type="checkbox"/> Individual	<input type="checkbox"/> Joint Venture
<input type="checkbox"/> Partnership	<input type="checkbox"/> Corporation
	<input type="checkbox"/> Limited Liability Company
	<input type="checkbox"/> Other:
<b>Retroactive Date</b> (Enter date or "none" if no Retroactive Date applies.):	
<b>Insuring Agreement 1. Web Site Publishing Liability:</b>	
<b>Insuring Agreement 2. Security Breach Liability:</b>	
<b>Insuring Agreement 3. Programming Errors And Omissions Liability:</b>	
<b>Annual Premium:</b>	\$
<b>Policy Aggregate Limit Of Insurance:</b>	\$

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1. Named Insured, Mailing Address, Policy Period
2. May or may not include Web Site Address(es)
3. Retroactive Date, if applicable

Note: Retroactive date may not be applicable to all insuring agreements

<b>Insuring Agreements, Aggregate Limits Of Insurance And Deductibles:</b>		
<b>Insuring Agreement/Coverages</b>	<b>Aggregate Limit Of Insurance</b>	<b>Deductible Amount</b>
1. Web Site Publishing Liability	\$	\$
2. Security Breach Liability	\$	\$
Defense Expenses And Fines Or Penalties (if insurable by law) In Connection With A Regulatory Proceeding – Sublimit: \$		
3. Programming Errors And Omissions Liability	\$	\$
4. Replacement Or Restoration Of Electronic Data	\$	\$
5. Extortion Threats	\$	\$
6. Business Income And Extra Expense Waiting Period Hours:	\$	\$
7. Public Relations Expense	\$	\$
8. Security Breach Expense	\$	\$
If "Not Covered" is inserted above opposite any specified Insuring Agreement, such Insuring Agreement and any other reference to it in this Policy is deleted.		
<b>If Added By Endorsement:</b>		
<b>Insuring Agreement(s) Or Coverage(s)</b>	<b>Limit Of Insurance</b>	<b>Deductible Amount</b>
	\$	\$
	\$	\$
	\$	\$
	\$	\$
	\$	\$
<b>Endorsement(s) Forming Part Of This Policy When Issued:</b>		
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4. May indicate a singular insuring agreement, or a singular insuring agreement with more than one type of coverage, or multiple insuring agreements.
  - ISO and many company specific forms have multiple insuring agreements. Coverage only applies to those indicated on the Declarations.
5. Limit Of Insurance and Deductible Amount
  - In some policies, may be an aggregate for all insuring agreements.



6. Examples of non-ISO Insuring Agreements that can found on company specific Declarations

Example 1

- A. Security and Privacy Liability Insurance
- B. Security Event Crisis Management Expense Coverage
- C. Regulatory Action Coverage
- D. Computer System Extortion Expense and Loss Coverage

Example 2

- A. Information Security & Privacy Liability
- B. Privacy Notification Costs
- C. Regulatory Defense and Penalties
- D. Website Media Content Liability

Example 3. Some policies may offer a broad range of first party optional coverages:

- Business Interruption and Extra Expense
- Cyber Theft Loss
- Cyber Communications Loss
- Cyber Extortion Expenses
- Cyber Vandalism Expenses
- Notification Expenses, including notification expenses not required by law
- Crisis Management
- Consequential Reputational Harm loss
- Social Engineering loss
- Breach Response Coaches

**Note:** Coverage varies by insurer. It is crucial to understand the terminology found within the insuring agreement(s) and the policy provisions to recognize what coverage is being provided.

## C. Insuring Agreements

For the purpose of this course, the eight insuring agreements of the **ISO Information Security Protection Policy EC 00 10** will be addressed

### 1. Web Site Publishing Liability Insuring Agreement

#### 1. Web Site Publishing Liability

We will pay for both "loss" that the "insured" becomes legally obligated to pay and "defense expenses" as a result of a "claim" first made against the "insured" during the "policy period" or during the applicable Extended Reporting Period, for a "wrongful act" or a series of "interrelated wrongful acts" taking place on or after the Retroactive Date, if any, shown in the Declarations and before the end of the "policy period".

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a. Pays for both loss and defense expenses as a result of a claim for a wrongful act. Watch out for limitations in various policies.

b. Definition of "loss"

#### 18. "Loss" means:

a. With respect to Insuring Agreements **1. Web Site Publishing Liability**, **2. Security Breach Liability** and **3. Programming Errors And Omissions Liability**:

- (1) Compensatory damages, settlement amounts and costs awarded pursuant to judgments or settlements;
- (2) Punitive and exemplary damages to the extent such damages are insurable by law; or
- (3) Under Paragraph **b.** of Insuring Agreement **2. Security Breach Liability**, fines or penalties assessed against the "insured" to the extent such fines or penalties are insurable by law.

With regard to Paragraphs **18.a.(1)** through **18.a.(3)**, "loss" does not include:

- (a) Civil or criminal fines or penalties imposed by law, except civil fines or penalties as provided under Paragraph **18.a.(3)**;
- (b) The multiplied portion of multiplied damages;
- (c) Taxes;
- (d) Royalties;
- (e) The amount of any disgorged profits; or
- (f) Matters that are uninsurable pursuant to law.

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- (1) Includes compensatory damages, settlement amounts and costs
- (2) Includes punitive and exemplary damages.
  - Beware: Some policies may not include punitive and exemplary damages
- (3) Notice that the definition of “loss” does not include civil or criminal fines or penalties imposed by law except for Security Breach Liability
- (4) Some policies may define as damages in lieu of “loss”. May or may not include assessments or other monies owed under contracts.

c. Definition of “defense expenses”

6. "Defense expenses" means the reasonable and necessary fees (attorneys' and experts' fees) and expenses incurred in the defense or appeal of a "claim", including the cost of appeal, attachment or similar bonds (without any obligation on our part to obtain such bonds) but excluding wages, salaries, benefits or expenses of your "employees".

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d. Definition of “claim”

3. "Claim" means:

- a. A written demand for monetary or nonmonetary damages, including injunctive relief;
  - b. A civil proceeding commenced by the service of a complaint or similar proceeding; or
  - c. Under Paragraph **b.** of Insuring Agreement **2. Security Breach Liability**, a "regulatory proceeding" commenced by the filing of a notice of charges, formal investigative order, service of summons or similar document;
- against any "insured" for a "wrongful act", including any appeal therefrom.

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- (1) A written demand for monetary or nonmonetary damages
- (2) A civil proceeding complaint
- (3) Beware: Some policies may not include nonmonetary damages or any civil proceeding, or regulatory proceeding
- (4) Some policies may have a broader definition to include a demand for arbitration or other alternate dispute resolution. Some may even include a criminal proceeding.

e. Definition of Web Site Publishing Liability “wrongful act”

**35.** "Wrongful act" means:

**a.** With respect to Insuring Agreement **1. Web Site Publishing Liability:**

Any actual or alleged error, misstatement or misleading statement posted or published by an "insured" on its web site that results in:

- (1)** Any type of infringement of another's copyright, title, slogan, trademark, trade name, trade dress, service mark or service name;
- (2)** Any form of defamation against a person or organization; or
- (3)** A violation of a person's right of privacy.

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- (1) Infringement of another's copyright, title, slogan, trademark, trade name, trade dress, service mark or service name;
- (2) Defamation
- (3) Violation of a person's right of privacy
- (4) Beware: Some policies may limit what is included
- (5) Some policies may be broader to include wrongful acts that are oral or written, in any manner (not just on a web site) via any e-mail, webinars, etc.

f. Definition of “interrelated wrongful acts”

**16.** "Interrelated wrongful acts" means all "wrongful acts" that have as a common nexus any:

- a.** Fact, circumstance, situation, event, transaction or cause; or
- b.** Series of causally connected facts, circumstances, situations, events, transactions or causes.

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## 2. Security Breach Liability Insuring Agreement

### 2. Security Breach Liability

- a. We will pay for both "loss" that the "insured" becomes legally obligated to pay and "defense expenses" as a result of a "claim" first made against the "insured" during the "policy period" or during the applicable Extended Reporting Period, for a "wrongful act" or a series of "interrelated wrongful acts" taking place on or after the Retroactive Date, if any, shown in the Declarations and before the end of the "policy period".
- b. We will pay for both "loss" and "defense expenses" as a result of a "claim" in the form of a "regulatory proceeding" first made against the "insured" during the "policy period" or during the applicable Extended Reporting Period, in response to a "wrongful act" or a series of "interrelated wrongful acts" covered under Paragraph **2.a.**

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- a. Pays for both loss and defense expenses as a result of a claim for a wrongful act
  - Definition of “claim” for Security Breach Liability includes regulatory proceeding commenced by the filing of a notice of charges, formal investigative order, service of summons or similar document
- b. Also pays for loss and defense expense as a result of claim in the form of a “regulatory proceeding”
- c. Definition of “regulatory proceedings”

**28.** "Regulatory proceeding" means an investigation, demand or proceeding brought by, or on behalf of, the Federal Trade Commission, Federal Communications Commission or other administrative or regulatory agency, or any federal, state, local or foreign governmental entity in such entity's regulatory or official capacity.

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- Beware: Some policies may not provide coverage for regulatory proceedings.

d. Definition of a Security Breach Liability “wrongful act”

**35.** "Wrongful act" means:

**b.** With respect to Insuring Agreement **2. Security Breach Liability**:

Any actual or alleged neglect, breach of duty or omission by an "insured" that results in:

- (1)** A "security breach"; or
- (2)** A "computer system" transmitting, by e-mail or other means, a "virus" to another person or organization.

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- (1) Includes security breach as defined
- (2) Includes transmission of a virus by email or by other means

e. Definition of “security breach”

**29.** "Security breach" means the acquisition of "personal information" held within the "computer system" or in nonelectronic format while in the care, custody or control of the "insured" or authorized "third party" by a person:

- a.** Who is not authorized to have access to such information; or
- b.** Who is authorized to have access to such information but whose access results in the unauthorized disclosure of such information.

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- (1) Beware: Some policies may not include nonelectronic format
- (2) Beware: Some policies may not extend to personal information in the CCC of an authorized third party
- (3) Beware: Some policies may exclude employees who are not authorized to have access to such information or employees have access to such information but whose access results in the unauthorized disclosure of such information.  
Example: Rogue or disgruntled employees

(4) Some policies have a broader definition including but not limited to:

- Theft, alteration or destruction of electronic data (not just personal information)
- Denial of service attacks
- Accidental release or disclosure of data

f. Definition of “personal information”

**21.** "Personal information" means any information not available to the general public for any reason through which an individual may be identified including, but not limited to, an individual's:

- a. Social security number, driver's license number or state identification number;
- b. Protected health information;
- c. Financial account numbers;
- d. Security codes, passwords, PINs associated with credit, debit or charge card numbers which would permit access to financial accounts; or
- e. Any other nonpublic information as defined in "privacy regulations".

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- Beware: Some policies may limit to only those defined by certain statutes

g. Definition of “privacy regulations”

**24.** "Privacy regulations" means any of the following statutes and regulations, and their amendments, associated with the control and use of personally identifiable financial, health or other sensitive information including, but not limited to:

- a. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Public Law 104-191);
- b. The Health Information Technology for Economic and Clinical Health Act (HITECH) (American Recovery and Reinvestment Act of 2009);
- c. The Gramm-Leach-Bliley Act of 1999;
- d. Section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)), but solely for alleged unfair or deceptive acts or practices in or affecting commerce;
- e. The Identity Theft Red Flags Rules under the Fair and Accurate Credit Transactions Act of 2003; or
- f. Any other similar state, federal or foreign identity theft or privacy protection statute or regulation.

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h. Definition of “third party”

**33.** "Third party" means any entity that you engage under the terms of a written contract to perform services for you.

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i. Definition of “computer system”

5. "Computer system" means the following which are owned, leased or operated by you:
- a. Computers, including Personal Digital Assistants (PDAs) and other transportable or handheld devices, electronic storage devices and related peripheral components;
  - b. Systems and applications software; and
  - c. Related communications networks;
- by which "electronic data" is collected, transmitted, processed, stored or retrieved.

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- A wrongful act under Security Breach Liability includes an insured's "computer system" transmitting, by e-mail or other means, a "virus" to another person or organization.

j. Definition of a “virus”

34. "Virus" means any kind of malicious code designed to damage or destroy any part of the "computer system" (including "electronic data") or disrupt its normal functioning.

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- Means any kind of malicious code that damages, destroys any part of the computer system

3. **Programming Errors And Omissions Liability Insuring Agreement**

**3. Programming Errors And Omissions Liability**

We will pay for both "loss" that the "insured" becomes legally obligated to pay and "defense expenses" as a result of a "claim" first made against the "insured" during the "policy period" or during the applicable Extended Reporting Period, for a "wrongful act" or a series of "interrelated wrongful acts" taking place on or after the Retroactive Date, if any, shown in the Declarations and before the end of the "policy period".

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- a. Pays for both loss and defense expenses as a result of a claim for a wrongful act

b. Definition of Programming Errors And Omissions Liability “wrongful act”

35. "Wrongful act" means:

c. With respect to Insuring Agreement 3. Programming Errors And Omissions Liability:

Any actual or alleged programming error or omission that results in the disclosure of your client's "personal information" held within the "computer system".

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- Not intended for professional liability exposures

4. Replacement Or Restoration Of Electronic Data Insuring Agreement

4. Replacement Or Restoration Of Electronic Data

We will pay for "loss" of "electronic data" or "computer programs" stored within the "computer system" resulting directly from an "e-commerce incident" sustained during the "policy period".

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- a. Pays for loss of electronic data or computer programs resulting directly from an e-commerce incident
- b. Definition of “loss”

18. "Loss" means:

b. With respect to Insuring Agreement 4. Replacement Or Restoration Of Electronic Data:

The cost to replace or restore "electronic data" or "computer programs" as well as the cost of data entry, reprogramming and computer consultation services.

"Loss" does not include the cost to duplicate research that led to the development of your "electronic data" or "computer programs". To the extent that any "electronic data" cannot be replaced or restored, we will pay the cost to replace the media on which the "electronic data" was stored with blank media of substantially identical type.

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- Does not include the cost to duplicate research that led to the development of the named insured's “electronic data” or “computer programs”.

c. Definition of “electronic data”

9. "Electronic data" means digital information, facts, images or sounds stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software) on electronic storage devices including, but not limited to, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment. "Electronic data" is not tangible property.

"Electronic data" does not include your "electronic data" that is licensed, leased, rented or loaned to others.

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d. Definition of “computer programs”

4. "Computer program" means a set of related electronic instructions, which direct the operation and function of a computer or devices connected to it, which enables the computer or devices to receive, process, store or send "electronic data".

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e. Definition of “e-commerce incident”

8. "E-commerce incident" means a:

- a. "Virus";
- b. Malicious code; or
- c. Denial of service attack;

introduced into or enacted upon the "computer system" (including "electronic data") or a network to which it is connected, that is designed to damage, destroy, delete, corrupt or prevent the use of or access to any part of the "computer system" or otherwise disrupt its normal operation.

Recurrence of the same "virus" after the "computer system" has been restored shall constitute a separate "e-commerce incident".

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- (1) Includes virus, malicious code, or denial of service attacks
- (2) Beware: Some policies may not include denial of service attacks.
- (3) Some policies may have broader definition to include the theft or loss of electronic data that is contained in any part of the insured's computer system (example: lost or stolen laptops)

## 5. Extortion Threats Insuring Agreement

### 5. Extortion Threats

We will pay for "loss" resulting directly from an "extortion threat" communicated to you during the "policy period".

However, we will not pay for "extortion expenses" or "ransom payments" which are part of a series of related threats that began prior to the "policy period".

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- a. Pays for loss resulting directly from an extortion threat
- b. Does not pay for extortion expenses or ransom payment for threats that began prior to the policy period
- c. Definition of "loss"

### 18. "Loss" means:

- c. With respect to Insuring Agreement 5. Extortion Threats:  
"Extortion expenses" and "ransom payments".

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- d. Definition of "extortion threat"

### 12. "Extortion threat" means a threat or series of related threats:

- a. To perpetrate an "e-commerce incident";
- b. To disseminate, divulge or utilize:
  - (1) Your proprietary information; or
  - (2) Weaknesses in the source code;  
within the "computer system" by gaining unauthorized access to the "computer system";
- c. To destroy, corrupt or prevent normal access to the "computer system" by gaining unauthorized access to the "computer system";
- d. To inflict "ransomware" on the "computer system" or a network to which it is connected; or
- e. To publish your client's "personal information".

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e. Definition of “ransomware”

27. "Ransomware" means any software that encrypts "electronic data" held within the "computer system" and demands a "ransom payment" in order to decrypt and restore such "electronic data".

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f. Definition of “extortion expenses”

11. "Extortion expenses" means:

a. Fees and costs of:

(1) A security firm; or

(2) A person or organization;

hired with our consent to determine the validity and severity of an "extortion threat" made against you;

b. Interest costs paid by you for any loan from a financial institution taken by you to pay a ransom demand;

c. Reward money paid by you to an "informant" which leads to the arrest and conviction of parties responsible for "loss"; and

d. Any other reasonable expenses incurred by you with our written consent, including:

(1) Fees and costs of independent negotiators; and

(2) Fees and costs of a company hired by you, upon the recommendation of the security firm, to protect your "electronic data" from further threats.

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g. Definition of “informant”

14. "Informant" means a person, other than an "employee", providing information not otherwise obtainable, solely in return for a reward offered by you.

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h. Definition of “ransom payments”

26. "Ransom payment" means a payment made in the form of cash.

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Note: Beware this definition does not appear to include virtual currency

## 6. Business Income And Extra Expense Insuring Agreement

### 6. Business Income And Extra Expense

We will pay for "loss" due to an "interruption" resulting directly from an "e-commerce incident" sustained during the "policy period" or an "extortion threat" communicated to you during the "policy period".

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- a. Pays for loss due to an interruption resulting directly from an e-commerce incident or from an extortion threat
  - Beware some policy may not pay for loss from an extortion threat
- b. Definition of "loss"

### 18. "Loss" means:

#### d. With respect to Insuring Agreement 6. Business Income And Extra Expense:

The actual loss of "business income" you sustain and/or "extra expense" you incur.

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- c. Definition of "business income"

### 2. "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.

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- Net income and continuing normal operating expenses (NICE)

d. Definition of “extra expense”

**13.** "Extra expense" means necessary expenses you incur:

- a.** During an "interruption" that you would not have incurred if there had been no "interruption"; or
- b.** To avoid or minimize the suspension of your "e-commerce activities".

"Extra expense" does not include any costs or expenses associated with upgrading, maintaining, improving, repairing or remediating any "computer system".

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e. Definition of “interruption”

**17.** "Interruption" means:

- a.** With respect to an "e-commerce incident":

- (1)** An unanticipated cessation or slowdown of your "e-commerce activities"; or
- (2)** Your suspension of your "e-commerce activities" for the purpose of avoiding or mitigating the possibility of transmitting a "virus" or malicious code to another person or organization;

and, with regard to Paragraphs **17.a.(1)** and **17.a.(2)**, shall be deemed to begin when your "e-commerce activities" are interrupted and ends at the earliest of:

- (a)** 90 days after the "interruption" begins;
- (b)** The time when your "e-commerce activities" are resumed; or
- (c)** The time when service is restored to you.

- b.** With respect to an "extortion threat", your voluntary suspension of your "e-commerce activities":

- (1)** Based upon clear evidence of a credible threat; or
- (2)** Based upon the recommendation of a security firm, if any;

and, with regard to Paragraphs **17.b.(1)** and **17.b.(2)**, shall be deemed to begin when your "e-commerce activities" are interrupted and ends at the earliest of:

- (a)** 14 days after the "interruption" begins;
- (b)** The time when your "e-commerce activities" are resumed; or
- (c)** The time when service is restored to you.

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f. Definition of “e-commerce activities”

**7.** "E-commerce activities" means those activities conducted by you in the normal conduct of your business via your web site or your e-mail system.

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- Some policies may have a broader or limited definition

## 7. Public Relations Expense Insuring Agreement

### 7. Public Relations Expense

We will pay for "loss" due to "negative publicity" resulting directly from an "e-commerce incident" or a "security breach" sustained during the "policy period".

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- a. Pays for loss due to negative publicity resulting directly from an e-commerce incident OR from a security breach
  - Beware: Some policies may limit to certain types of incidents and/or security breaches
- b. Definition of "loss"

### 18. "Loss" means:

- e. With respect to Insuring Agreement 7. Public Relations Expense:  
"Public relations expenses".

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- c. Definition of "public relations expenses"

### 25. "Public relations expenses" means:

- a. Fees and costs of a public relations firm; and
- b. Any other reasonable expenses incurred by you with our written consent; to protect or restore your reputation solely in response to "negative publicity".

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- (1) Cost of a public relations firm
- (2) Other reasonable expenses incurred with the insurer's written consent

- d. Definition of "negative publicity"

20. "Negative publicity" means information which has been made public that has caused, or is reasonably likely to cause, a decline or deterioration in the reputation of the "named insured" or of one or more of its products or services.

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- Information which has been made public



## 8. Security Breach Expense Insuring Agreement

### 8. Security Breach Expense

We will pay for "loss" resulting directly from a "security breach" sustained during the "policy period".

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- a. Pays for loss resulting directly from a security breach
- b. Reminder: Definition of "security breach"

**29.** "Security breach" means the acquisition of "personal information" held within the "computer system" or in nonelectronic format while in the care, custody or control of the "insured" or authorized "third party" by a person:

- a. Who is not authorized to have access to such information; or
- b. Who is authorized to have access to such information but whose access results in the unauthorized disclosure of such information.

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- c. Definition of "loss"

**18.** "Loss" means:

- f. With respect to Insuring Agreement 8. Security Breach Expense:  
"Security breach expenses".

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d. Definition of “security breach expenses”

**30.** "Security breach expenses" means:

- a.** Costs to establish whether a "security breach" has occurred or is occurring;
- b.** Costs to investigate the cause, scope and extent of a "security breach" and to identify any affected parties;
- c.** Costs to determine any action necessary to correct or remediate the conditions that led to or resulted from a "security breach";
- d.** Costs to notify all parties affected by a "security breach";
- e.** Overtime salaries paid to "employees" assigned to handle inquiries from the parties affected by a "security breach";
- f.** Fees and costs of a company hired by you for the purpose of operating a call center to handle inquiries from the parties affected by a "security breach";
- g.** Post-event credit monitoring costs for the parties affected by a "security breach" for up to one year from the date of notification to those affected parties of such "security breach"; and
- h.** Any other reasonable expenses incurred by you with our written consent.

"Security breach expenses" do not include any costs or expenses associated with upgrading, maintaining, improving, repairing or remediating any "computer system" as a result of a "security breach".

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- (1) Some policies may be very limited as to what is included as a security breach expense
- (2) Some policies may pay notification costs but only as required by law
- (3) Other policies may or may not include investigative costs, overtime, outside call service, and/or credit monitoring costs, etc.
- (4) Some policies may be broad enough to include indemnification obligations under written contract
- (5) Does not include upgrades

## D. Who Is Insured

### Example 1: ISO EC 00 10

- 15.** "Insured" means any "named insured" and its "employees"
- 19.** "Named insured" means the entity or entities shown in the Declarations and any "subsidiary".
- 10.** "Employee" means any natural person who was, now is or will be:
- a.** Employed on a full- or part-time basis;
  - b.** Furnished temporarily to you to substitute for a permanent employee on leave or to meet seasonal or short-term workload conditions;
  - c.** Leased to you by a labor leasing firm under an agreement between you and the labor leasing firm to perform duties related to the conduct of your business, but does not mean a temporary employee as defined in Paragraph **10.b.**;
  - d.** An officer;
  - e.** A director, trustee or manager (if a limited liability company);
  - f.** A volunteer worker; or
  - g.** A partner or member (if a limited liability company);
- of the "named insured" and those of any organization qualifying as a "subsidiary" under the terms of this Policy, but only while acting within the scope of their duties as determined by the "named insured" or such "subsidiary".

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#### 1. Named insured

- Beware: The ISO definition does not include a spouse. Other policies may do so

#### 2. Employees

Typically, employees are included as “insureds”, but look for limitations

- a.** ISO Definition does include leased employees, temporary, part-time employees, former employees
  - Beware: some policies may not be as broad
- b.** Officers, directors, trustees or managers (if a LLC).
- c.** ISO definition includes volunteer workers. Other policies may not do so.

- d. Partners or LLC members
  - Beware: The ISO definition does not include a spouse. Other policies may do so
- e. All of the above for qualifying subsidiaries
- f. Definition of “subsidiary”

#### Example: ISO EC 00 10

**31.** "Subsidiary" means any organization in which more than 50% of the outstanding securities or voting rights representing the present right to vote for the election of directors, trustees, managers (if a limited liability company) or persons serving in a similar capacity is owned, in any combination, by one or more "named insured(s)".

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- 3. Other policies may be broader
  - a. May include independent contractors
  - b. May include coverage for newly acquired business
  - c. May include an additional insured as required by written contract.

#### Example 1

Insured means:

1. The Named Insured;
2. Subsidiaries of the Named Insured, but only with respect to Wrongful Acts that occur while they are a Subsidiary;
3. any past, present or future principal, partner, officer, director, trustee, employee, leased employee, or temporary employee of the Named Insured or a Subsidiary, but only with respect to the commission of a Wrongful Act committed within the scope of such person's duties performed on behalf of the Named Insured or such Subsidiary; and
4. independent contractors of the Named Insured or of a Subsidiary who are natural persons, but only with respect to the commission of a Wrongful Act within the scope of such person's duties performed on behalf of the Named Insured or such Subsidiary.

## Example 2

Named Insured; and individual insureds means, individually and collectively:

1. Any Named Insured that is an individual person;
2. Any Named Insured's stockholders for their liability as stockholders;
3. Any Named Insured's and Subsidiaries' partners, officers, directors and employees, but only with respect to their activities within the scope of their duties in such capacity;
4. Any Named Insured's and Subsidiaries' former partners, officers, directors and employees, but only with respect to their activities within the scope of their duties in such capacity;
5. Any legal representatives of an Insured in the event of death, incompetence, insolvency or bankruptcy of the Insured, but only with respect to their activities within the scope of their duties in such capacity; and
6. Any spouse of an Individual Insured, but only with respect to their status as such. For the purposes of this definition, "spouse" shall be any natural person qualifying as a domestic partner of an Individual Insured under the provisions of any applicable federal, state or local law in the United States of America.

**Note:** Some Cyber Liability Policies may provide Spousal Liability Coverage in a separate provision.

## Example: Spousal Liability Coverage

If a Claim made against an Individual Insured includes a Claim against that Individual Insured's lawful spouse solely by reason of:

1. Such spouse's status as the Individual Insured's spouse; or
2. Such spouse's ownership interest in property from which the claimant seeks recovery for the Individual Insured's Wrongful Acts;

All loss, which such spouse becomes legally obligated to pay on account of such Claim, shall be treated for purposes of this Policy as loss that the Individual Insured is legally obligated to pay on account of the Claim made against the Individual Insured. Such loss shall be covered under this Policy only if and to the extent that such loss would be covered under this Policy if incurred by the Individual Insured. The coverage extension afforded by this subsection does not apply to any Claim alleging any Wrongful Act or omission by the Individual Insured's spouse. The term "spouse" as used in this subsection shall include any natural person qualifying as a domestic partner under the provisions of any applicable federal, state or local law in the United States of America.

E. Defense and Settlement Provisions vary

1. Insurer has the right and duty to defend
  - No coverage, no defense
2. Usually within the limits of liability, and NOT in addition to the limit of insurance

Note: Warnings on the Coverage Form may appear

Example 1: ISO EC 00 10

**INSURING AGREEMENTS 1., 2. AND 3. OF THIS POLICY PROVIDE CLAIMS-MADE COVERAGE. DEFENSE EXPENSES ARE PAYABLE WITHIN, AND NOT IN ADDITION TO, THE LIMIT OF INSURANCE. PAYMENT OF DEFENSE EXPENSES UNDER THIS POLICY WILL REDUCE THE LIMIT OF INSURANCE.**

**PLEASE READ THE ENTIRE POLICY CAREFULLY.**

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Example 2

**THE LIMITS OF LIABILITY AVAILABLE TO PAY INSURED DAMAGES SHALL BE REDUCED BY AMOUNTS INCURRED FOR CLAIMS EXPENSES. FURTHER NOTE THAT AMOUNTS INCURRED FOR DAMAGES AND CLAIMS EXPENSES SHALL BE APPLIED AGAINST THE RETENTION AMOUNT.**

Example 3

**DEFENSE EXPENSES REDUCE AND MAY EXHAUST THE APPLICABLE LIMITS OF LIABILITY AND APPLY TO THE RETENTION.**

Example 4

**Amounts incurred as Claims Expenses under this Policy shall reduce and may exhaust the limit of liability and are subject to retentions.**

3. Defense costs may be excess of the Deductible Amount shown in the Declarations

Example: ISO EC 00 10

- a. Under Insuring Agreements 1. Web Site Publishing Liability, 2. Security Breach Liability and 3. Programming Errors And Omissions Liability:

We will pay only the amount of "loss" and "defense expenses" which are in excess of the applicable Deductible Amount shown in the Declarations resulting from the same "wrongful act" or "interrelated wrongful acts". Such Deductible Amount will be borne by you, self-insured, and at your own risk.

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4. Defense And Settlement provision

Example: ISO EC 00 10

**SECTION IV – DEFENSE AND SETTLEMENT**

The provisions contained within this section apply only to Insuring Agreements 1. Web Site Publishing Liability, 2. Security Breach Liability and 3. Programming Errors And Omissions Liability:

1. We shall have the right and duty to select counsel and defend the "insured" against any "claim" covered under Insuring Agreements 1. Web Site Publishing Liability, 2. Security Breach Liability and 3. Programming Errors And Omissions Liability, even if the allegations of such "claim" are groundless, false or fraudulent. However, we shall have the right but not the duty to defend the "insured" against a "claim" covered under Paragraph b. of Insuring Agreement 2. Security Breach Liability, and we shall have no duty to defend the "insured" against any "claim" which is not covered under any of these Insuring Agreements.
2. We may, upon the written consent of the "insured", make any settlement of a "claim" which we deem reasonable. If the "insured" withholds consent to such settlement, our liability for all "loss" resulting from such "claim" will not exceed the amount for which we could have settled such "claim", plus "defense expenses" incurred, as of the date we proposed such settlement in writing to the "insured". Upon refusing to consent to a settlement we deem reasonable, the "insured" shall, at its sole expense, assume all further responsibility for its defense, including all additional costs associated with the investigation, defense and/or settlement of such "claim"

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## F. Limits Of Insurance

### Example 1: ISO EC 00 01

#### **SECTION II – LIMITS OF INSURANCE**

##### **1. Policy Aggregate Limit Of Insurance**

The most we will pay for all "loss", and "defense expenses" if covered, under this Policy is the Policy Aggregate Limit Of Insurance shown in the Declarations. The Policy Aggregate Limit of Insurance shall be reduced by the amount of any payment made under the terms of this Policy. Upon exhaustion of the Policy Aggregate Limit of Insurance by such payments, we will have no further obligations or liability of any kind under this Policy.

##### **2. Insuring Agreement Aggregate Limit Of Insurance**

a. Subject to the Policy Aggregate Limit of Insurance, the most we will pay for all "loss", and "defense expenses" if covered, under each Insuring Agreement, is the Insuring Agreement Aggregate Limit Of Insurance shown in the Declarations:

(1) The Insuring Agreement Aggregate Limit of Insurance shall be reduced by the amount of any payment for "loss", and "defense expenses" if covered, under that Insuring Agreement; and

(2) Upon exhaustion of the Insuring Agreement Aggregate Limit of Insurance by such payments, we will have no further obligations or liability of any kind under that Insuring Agreement.

b. If coverage for "regulatory proceedings" is being provided under Paragraph **b.** of Insuring Agreement **2. Security Breach Liability**, the Limit of Insurance shall be part of, not in addition to, the Aggregate Limit of Insurance for the Insuring Agreement.

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1. Policy Aggregate Limit Of Insurance
2. Limit of insurance applies to the per Insuring Agreement indicated in the Declarations subject to the Policy Aggregate Limit Of Insurance

### Example 2

#### **Total Limit of Insurance**

The Total Limit of Insurance stated in Item 4. of the Declarations is the maximum the Company will pay for all Damages, Claim Expense, Crisis Management Expense, Extortion Expense or Extortion Loss combined for the total of all Claims made and/or Wrongful Acts or Extortion Threats that occur during the Policy Period and any Extended Reporting Period, no matter how many:

a. Insureds this Policy covers;

b. Claims are made;

c. Persons or organizations make Claims; or

d. Wrongful Acts, Security Events, Regulatory Actions or Extortion Threats occur;



## G. Deductible / Retention

1. The deductible/retention may be per loss regardless of the number of claims
2. The deductible/retention may be per insuring agreement
  - Check the policy language to see how the deductible applies if more than one insuring agreement applies to a loss
3. The deductible/retention may be per policy

### Example 1: ISO EC 00 10

#### **SECTION III – DEDUCTIBLE**

##### **1. Subject to Section II – Limits Of Insurance:**

- a. Under Insuring Agreements 1. Web Site Publishing Liability, 2. Security Breach Liability and 3. Programming Errors And Omissions Liability:**

We will pay only the amount of "loss" and "defense expenses" which are in excess of the applicable Deductible Amount shown in the Declarations resulting from the same "wrongful act" or "interrelated wrongful acts". Such Deductible Amount will be borne by you, self-insured, and at your own risk.

- b. Under Insuring Agreements 4. Replacement Or Restoration Of Electronic Data, 5. Extortion Threats, 7. Public Relations Expense and 8. Security Breach Expense:**

We will pay only the amount of "loss" which is in excess of the applicable Deductible Amount shown in the Declarations.

- c. Under Insuring Agreement 6. Business Income And Extra Expense:**

We will pay only the amount of "loss" which exceeds the greater of:

- (1) The Deductible Amount shown in the Declarations; or
- (2) The amount of "loss" incurred during the Waiting Period shown in the Declarations.

**2. In the event a "loss" is covered under more than one Insuring Agreement, only the highest Deductible Amount applicable to the "loss" shall be applied.**

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### Example 2

The Company's maximum liability shall apply only to that part of each Loss which is excess of the Deductible set forth in the Declarations, and such Deductible shall be borne by the Insured at its own risk and uninsured.

### Example 3

A separate Retention applies to each actual and/or alleged Wrongful Act. For purposes of this provision, a series of related Wrongful Acts, as described in Section II.W., will be considered a single Wrongful Act. The Retention applies to Damages and Claim Expenses combined, and the Company's obligation to pay Damages and Claim Expenses applies only to the amount of Damages and Claim Expenses in excess of the Retention. The amount of the Insured's Retention is stated in Item 6. of the Declarations. The Retention does not deplete the applicable Limit of Insurance.

H. Exclusions are typically numerous and vary by insurer.

Following are exclusions found in the ISO coverage form.

Example: ISO EC 00 10

**SECTION V – EXCLUSIONS**

We will not be liable for "loss" or "defense expenses":

1. Based upon, attributable to or arising out of lightning, earthquake, hail, volcanic action or any other act of nature.
2. Based upon, attributable to or arising out of:
  - a. War, including undeclared or civil war or civil unrest;
  - b. Warlike action by military force, including action hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
  - c. Insurrection, rebellion, revolution, usurped power, or action taken by government authority in hindering or defending against any of these.
3. Based upon, attributable to or arising out of the dispersal or application of pathogenic or poisonous biological or chemical materials, nuclear reaction, nuclear radiation or radioactive contamination, or any related act or incident, however caused.
4. Based upon, attributable to or arising out of bodily injury or physical damage to or destruction of tangible property, including loss of use thereof.

Bodily injury means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

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1. Lightning, earthquake, hail, volcanic action or other acts of nature
2. War, warlike action, or insurrection
3. Biological or chemical materials, nuclear radiation
4. Bodily injury or physical damage to or destruction of tangible property, including loss of use.

## Example: ISO EC 00 10

### SECTION V – EXCLUSIONS

We will not be liable for "loss" or "defense expenses":

5. Based upon, attributable to or arising out of any unexplained or indeterminable failure, malfunction or slowdown of the "computer system", including "electronic data" and the inability to access or properly manipulate the "electronic data".
6. Based upon, attributable to or arising out of any "interruption" in normal computer function or network service or function due to insufficient capacity to process transactions or due to an overload of activity on the "computer system" or network. However, this exclusion shall not apply if such "interruption" is caused by an "e-commerce incident".
7. Based upon, attributable to or arising out of a complete or substantial failure, disablement or shutdown of the Internet, regardless of the cause.
8. Based upon, attributable to or arising out of any failure of, reduction in or surge of power.

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5. Unexplained or indeterminable failure, malfunction OR slowdown of the computer system

- Example: The named insured suffers a slowdown of the computer system and customers cannot access their site. After doing an investigation, it is determined the slowdown was NOT caused by a covered security breach. Cause is unexplained so the Policy will not respond to any claims.

6. An interruption due to insufficient capacity to process transactions or due to an overload of activity on the "computer system" or network, other than an e-commerce incident.

- Example: The named insured's computer system does not have enough "storage space" and suffers an interruption of its normal business activities. Policy will not respond to this type of interruption.

7. Complete or substantial failure, disablement or shutdown of the Internet,

8. Failure of, reduction in or surge of power

## Example: ISO EC 00 10

### **SECTION V – EXCLUSIONS**

We will not be liable for "loss" or "defense expenses":

...

9. Based upon, attributable to or arising out of any actual or alleged violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and its amendments, or similar provisions of any federal, state or local statutory or common law.
10. Based upon, attributable to or arising out of any malfunction or failure of any satellite.
11. Based upon, attributable to or arising out of any oral or written publication of material, if done by an "insured" or at an "insured's" direction with knowledge of its falsity.
12. Based upon, attributable to or arising out of an "insured's" assumption of liability by contract or agreement, whether oral or written. However, this exclusion shall not apply to any liability that an "insured" would have incurred in the absence of such contract or agreement.
13. Based upon, attributable to or arising out of any actual or alleged patent or trade secret violation, including any actual or alleged violation of the Patent Act, the Economic Espionage Act of 1996 or the Uniform Trade Secrets Act and their amendments.
14. Based upon, attributable to or arising out of:
  - a. The actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time;
  - b. Any 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
  - c. Any "claim" or "suit" brought by, or on behalf of, any 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".

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9. Violation of RICO and its amendments, or similar law
10. Malfunction or failure of any satellite.
11. Oral or written material published with knowledge of falsity
12. Contractual liability
13. Patent or trade secret violation
14. Pollution or pollution related

## Example: ISO EC 00 10

### SECTION V – EXCLUSIONS

We will not be liable for "loss" or "defense expenses":

...

15. Based upon, attributable to or arising out of any "claim", "suit" or other proceeding against an "insured" which was pending or existed prior to the "policy period", or arising out of the same or substantially the same facts, circumstances or allegations which are the subject of, or the basis for, such "claim", "suit" or other proceeding.
16. Based upon, attributable to or arising out of an "insured's" employment practices including, but not limited to, termination of employment, demotion, reassignment, discipline, harassment, coercion or refusal to employ regardless of whether the "insured" is liable as an employer or in any other capacity.
17. Based upon, attributable to or arising out of any "wrongful act" or "interrelated wrongful acts" that occurred before the Retroactive Date, if any, shown in the Declarations.
18. Based upon, attributable to or arising out of the same facts, "wrongful acts" or "interrelated wrongful acts" alleged or contained in any "claim" which has been reported, or in any circumstances of which notice has been given, under any insurance policy of which this Policy is a renewal or replacement.
19. Based upon, attributable to or arising out of any criminal, dishonest, malicious or fraudulent act or any willful violation of any statute or regulation committed by an "insured", acting alone or in collusion with others. However, this exclusion shall not apply to dishonest, malicious or fraudulent acts committed by an "employee" which give rise to a "claim" or "loss" covered under Insuring Agreement 2. Security Breach Liability.

With the exception of "claims" excluded under Exclusion 13., we will defend "claims" first made against an "insured" alleging such acts or violations until final adjudication is rendered against that "insured". Final adjudication rendered against one "insured" shall not be imputed to any other "insured".

We will not provide indemnification for any "claim" to which any "insured" enters a guilty plea or pleads no contest and we will not provide a defense from the time we become aware that any "insured" intends to so plead.

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15. Prior or pending claims\*
16. Employment practices related liability
17. Wrongful acts that occurred before the Retroactive Date\*
18. Same wrongful acts, alleged or contained, in any claim which has been reported under any insurance policy of which this Policy is a renewal of\*
19. Criminal, dishonest, malicious or fraudulent act or any willful violation of any statute or regulation committed by an insured

\* Reinforces the claims made aspect of the coverage

## Example: ISO EC 00 10

### SECTION V – EXCLUSIONS

We will not be liable for "loss" or "defense expenses":

...

**20.** Based upon, attributable to or arising out of any action or proceeding brought by, or on behalf of, any governmental authority or regulatory agency including, but not limited to:

- a.** The seizure or destruction of property by order of a governmental authority; or
- b.** Regulatory actions or proceedings brought by, or on behalf of, the Federal Trade Commission, Federal Communications Commission or other regulatory agency, except when covered under Paragraph **b.** of Insuring Agreement **2. Security Breach Liability**.

However, this exclusion shall not apply to actions or proceedings brought by a governmental authority or regulatory agency acting solely in its capacity as a customer of the "named insured" or of a "subsidiary".

**21.** Based upon, attributable to or arising out of costs associated with upgrading or improving the "computer system" regardless of the reason for the upgrade.

**22.** Based upon, attributable to or arising out of any "claim" brought or alleged by one "insured" against another, except for a "claim" brought or alleged by an "employee" against an "insured" as a result of a "security breach".

**23.** Based upon, attributable to or arising out of unintentional errors or omissions in the entry of "electronic data" into the "computer system".

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20. Proceeding brought by, or on behalf of, any governmental authority or regulatory agency

- There may be a some give back of coverage if covered under Security Breach Liability

21. Costs associated with upgrade or improvements

22. Insured versus insured claims

- Some Cyber Policies may have an exception for security breach claims brought by an employee against another insured.

23. Electronic data entry errors or omissions

## I. Selected Conditions

### 1. Subrogation

Example: ISO EC 00 10

#### **7. Subrogation**

With respect to any payment made under this Policy on behalf of any "insured", we shall be subrogated to the "insured's" rights of recovery to the extent of such payment. The "insured" shall execute all papers required and shall do everything necessary to secure and preserve such rights, including the execution of such documents necessary to enable us to bring suit in the "insured's" name. Any recoveries, less the cost of obtaining them, will be distributed as follows:

- a.** To you, until you are reimbursed for any "loss" you sustain that exceeds the sum of the applicable Aggregate Limit of Insurance and the Deductible Amount, if any;
- b.** Then to us, until we are reimbursed for the payment made under this Policy; and
- c.** Then to you, until you are reimbursed for that part of the payment equal to the Deductible Amount, if any.

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### 2. Representation

Example: ISO EC 00 10

#### **9. Representations**

You represent that all information and statements contained in the "application" are true, accurate and complete. All such information and statements are the basis for our issuing this Policy and shall be considered as incorporated into and shall constitute a part of this Policy. Misrepresentation of any material fact may be grounds for the rescission of this Policy.

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- a.** Warranty statement
- b.** Misrepresentation may be grounds for rescission

### 3. Changes In Exposure

#### 10. Changes In Exposure

##### a. Acquisition Or Creation Of Another Organization

If before or during the "policy period":

(1) You acquire securities or voting rights in another organization or create another organization which, as a result of such acquisition or creation, becomes a "subsidiary"; or

(2) You acquire any organization through merger or consolidation;

then such organization will be covered under this Policy but only with respect to "wrongful acts" or "loss" which occurred after the effective date of such acquisition or creation provided, with regard to Paragraphs **10.a.(1)** and **10.a.(2)**, you:

(a) Give us written notice of the acquisition or creation of such organization within 90 days after the effective date of such action;

(b) Obtain our written consent to extend the coverage provided by this Policy to such organization; and

(c) Upon obtaining our consent, pay us an additional premium.

##### b. Acquisition Of Named Insured

If during the "policy period":

(1) The "named insured" merges into or consolidates with another organization, such that the "named insured" is not the surviving organization; or

(2) Another organization, or person or group of organizations and/or persons acting in concert, acquires securities or voting rights which result in ownership or voting control by the other organization(s) or person(s) of more than 50% of the outstanding securities or voting rights representing the present right to vote for the election of directors, trustees or managers (if a limited liability company) of the "named insured";

then the coverage afforded under this Policy will continue until the end of the "policy period", but only with respect to "claims" arising out of "wrongful acts" or "loss" which occurred prior to the effective date of such merger, consolidation or acquisition.

The full annual premium for the "policy period" will be deemed to be fully earned immediately upon the occurrence of such merger, consolidation or acquisition of the "named insured".

The "named insured" must give written notice of such merger, consolidation or acquisition to us as soon as practicable, together with such information as we may reasonably require.

##### c. Cessation Of Subsidiaries

If before or during the "policy period" an organization ceases to be a "subsidiary", the coverage afforded under this Policy with respect to such "subsidiary" will continue until the end of the "policy period" but only with respect to "claims" arising out of "wrongful acts" or "loss" which occurred prior to the date such organization ceased to be a "subsidiary".

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- a. Newly acquired or created organization are covered; however, written notice is required within 90 days of acquisition or creation
- b. Coverage continues for the acquisition of the named insured until the end of the policy period; written notice is required as soon as practicable
- c. Coverage continues for such organizations that cease to be a subsidiary until the end of the policy period but only for wrongful acts that occurred prior to the date that such ceased to be a subsidiary



#### 4. Other insurance

Example: ISO EC 00 10

##### 11. Other Insurance

- a. If any covered "claim" or "loss" is insured by any other valid policy, then this Policy shall apply only in excess of the amount of any deductible, retention and limit of insurance under such other policy, whether such other policy is stated to be primary, contributory, excess, contingent or otherwise, unless such other policy is written specifically excess of this Policy by reference in such other policy to this Policy's policy number.
- b. When this Policy is excess, we shall have no duty under Insuring Agreement 1. Web Site Publishing Liability, 2. Security Breach Liability or 3. Programming Errors And Omissions Liability to defend the "insured" against any "suit" if any other insurer has a duty to defend the "insured" against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the "insured's" rights against all those other insurers.

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- a. Policy shall be excess over any other valid policy unless the other policy is specifically excess
- b. No duty to defend when the Policy is excess

#### 5. Separation of Insureds

Example: ISO EC 00 10

##### 13. Separation Of Insureds

Except with respect to the applicable Aggregate Limit of Insurance, and any rights or duties specifically assigned in Insuring Agreement 1. Web Site Publishing Liability, 2. Security Breach Liability or 3. Programming Errors And Omissions Liability to the first "named insured", this Policy applies separately to each "insured" against whom "claim" is made.

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- Liability coverage applies separately to each insured subject to the applicable Aggregate Limit of Insurance

## 6. Duties In The Event Of Claim Or Loss

Example: ISO EC 00 10

### 14. Duties In The Event Of Claim Or Loss

In the event of either an occurrence or offense that may result in a "claim" against an "insured" or a "loss" or situation that may result in a "loss" covered under this Policy, you must notify us in writing as soon as practicable, but not to exceed 30 days, and cooperate with us in the investigation and settlement of the "claim" or "loss". Additionally:

a. Under Insuring Agreements **1. Web Site Publishing Liability**, **2. Security Breach Liability** and **3. Programming Errors And Omissions Liability**, you must:

- (1) Immediately record the specifics of the "claim" and the date received;
- (2) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "claim";
- (3) Authorize us to obtain records and other information; and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to you because of an occurrence or offense to which this Policy may also apply.

You will not, except at your own cost, voluntarily make a payment, assume any obligation or incur any expense without our consent.

A "claim" brought by a person or organization seeking damages will be deemed to have been made when the "claim" is received by an "insured".

b. Under Insuring Agreements **4. Replacement Or Restoration Of Electronic Data** and **5. Extortion Threats**, you must:

- (1) Notify local law enforcement officials;
  - (2) Submit to examination under oath at our request and give us a signed statement of your answers; and
  - (3) Give us a detailed, sworn proof of loss within 120 days.
- (4) In addition, under Insuring Agreement **5. Extortion Threats**, you must:
- (a) Determine that the "extortion threat" has actually occurred;
  - (b) Make every reasonable effort to immediately notify an associate and the security firm, if any, before making any "ransom payment" based upon the "extortion threat"; and
  - (c) Approve any "ransom payment" based upon the "extortion threat".

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- a. Written notification is required as soon as practicable not to exceed 30 days
- b. The named insured must cooperate in the investigation and settlement of claims or losses
- c. Additional duties for liability claims/losses
- d. Additional duties for first party losses

## 7. Valuation – Settlement

### Example: ISO EC 00 10

#### 15. Valuation – Settlement

a. All premiums, Aggregate Limits of Insurance, Deductible Amounts, "loss" and any other monetary amounts under this Policy are expressed and payable in the currency of the United States of America. If judgment is rendered, settlement is agreed to or another component of "loss" under this Policy is expressed in any currency other than United States of America dollars, payment under this Policy shall be made in United States dollars at the rate of exchange published in The Wall Street Journal on the date the final judgment is entered, settlement amount is agreed upon or the other component of "loss" is due, respectively.

b. With respect to "loss" covered under Insuring Agreement 6. Business Income And Extra Expense:

(1) The amount of "business income" will be determined based on consideration of:

- (a) The net income generated from your "e-commerce activities" before the "interruption" occurred;
- (b) The likely net income generated by your "e-commerce activities" if no "interruption" had occurred, but not including any net income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the "e-commerce incident" on customers or on other businesses;
- (c) The operating expenses, including payroll, necessary to resume your "e-commerce activities" with the same quality of service that existed before the "interruption"; and
- (d) Other relevant sources of information, including your financial records and accounting procedures, bills, invoices and other vouchers, and debts, liens and contracts.

However, the amount of "business income" will be reduced to the extent that the reduction in the volume of business from the affected "e-commerce activities" is offset by an increase in the volume of business from other channels of commerce such as via telephone, mail or other sources.

(2) The amount of "extra expense" will be determined based on:

- (a) Necessary expenses that exceed the normal operating expenses that would have been incurred in the course of your "e-commerce activities" during the period of coverage if no "interruption" had occurred. We will deduct from the total of such expenses the salvage value that remains of any property bought for temporary use during the period of coverage once your "e-commerce activities" are resumed; and
- (b) Necessary expenses that reduce the "business income" "loss" that otherwise would have been incurred during the period of coverage.

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- a. Payable in the currency of the United States of America.
- b. Determines how Business Income losses will be paid
- c. Determines how Extra Expenses losses will be paid

## 8. Confidentiality

Example: ISO EC 00 10

### 17. Confidentiality

Under Insuring Agreement **5. Extortion Threats**, "insureds" must make every reasonable effort not to divulge the existence of this coverage.

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## 9. Territory

Example: ISO EC 00 10

### 18. Territory

This Policy covers "wrongful acts" which occurred anywhere in the world. However, "suits" must be brought in the United States of America (including its territories and possessions), Puerto Rico or Canada.

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- a. Due to the worldwide reach of the Internet, provides worldwide coverage, but some policies may have some limitations
- b. Suit must be brought in the United States of America, including its territories and possessions, Puerto Rico or Canada

Example: ISO EC 00 10

**32.** "Suit" means a civil proceeding in which damages to which this Policy applies are claimed against the "insured". "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the "insured" submits with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the "insured" submits with our consent.

"Suit" does not include a civil proceeding seeking recognition and/or enforcement of a foreign money judgment.

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- c. Some policies do not have a requirement on where suits are filed

Example.

This Insurance applies to Claims made, and acts, errors or omissions committed, or Loss occurring anywhere in the world.

## **VI. CONCLUSION**





# James K. Ruble Seminar

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

## Section 4

# **Commercial Casualty Do's and Don'ts**





# Commercial Casualty



## CGL Policy – BAP

**Workers Compensation & Employers Liability  
Insurance Policy**

as well as some legal concepts  
(if time permits)

BUT EXCLUDING WHO IS AN INSURED PROVISIONS

**Allen Messer**

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# Introductory Comments

## In my opinion!

- Agency should have a **formal method for exposure identification**
- **Agency** should establish “**standards**” when **providing insurance protection** – for example:
  - Minimum liability limits
  - Specific endorsements **on every policy**
  - **Do your best to avoid certain endorsements**

# **Formal Method For Identification**

**Survey for Particular Niche**

**Website Review**

**Flowchart**

**Insurance Policy Review**

**Physical Inspections**

**Compliance Review**

**Policies & Procedures Review**

**Contract Review**

**Financial Statement Analysis**

**Loss Data Analysis**

**Experts**

# **EARLIER NOTICE OF CANCELLATION PROVIDED BY US – CG 02 24**

## **SCHEDULE**

**Number of Days' Notice** \_\_\_\_\_

For any statutorily permitted reason other than nonpayment of premium, the number of days required for notice of cancellation, as provided in paragraph 2. of either the CANCELLATION Common Policy Condition or as amended by an applicable state cancellation endorsement, is increased to the number of days shown in the Schedule above.

## DEDUCTIBLE LIABILITY INSURANCE – CG 03 00

### SCHEDULE

Coverage	Amount and Basis of Deductible PER CLAIM or PER OCCURRENCE	
Bodily Injury Liability	\$	\$
OR		
Property Damage Liability	\$	\$
OR		
Bodily Injury Liability and/or Property Damage Liability Combined	\$	\$

**APPLICATION OF ENDORSEMENT** (enter below any limitations on the application of this endorsement. If no limitation is entered, the deductibles apply to damages for all “bodily injury” and “property damage”, however caused):

e.g., **SPRAY PAINTING OPERATIONS**

# COVERAGE FOR INJURY TO LEASED WORKERS

## – CG 04 24

With respect to the Employer's Liability exclusion (Section I) only, the definition of "employee" in the **DEFINITIONS** Section is replaced by the following:

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

# EMPLOYEE BENEFITS LIABILITY COVERAGE

## – CG 04 35

- Adds insurance protection on a claims made basis for those sums that the insured becomes legally obligated to pay as damages because of any act, error or omission, of the insured, or of any other person for whose acts the insured is legally liable, to which this insurance applies.
- Insurance applies to damages only if:
  - (1) The act, error or omission, is negligently committed in the "administration" of the named insured's "employee benefit program";
  - (2) The act, error or omission, did not take place before the Retroactive Date, if any, shown in the Schedule nor after the end of the policy period; and
  - (3) A "claim" for damages, because of an act, error or omission, is first made against any insured, in accordance with Paragraph c. below, during the policy period or an Extended Reporting Period we provide under Paragraph F. of this endorsement.
- Exclusions for Dishonest, Fraudulent, Criminal Or Malicious Act ; Bodily Injury, Property Damage, Or Personal And Advertising Injury; Failure To Perform A Contract ; Insufficiency Of Funds; Inadequacy Of Performance Of Investment/Advice Given With Respect To Participation; Workers' Compensation And Similar Laws; ERISA; Available Benefits; Taxes, Fines Or Penalties ; Employment-Related Practices
- Limit Of Insurance applies each employee with an aggregate
- Deductible applies each employee

## **CGL Policy Definition**

**17. "Property damage" means: (revised with 2001 edition)**

- 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.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

## **NEED AN OPTION FOR BUYING BACK LIABILITY COVERAGE FOR DAMAGE TO ELECTRONIC DATA – CG 04 37**



# ELECTRONIC DATA LIABILITY – CG 04 37

allows the chance to buy back limited coverage

## SCHEDULE

Loss Of Electronic Data Limit: \$\_\_\_\_\_

.....*in part*

**E. For the purposes of the coverage provided by this endorsement, the definition of "property damage" in the Definitions section is replaced by the following:**

**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;
- 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; or
- c. Loss of, loss of use of, damage to**, corruption of, inability to access, or inability to properly manipulate "electronic data", **resulting from physical injury to tangible property**. All such loss of "electronic data" 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.

## ❖ **Electronic Data Liability Coverage Form – CG 00 65**

covers actual loss of data without requiring associated  
“physical injury to tangible property”

# PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION – CG 20 01

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

## **Primary And Noncontributory Insurance**

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

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

## **Sample Umbrella Wording – Other Insurance**

### **Other Insurance**

If valid and collectible **Other Insurance** Applies to damages that are also covered by this policy, this policy will apply excess of, and will not contribute with, that **Other Insurance**, whether it is primary, excess, contingent or on any other basis.

However, if you specifically agree in a written contract or agreement that the insurance provided to any person or organization as an **Insured** under paragraph IV.O.3 above, must apply on a primary basis or a primary and non-contributory basis, this policy will apply to **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** as if **Other Insurance** available to such person or organization under which that person or organization qualifies as a named insured does not exist, and we will not share with that **Other Insurance**, provided that such **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** is caused by an **Occurrence** that commences subsequent to the execution of such contract or agreement. But this insurance is still excess over any **Other Insurance**, whether such insurance is primary, excess, contingent or on any other basis, which covers that person or organization as an additional insured or as any other insured that does not qualify as a named insured.

## **ADDITIONAL INSURED – CLUB MEMBERS – CG 20 02**

WHO IS AN INSURED (Section II) is amended to include as an insured any of your members, but only with respect to their liability for your activities or activities they perform on your behalf.

## **ADDITIONAL INSURED – CHURCH MEMBERS AND OFFICERS - CG 20 22**

**A. Paragraph 2.a., Exclusions of Section I – Coverage C – Medical Payments** is replaced by the following:

We will not pay expenses for "bodily injury":

- a.** To any insured, except church members who are not paid a fee, salary or other compensation.

**B. Section II – Who Is An Insured** is amended to include the following as insureds:

- 1.** Any of your church members, but only with respect to their liability for your activities or activities they perform on your behalf.
- 2.** Any:
  - a.** Trustee, official or member of the board of governors of the church; or
  - b.** Members of the clergybut only with respect to their duties as such.

# **EXCLUSION – ALL HAZARDS IN CONNECTION WITH DESIGNATED PREMISES – CG 21 00 SCHEDULE**

## **Description And Location Of Premises:**

The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2., Exclusions Of Section I – Coverage B – Personal And Advertising Injury Liability:

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 shown 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.

# **EXCLUSION – ATHLETIC OR SPORTS PARTICIPANTS – CG 21 01**

## **SCHEDULE**

### **Description of Operations:**

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

With respect to any operations shown in the Schedule, this insurance does not apply to "bodily injury" to any person arising out of practicing for or participating in any sports or athletic contest or exhibition that you sponsor.

This exclusion applies even if the claims against any insured allege negligence or other wrong doing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" involving practicing for or participating in any sports or athletic contest or exhibition that you sponsor.

# **EXCLUSION – ATHLETIC OR SPORTS PARTICIPANTS – ALL CONTESTS OR EXHIBITIONS – CG 40 03**

### **Description of Operations:**

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

With respect to any operations shown in the Schedule, this insurance does not apply to "bodily injury" to any person arising out of practicing for or participating in any sports or athletic contest or exhibition.

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" involved practicing for or participating in any sports or athletic contest or exhibition.

# **EXCLUSION – ACCESS OR DISCLOSURE OF CONFIDENTIAL OR PERSONAL INFORMATION AND DATA-RELATED LIABILITY – WITH LIMITED BODILY INJURY EXCEPTION – CG 21 06**

A. Exclusion 2.p. of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

## **2. Exclusions**

This insurance does not apply to:

### **p. Access Or Disclosure Of Confidential Or Personal Information And Data-related Liability**

Damages arising out of:

- (1)** Any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information; or
- (2)** The loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

This exclusion applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of that which is described in Paragraph **(1)** or **(2)** above.

However, unless Paragraph **(1)** above applies, this exclusion does not apply to damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

B. The following is added to Paragraph 2. **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:**

## **2. Exclusions**

This insurance does not apply to:

### **Access Or Disclosure Of Confidential Or Personal Information**

"Personal and advertising injury" arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information.

This exclusion applies even if damages are claimed for notification costs, credit monitoring expenses, forensic expenses, public relations expenses or any other loss, cost or expense incurred by you or others arising out of any access to or disclosure of any person's or organization's confidential or personal information.

# **EXCLUSION - UNMANNED AIRCRAFT – CG 21 09**

## ***In part***

- A. Exclusion 2.g. Aircraft, Auto Or Watercraft under Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

### **2. Exclusions**

This insurance does not apply to:

#### **g. Aircraft, Auto Or Watercraft**

##### **(1) Unmanned Aircraft**

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

- B. The following is added to Paragraph 2. Exclusions of Coverage B- Personal And Advertising Injury Liability:**

### **2. Exclusions**

This insurance does not apply to:

#### **Unmanned Aircraft**

**“Personal and advertising injury” arising out of the ownership, maintenance, use or entrustment to others of any aircraft that is an “unmanned aircraft”. Use includes operation and Loading or unloading. ....**

- C. The following definition is added to the Definitions section:**

**“Unmanned aircraft: means an aircraft that is not:**

- 1. Designed;**
- 2. Manufactured; or**
- 3. Modified after manufacture:**

**to be controlled directly by a person from within or on the aircraft.**

## **CG 21 09 AND OTHER ENDORSEMENTS**

- Exclusion g. under Coverage A. in the CGL Policy already excludes any coverage for drones if ... “owned or operated by or rented or loaned to any insured”... BUT does not exclude exposure if operated by a third party on behalf of the insured
  - **CG 21 09 excludes this third party exposure**
- No exclusion under Coverage B in the unendorsed CGL Policy
  - **CG 21 09 adds this exclusion to Coverage B**
- **CG 21 10 - EXCLUSION - UNMANNED AIRCRAFT (Coverage A Only)**
- **CG 21 11 - EXCLUSION - UNMANNED AIRCRAFT (Coverage B Only)**
- **CG 24 50 – LIMITED COVERAGE FOR DESIGNATED UNMANNED AIRCRAFT**
  - Schedule – Description of Unmanned Aircraft/Description of Operation(s) Or Project(s)
  - Optional Unmanned Aircraft Liability Aggregate Limit



# **LIMITED EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONTROLLED (WRAP-UP) INSURANCE PROGRAM – CG 21 31 SCHEDULE**

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

### **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 described in the Schedule of this endorsement, but only if you are enrolled in as 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 consolidated (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 locations 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.

## **Watch out for – CG 21 54 - EXCLUSION—DESIGNATED OPERATIONS COVERED BY A CONTROLLED (WRAP-UP) INSURANCE PROGRAM**

# **COMMUNICABLE DISEASE EXCLUSION**

## **– CG 21 32**

### **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.

## **EXCLUSION – DESIGNATED PRODUCTS – CG 21 33 SCHEDULE**

### **Designated Product(s):**

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

## **EXCLUSION – DESIGNATED WORK – CG 21 34 SCHEDULE**

### **Description of your work:**

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.

# **EXCLUSION - COVERAGE C – MEDICAL PAYMENTS – CG 21 35 SCHEDULE**

## **Description and Location of Premises or Classification:**

With respect to any premises or classification shown in the Schedule:

1. Section I – Coverage C – Medical Payments does not apply and none of the references to it in the Coverage Part apply: and
2. The following is added to Section I – Supplementary Payments:
  - h. Expenses incurred by the insured for first aid administered to others at the time of an accident for "bodily injury" to which this insurance applies.

## **FROM CGL Insuring Agreement**

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

# CONTRACTUAL LIABILITY LIMITATION

## – CG 21 39

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.

➤ eliminates Paragraph f. from definition

**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.**

# CGL Policy Conditions

## 7. 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.

## EXCLUSION – INTERCOMPANY PRODUCTS SUITS – CG 21 41

This insurance does not apply to any claim 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."

## EXCLUSION – CROSS SUITS LIABILITY – CG 40 10

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

This insurance does not apply to:

### Cross Suits

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".

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

This insurance does not apply to:

### Cross Suits

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".

# **LIMITATION OF COVERAGE TO DESIGNATED PREMISES OR PROJECT – CG 21 44 SCHEDULE**

**Premises:**

**Project:**

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.

**Just how ambiguous the limitation of liability coverage to specific premises can be was illustrated** in the case of *Brewer & Co. v. Marine Indem. Ins. Co. of Am.*, 347 P.3d 163 (Hawaii 2015). Following the collapse of a dam in 2006 and resulting claims for bodily injury and property damage, the owner of the dam brought suit **against the corporation that had sold the dam and surrounding property to him**. The allegations contained in this suit were that the seller had been **negligent in arranging maintenance and repair work on the dam** and, therefore, was legally responsible for the collapse. At the time of the injury and damage, the **seller was insured under a general liability policy that had been endorsed to limit coverage to injury or damage "arising out of the ownership, maintenance or use of the premises shown in the above Schedule"**. **Listed as a scheduled premises was the seller's business headquarters.** The dam itself and the land it was on were not in the schedule. On that basis, the seller's liability insurer denied coverage. The resulting litigation ultimately made its way on appeal to the **Hawaii Supreme Court, which ruled that the seller's negligence in maintaining the dam before it was sold caused injury and damage "arising out of the ownership, maintenance or use" of the seller's business office.**

The **court emphasized** that no "designated premises" endorsement (other than one, perhaps, that specifically limits coverage to liability for injury or damage that occurs at the designated premises) **can convert a CGL policy into a premises liability policy**. That principle, enunciated by the Hawaii court in interpreting the phrase "arising out of the ownership, maintenance or use of the premises," would seem to be even more applicable in interpreting the scope of liability that arises out of "operations necessary or incidental" to the scheduled premises.

## **As a result, LIMITATION OF COVERAGE TO DESIGNATED PREMISES, PROJECT OR OPERATION – CG 21 44 04 17**

# EMPLOYMENT-RELATED PRACTICES EXCLUSION

## – CG 21 47

### **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, 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.



# CGI Policy – Pollution Exclusion

**This insurance does not apply to:**

(1) “Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of “pollutants”:

**Paragraph (a)** - at or from any premises, site, or location which is or was at any time owned or occupied by, or rented or loaned to, **any** insured.

However, this subparagraph does **NOT** apply to:

**Let’s look at exceptions to premises exclusion!**

- bodily injury caused by smoke, fumes, vapor or soot from the building’s heating or cooling system or equipment used to heat water for personal use
- bodily injury or property damage if named insured is a contractor and:
  - The owner or lessee of the premises, site or location has been added to named insured’s policy as an additional insured for ongoing operations with respect to that additional insured at that premises, site or location; and
  - That premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured
- bodily injury or property damage arising out of heat, smoke or fumes from a “hostile fire” (premises)

# **CGL POLLUTION EXCLUSION**

**This insurance does not apply to:**

**Paragraph (b)** - at or from any premises, site or location which is was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste – **“landfill exclusion”**

**Paragraph (c)** - which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste for any insured or any person or organization for whom you may be legally responsible – **“transporter exclusion”**

**These two paragraphs involve waste treatment and disposal – both premises and operations exposures are excluded!**

# CGL POLLUTION EXCLUSION

**This insurance does not apply to:**

**Paragraph (d)** - at or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" **are brought** on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does NOT apply to:

**Let's look at operations exceptions to exclusions!**

- BI – Do not take pollutants to site – no intentional discharge – not there to work on - implied exception
- BI/PD – Fuels/Lubricants mobile equipment – no intentional discharge
- BI/PD – Take pollutants to site – within building – release of gases/fumes/vapors
- BI/PD – Hostile Fire

## **CGL Policy POLLUTION EXCLUSION**

### **This insurance does not apply to:**

**Paragraph (e)** - at or from premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants". –  
**"environmental remediation exclusion"**

**This paragraph involves the "hazardous materials" contractor – must be endorsed to provide coverage – not usually available in standard market**

### **HAZARDOUS MATERIAL CONTRACTORS – CG 22 78**

With respect to the removal, replacement, repair, enclosure or encapsulation of any hazardous material or substance from a building or structure, Paragraph (1)(e) under **Exclusion f. of Section I—Coverage A—Bodily Injury and Property Damage Liability** is deleted.

## **CGL POLLUTION EXCLUSION**

**Products-completed operations exception**

# **TOTAL POLLUTION EXCLUSION ENDORSEMENT – CG 21 49**

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".

## **TOTAL POLLUTION EXCLUSION WITH A BUILDING HEATING, COOLING AND DEHUMIDIFYING EQUIPMENT EXCEPTION AND A HOSTILE FIRE EXCEPTION – CG 21 65**

## **TOTAL POLLUTION EXCLUSION WITH A HOSTILE FIRE EXCEPTION – CG 21 55**

# CGL Policy Exclusions

## c. Liquor Liability

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

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

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

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

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

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

## **AMENDMENT OF LIQUOR LIABILITY EXCLUSION – CG 21 50**

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

.....*in part*

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 – EXCEPTION FOR SCHEDULED PREMISES OR ACTIVITIES – CG 21 51 SCHEDULE**

**Description Of Premises Or Activities:**

.....*in part*

However, this exclusion does not apply to "bodily injury" or "property damage" arising out of:

- (i) The selling, serving or furnishing of alcoholic beverages at the specified activity described in the Schedule; or
- (ii) Permitting any person to bring any alcoholic beverages on the premises described in the Schedule, for consumption on the premises described in the Schedule.

## **AMENDMENT OF LIQUOR LIABILITY EXCLUSION – LIMITED EXCEPTION FOR BRING YOUR OWN ALCOHOL – CG 40 09**

.....(in part) May be used instead of CG 21 50 or 21 51

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

# **EXCLUSION – DESIGNATED ONGOING OPERATIONS – CG 21 53**

## **SCHEDULE**

### **Description of Designated Ongoing Operation(s):**

#### **Specified Location (If Applicable):**

The following exclusion is added to paragraph **2.**, Exclusions of COVERAGE A—BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I —Coverages):

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.

Unless a "location" is specified in the Schedule, this exclusion applies regardless of where such operations are conducted by you or on your behalf. If a specific "location" is designated in the Schedule of this endorsement, this exclusion applies only to the described ongoing operations conducted at that "location".

For the purpose of this endorsement, "location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.



## **PESTICIDE OR HERBICIDE APPLICATOR— LIMITED POLLUTION COVERAGE – CG 22 64**

With respect to the operations shown in the Schedule, Paragraph (1)(d) of Exclusion f. of **Section I – Coverage A – Bodily Injury And Property Damage Liability** does not apply *if the operations meet all standards of any statute, ordinance, regulation or license requirement of any federal, state or local government which apply to those operations.*

**CLM** rules mandate the use of endorsement CG 22 64 on the CGL Policy of any named insured in one of the following classifications:

- 43470    Pest Control Services**
- 43860    Fumigating**
- 91606    Crop Spraying—by contractors**
- 98257    Orchards and Vineyards—operation by contractors**
- 99777    Tree Pruning, Dusting, Spraying, Repairing, Trimming or Fumigating**

# **MISDELIVERY OF LIQUID PRODUCTS COVERAGE**

## **– CG 22 66**

Exclusion **g.** of COVERAGE A (Section I) does not apply to "bodily injury" or "property damage" arising out of:

- 1.** The delivery of any liquid product into a wrong receptacle or to a wrong address; or
- 2.** The erroneous delivery of one liquid product for another by an "auto";

if the "bodily injury" or "property damage" occurs after such operations have been completed or abandoned at the site of such delivery.

Operations which may require further service, maintenance, correction, repair or replacement of performance at the wrong address or because of any error, defect or deficiency, but which are otherwise completed, will be deemed completed.

## OPERATION OF CUSTOMERS' AUTOS ON PARTICULAR PREMISES – CG 22 68

- A. Exclusion g. of paragraph 2., Exclusions of COVERAGE A—BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I —Coverages) does not apply to any "customer's auto" while on or next to those premises you own, rent or control that are used for any of the following businesses:
1. Auto Repair or Service Shops;
  2. Car Washes;
  3. Gasoline Stations;
  4. Tire Dealers;
  5. Automobile Quick Lubrication Services.
- B. The following definition is added to the DEFINITIONS Section:
- "Customer's auto" means an "auto" on those premises for the purpose of receiving the services normally provided in connection with those businesses but does not include an "auto" owned by or rented or loaned to any insured.

# LIMITED CONTRACTUAL LIABILITY COVERAGE FOR PERSONAL AND ADVERTISING INJURY – CG 22 74 SCHEDULE

## Designated Contract Or Agreement:

*In part....*

A. With respect to the contract or agreement designated in the Schedule above, Subparagraph e. of Paragraph 2. **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability** is replaced by the following:

### 2. 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:

- (1) Liability for damages that the insured would have in the absence of the contract or agreement; or
- (2) Liability for "personal and advertising injury" if:
  - (a) The liability pertains to your business and is assumed in the designated contract or agreement shown in the Schedule in which you assume the tort liability of another. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;
  - (b) The "personal and advertising injury" occurs subsequent to the execution of the designated contract or agreement shown in the Schedule; and
  - (c) The "personal and advertising injury" arises out of the offenses of false arrest, detention or imprisonment.

# **EXCLUSION – CONTRACTORS – PROFESSIONAL LIABILITY – CG 22 79**

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

1. This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:
  - a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and
  - b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.

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 the rendering of or failure to render any professional services by you or on your behalf with respect to the operations described above.

2. Subject to Paragraph 3. below, professional services include:
  - a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
  - b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.
3. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

# SNOW PLOW OPERATIONS COVERAGE

## – CG 22 92

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.

# **LAWN CARE SERVICES – LIMITED POLLUTION COVERAGE – CG 22 93**

Paragraph **(1)(d)** of Exclusion **f.** under **Section I – Coverage A – Bodily Injury And Property Damage Liability** does not apply to the application of herbicides or pesticides by an insured on lawns under your regular care.

For use with Class Code 97050—Lawn Care Services

# **EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF – CG 22 94**

Exclusion I. of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:

## **2. Exclusions**

This insurance does not apply to:

### **I. Damage To Your Work**

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

❖ Watch out for **EXCLUSION – DAMAGE TO WORK  
PERFORMED BY SUBCONTRACTORS ON YOUR  
BEHALF – DESIGNATED SITES OR OPERATIONS  
- CG 22 95**



# **WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US – CG 24 04 SCHEDULE**

## **Name Of Person(s) Or Organization(s):**

The following is added to Paragraph 8. Transfer Of Rights Of Recovery Against Others To Us of Section IV – Conditions:

We waive any right of recovery against the person(s) or organization(s) shown in the Schedule above because of payments we make under this Coverage Part. Such waiver by us applies only to the extent that the insured has waived its right of recovery against such person(s) or organization(s) prior to loss. This endorsement applies only to the person(s) or organization(s) shown in the Schedule above.

# **WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US (WAIVER OF SUBROGATION) – AUTOMATIC – CG 24 53**

The following is added to Paragraph 8. Transfer Of Rights Of Recovery Against Others To Us of Section IV – Conditions:

We waive any right of recovery against any person or organization, because of any payment we make under this Coverage Part, to whom the insured has waived its right of recovery in a written contract or agreement. Such waiver by us applies only to the extent that the insured has waived its right of recovery against such person or organization prior to loss.

# CGL Policy Definitions

## *In part*

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

# PRODUCTS/COMPLETED OPERATIONS HAZARD REDEFINED – CG 24 07

## SCHEDULE

### Description of Premises and Operations:

With respect to "bodily injury" or "property damage" arising out of "your products" manufactured, sold, handled or distributed:

1. On, from or in connection with the use of any premises described in the Schedule, or
2. In connection with the conduct of any operation described in the Schedule, when conducted by you or on your behalf,

Paragraph a. of the definition of "Products—completed operations hazard" in the DEFINITIONS Section is replaced by the following:

"Products-completed operations hazard":

- a. Includes all "bodily injury" and "property damage" that arises out of "your products" if the "bodily injury" or "property damage" occurs after you have relinquished possession of those products.

# BOATS – CG 24 12

## SCHEDULE

### Description of Watercraft:

### Additional Premium:

1. Exclusion g. of **COVERAGE A** (Section I) does not apply to any watercraft owned or used by or rented to the insured shown in the Schedule.
2. **WHO IS AN INSURED** (Section II) is amended to include as an insured any person or organization legally responsible for the use of any such watercraft you own, provided the actual use is with your permission.

# **AMENDMENT OF PERSONAL AND ADVERTISING INJURY DEFINITION – CG 24 13**

With respect to Coverage B Personal And Advertising Injury Liability, Paragraph 14.e. of the Definitions section does not apply.

## **FROM CGL POLICY DEFINITIONS**

**14.** "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a.** False arrest, detention or imprisonment;
- b.** Malicious prosecution;
- c.** The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d.** Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e.** Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f.** The use of another's advertising idea in your "advertisement"; or
- g.** Infringing upon another's copyright, trade dress or slogan in your "advertisement".

# **CONTRACTUAL LIABILITY – RAILROADS**

## **– CG 24 17**

### **SCHEDULE**

#### **Scheduled Railroad:**

#### **Designated Job Site:**

With respect to operations performed for, or affecting, a Scheduled Railroad at a Designated Job Site, the definition of "insured contract" in the Definitions section is replaced by the following:

#### **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;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

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

- (1) 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;
- (2) 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 Paragraph (1) above and supervisory, inspection, architectural or engineering activities.

❖ **Watch out for LIMITED CONTRACTUAL LIABILITY –  
RAILROADS - CG 24 27 – does not apply to sole  
negligence of railroad**

# AMENDMENT OF INSURED CONTRACT

## DEFINITION – CG 24 26

The definition of "insured contract" in the Definitions section is replaced by the following:

"Insured contract" means:

.....***in part***

- 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.

# DESIGNATED CONSTRUCTION PROJECT(S)

## GENERAL AGGREGATE LIMIT – CG 25 03

### SCHEDULE

#### **Designated Construction Project(s): ALL**

- A. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section I – Coverage A, and for all medical expenses caused by accidents under Section I – Coverage C, which can be attributed only to ongoing operations at a single designated construction project shown in the Schedule above:
1. A separate Designated Construction Project General Aggregate Limit applies to each designated construction project, and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.
  2. The Designated Construction Project General Aggregate Limit is the most we will pay for the sum of all damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", and for medical expenses under Coverage C regardless of the number of:
    - a. Insureds;
    - b. Claims made or "suits" brought; or
    - c. Persons or organizations making claims or bringing "suits".
  3. Any payments made under Coverage A for damages or under Coverage C for medical expenses shall reduce the Designated Construction Project General Aggregate Limit for that designated construction project. Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Construction Project General Aggregate Limit for any other designated construction project shown in the Schedule above.
  4. The limits shown in the Declarations for Each Occurrence, Damage To Premises Rented To You and Medical Expense continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Construction Project General Aggregate Limit.
- B. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section I – Coverage A, and for all medical expenses caused by accidents under Section I – Coverage C, which cannot be attributed only to ongoing operations at a single designated construction project shown in the Schedule above:
1. Any payments made under Coverage A for damages or under Coverage C for medical expenses shall reduce the amount available under the General Aggregate Limit or the Products-completed Operations Aggregate Limit, whichever is applicable; and
  2. Such payments shall not reduce any Designated Construction Project General Aggregate Limit.
- C. When coverage for liability arising out of the "products-completed operations hazard" is provided, any payments for damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" will reduce the Products-completed Operations Aggregate Limit, and not reduce the General Aggregate Limit nor the Designated Construction Project General Aggregate Limit.
- D. If the applicable designated construction project has been abandoned, delayed, or abandoned and then restarted, or if the authorized contracting parties deviate from plans, blueprints, designs, specifications or timetables, the project will still be deemed to be the same construction project.
- E. The provisions of Section III – Limits Of Insurance not otherwise modified by this endorsement shall continue to apply as stipulated.



# DESIGNATED LOCATION(S) GENERAL AGGREGATE LIMIT - CG 25 04 SCHEDULE

## Designated Location(s): ALL

- A. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section I – Coverage A, and for all medical expenses caused by accidents under Section I – Coverage C, which can be attributed only to operations at a single designated "location" shown in the Schedule above:
1. A separate Designated Location General Aggregate Limit applies to each designated "location", and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.
  2. The Designated Location General Aggregate Limit is the most we will pay for the sum of all damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", and for medical expenses under Coverage C regardless of the number of:
    - a. Insureds;
    - b. Claims made or "suits" brought; or
    - c. Persons or organizations making claims or bringing "suits".
  3. Any payments made under Coverage A for damages or under Coverage C for medical expenses shall reduce the Designated Location General Aggregate Limit for that designated "location". Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Location General Aggregate Limit for any other designated "location" shown in the Schedule above.
  4. The limits shown in the Declarations for Each Occurrence, Damage To Premises Rented To You and Medical Expense continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Location General Aggregate Limit.
- B. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section I – Coverage A, and for all medical expenses caused by accidents under Section I – Coverage C, which cannot be attributed only to operations at a single designated "location" shown in the Schedule above:
1. Any payments made under Coverage A for damages or under Coverage C for medical expenses shall reduce the amount available under the General Aggregate Limit or the Products-completed Operations Aggregate Limit, whichever is applicable; and
  2. Such payments shall not reduce any Designated Location General Aggregate Limit.
- C. When coverage for liability arising out of the "products-completed operations hazard" is provided, any payments for damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" will reduce the Products-completed Operations Aggregate Limit, and not reduce the General Aggregate Limit nor the Designated Location General Aggregate Limit.
- D. For the purposes of this endorsement, the Definitions Section is amended by the addition of the following definition:
- "Location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.
- E. The provisions of Section III – Limits Of Insurance not otherwise modified by this endorsement shall continue to apply as stipulated.

# DESIGNATED PROJECT(S) PRODUCTS-COMPLETED OPERATIONS AGGREGATE LIMIT – CG 25 45

## Designated Project(s): ALL

- A. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section I – Coverage A because of "bodily injury" and "property damage" included in the "products-completed operations hazard" which can be attributed only to "your work" at a single designated project shown in the Schedule above:
1. A separate Designated Project Products-Completed Operations Aggregate Limit applies to each designated project, and that limit is equal to the amount of the Products-Completed Operations Aggregate Limit shown in the Declarations.
  2. The Designated Project Products-Completed Operations Aggregate Limit is the most we will pay for the sum of all damages under Coverage A because of "bodily injury" and "property damage" included in the "products-completed operations hazard", regardless of the number of:
    - a. Insureds;
    - b. Claims made or "suits" brought; or
    - c. Persons or organizations making claims or bringing "suits".
  3. Any payments made under Coverage A for damages shall reduce the Designated Project Products-Completed Operations Aggregate Limit for that designated project. Such payments shall not reduce the Products-Completed Operations Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Project Products-Completed Operations Aggregate Limit for any other designated project shown in the Schedule above.
  4. The limits shown in the Declarations for Each Occurrence continue to apply. However, instead of being subject to the Products-Completed Operations Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Project Products-Completed Operations Aggregate Limit.
- B. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section I – Coverage A because of "bodily injury" and "property damage" included in the "products-completed operations hazard" which cannot be attributed only to "your work" at a single designated project shown in the Schedule above:
1. Any payments made under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard" shall reduce the amount available under the Products-Completed Operations Aggregate Limit; and
  2. Such payments shall not reduce any Designated Project Products-Completed Operations Aggregate Limit.
- C. Any payments for damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", will reduce the General Aggregate Limit, and will not reduce the Products-Completed Operations Aggregate Limit nor any Designated Project Products-Completed Operations Aggregate Limit.
- D. If the applicable designated project has been abandoned, delayed, or abandoned and then restarted, or if the authorized contracting parties deviate from plans, blueprints, designs, specifications or timetables, the project will still be deemed to be the same project.
- E. The provisions of Section III – Limits Of Insurance not otherwise modified by this endorsement shall continue to apply as stipulated.

# DESIGNATED LOCATIONS(S) PRODUCTS- COMPLETED OPERATIONS AGGREGATE LIMIT – CG 25 46

## Designated Location(s): ALL

- A. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section I – Coverage A because of "bodily injury" and "property damage" included in the "products-completed operations hazard" which can be attributed only to:
- Operations at; or
  - "Your products" manufactured, sold, handled or distributed at, from or in connection with;
- a single designated project shown in the Schedule above:
- A separate Designated Location Products-Completed Operations Aggregate Limit applies to each designated "location", and that limit is equal to the amount of the Products-Completed Operations Aggregate Limit shown in the Declarations.
  - The Designated Location Products-Completed Operations Aggregate Limit is the most we will pay for the sum of all damages under Coverage A because of "bodily injury" and "property damage" included in the "products-completed operations hazard", regardless of the number of:
    - Insureds;
    - Claims made or "suits" brought; or
    - Persons or organizations making claims or bringing "suits".
  - Any payments made under Coverage A for damages shall reduce the Designated Location Products-Completed Operations Aggregate Limit for that designated "location". Such payments shall not reduce the Products-Completed Operations Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Location Products-Completed Operations Aggregate Limit for any other designated "location" shown in the Schedule above.
  - The limit shown in the Declarations for Each Occurrence continue to apply. However, instead of being subject to the Products-Completed Operations Aggregate Limit shown in the Declarations, such limit will be subject to the applicable Designated Location Products-Completed Operations Aggregate Limit.
- B. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under Section I – Coverage A because of "bodily injury" and "property damage" included in the "products-completed operations hazard" which cannot be attributed only to:
- Operations at; or
  - "Your products" manufactured, sold, handled or distributed at, from or in connection with;
- at a single designated project shown in the Schedule above:
- Any payments made under Coverage A for damages shall reduce the amount available under the Products-Completed Operations Aggregate Limit; and
  - Such payments shall not reduce any Designated Location Products-Completed Operations Aggregate Limit.
- C. Any payments for damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", will reduce the General Aggregate Limit, and will not reduce the Products-Completed Operations Aggregate Limit nor any Designated Location Products-Completed Operations Aggregate Limit.
- D. For the purposes of this endorsement, the **Definitions** section is amended by the addition of the following definition:
- "Location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.
- E. The provisions of Section III – Limits Of Insurance not otherwise modified by this endorsement shall continue to apply as stipulated.

## **EXCLUSION – EARTH MOVEMENT – CG 40 04**

**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 realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface.

## **EXCLUSION – EARTH MOVEMENT – COMPLETED OPERATIONS – CG 40 05**

## **EARTH MOVEMENT – EXCLUSION FOR DESIGNATED OPERATION(S) OR PROJECTS(S) – CG 40 06**

# EXCLUSION – HIRED AUTO LIABILITY – CG 40 11

With respect to “hired autos”, the following provisions supersede any provisions to the contrary:

- A. The following exclusion is added to Paragraph **g. Aircraft, Auto Or Watercraft**, Paragraph 2.

**Exclusions of Section I – Coverages, Coverage A – Bodily Injury And Property Damage Liability:**

This insurance does not apply to:

**g. Aircraft, Auto Or Watercraft**

“Bodily injury” or “property damage” arising out of the maintenance, use or entrustment to others of any “hired auto”.

Use includes operation and “loading or unloading”.

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

- B. For the purposes of this endorsement, the following definition is added:

“Hired auto” means any “auto”:

1. Leased to, for or by any insured; or
2. Hired or borrowed for or by any insured.

# PREMIUM AUDIT NONCOMPLIANCE CHARGE

## – CG 99 09

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART  
ELECTRONIC DATA LIABILITY COVERAGE PART  
LIQUOR LIABILITY COVERAGE PART  
POLLUTION LIABILITY COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART  
UNDERGROUND STORAGE TANK LIABILITY COVERAGE PART

### SCHEDULE

<b>Total Advance Premium:</b>	<b>\$</b>
<b>Audit Noncompliance Charge Factor:</b>	
<b>Number Of Written Attempts To Obtain Audit Information:</b>	
<b>Reassessment Charge:</b>	<b>\$</b>

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

Paragraph 5.c. of the **Premium Audit** Condition under **Section IV – Conditions** is replaced by the following:

- c. The first Named Insured must keep records of the information we need for premium computation and send us copies at such times as we may request. If the first Named Insured fails to comply with this request at the close of an audit period, an Audit Noncompliance Charge will be assessed, and notice will be sent to the first Named Insured.

The additional charge will be determined by multiplying the Total Advance Premium by the Audit Noncompliance Charge Factor indicated in the Schedule of this endorsement. (The following example is for illustration purposes only.)

Example:

Total Advance Premium: \$25,000  
Audit Noncompliance Charge Factor: 1  
Audit Noncompliance Charge: \$25,000

**(1) We will only assess the Audit Noncompliance Charge:**

- (a)** For audits conducted after the end of the policy period; and
- (b)** When we have made the number of written attempts indicated in the Schedule of this endorsement to obtain audit information from the first Named Insured.

The due date for the Audit Noncompliance Charge is the date shown as the due date on the bill

**(2) Subsequent Compliance And Reassessment Charge**

- (a)** The first Named Insured may notify us in writing, prior to the due date on the bill for the Audit Noncompliance Charge, that the Named Insured agrees to comply with the audit request.
- (b)** A Reassessment Charge may apply if this charge is indicated in the Schedule.
- (c)** The first Named Insured must comply with the audit within 30 days of our receipt of the written notification described in Paragraph **(2)(a)** above, and then the Audit Noncompliance Charge will no longer apply. If a Reassessment Charge is indicated in the Schedule of this endorsement, that charge will remain applicable.
- (d)** If the first Named Insured fails to comply with the premium audit after 30 days of our receipt of the notification described in Paragraph **(2)(a)** above, a subsequent notice will be sent to the first Named Insured indicating that the Audit Noncompliance Charge and the Reassessment Charge (if applicable) will be final. The due date for the Audit Noncompliance Charge and the Reassessment Charge is the date shown as the due date on the bill.

# **CGL POLICY – A LAST LOOK!**

## **EXCLUSION j. – Damage To Property**

- Commonly referred to as care, custody or control exclusion
- Coverage A – Exclusion**

**Damage To Property** excludes “property damage” to:

- Property owned/rented/occupied by named insured...
- Premises named insured sells, gives away or abandons...
- Loaned to named insured...
- Personal property in the CCC of the insured...
- That particular part of real property...
- That particular part of any property.... – faulty work

Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** – Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3)**, **(4)**, **(5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

**Try to secure insurer specific endorsements that modify Exclusion j**

# SUSPENSION OF INSURANCE – CA 02 40

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

<b>Named Insured:</b> <b>Endorsement Effective Date:</b> <b>Reinstatement Effective Date (optional):</b>
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## SCHEDULE

Coverage (Check all that apply)	All Covered "Autos"	All Covered "Autos" You Own	Covered "Autos" Listed Below
<b>Covered Autos Liability</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Auto Medical Payments</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Uninsured Motorists</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Underinsured Motorists</b> (Indicate only when coverage is not included in Uninsured Motorists Coverage.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Collision</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Other Auto Coverage</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Other Auto Coverage:</b>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Covered Autos:</b>			
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

- A.Except for maintaining or testing covered "autos" on your property, the coverages and "autos" indicated in this endorsement are suspended as of the Endorsement Effective Date indicated in the Schedule.
- B.If you suspended coverage for at least 30 consecutive days, you will be entitled to a refund of premium.
- C.The coverages indicated in the Schedule will remain suspended until the Reinstatement Effective Date if provided in the Schedule or, if no date is provided, the end of the policy period.



# **WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US (WAIVER OF SUBROGATION) – CA 04 44**

## **SCHEDULE**

**Name(s) Of Person(s) Or Organization(s):**

The Transfer Of Rights Of Recovery Against Others To Us condition does not apply to the person(s) or organization(s) shown in the Schedule, but only to the extent that subrogation is waived prior to the "accident" or the "loss" under a contract **with that person or organization.**

# **WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US (WAIVER OF SUBROGATION) – AUTOMATIC WHEN REQUIRED BY WRITTEN CONTRACT OR AGREEMENT – CA 04 43**

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

The Transfer Of Rights Of Recovery Against Others To Us Condition does not apply to any person(s) or organization(s) for whom you are required to waive subrogation with respect to the coverage provided under this Coverage Form, but only to the extent that subrogation is waived: A. Under a written contract or agreement with such person(s) or organization(s); and B. Prior to the "accident" or the "loss."

# Golf Carts and Low-Speed Vehicles - CA 04 45

Named Insured:

Endorsement Effective Date:

## SCHEDULE

Coverages	Covered "Auto" Vehicle Numbers	Limit of Insurance	Premium
Covered Autos Liability		\$ _____ Each "Accident"	\$
Auto Medical Payments		\$ _____ Each Person	\$
Personal Injury Protection Or Equivalent No-fault Coverage		Separately Stated In Each P.I.P. Endorsement	\$
Uninsured Motorists		\$ _____ Each "Accident"	\$
Underinsured Motorists (When Not Included In Uninsured Motorists Coverage)		\$ _____ Each "Accident"	\$

Vehicle No.	Description Of Vehicles That Are Covered "Autos"

- A.** This endorsement provides only those coverages where a premium is shown in the Schedule. Each of these coverages applies only to the vehicles shown as covered "autos" in the Schedule.
- B.** The vehicles described in the Schedule will be considered covered "autos".

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

## **PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION**

This endorsement modifies insurance provided under the following:

AUTO DEALERS COVERAGE FORM

BUSINESS AUTOCOVERAGE FORM

MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

- A.** The following is added to the **Other Insurance** Condition in the Business Auto Coverage Form and the **Other Insurance – Primary And Excess Insurance Provisions** in the Motor Carrier Coverage Form and supersedes any provision to the contrary:

This Coverage Form's Covered Autos Liability Coverage is primary to and will not seek contribution from any other insurance available to an "insured" under your policy provided that:

1. Such "insured" is a Named Insured under such other insurance; and
2. You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to such "insured".

- B.** The following is added to the **Other Insurance** Condition in the Auto Dealers Coverage Form and supersedes any provision to the contrary:

This Coverage Form's Covered Autos Liability Coverage and General Liability Coverages are primary to and will not seek contribution from any other insurance available to an "insured" under your policy provided that:

1. Such "insured" is a Named Insured under such other insurance; and
2. You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to such "insured".

# MOBILE EQUIPMENT – CA 20 15

Named Insured:
Endorsement Effective Date:

## SCHEDULE

Coverages	Covered "Auto" Vehicle Numbers	Limit Of Insurance	Premium
Covered Autos Liability		\$_____ Each Accident	\$
Auto Medical Payments		\$_____ Each Person	\$
Personal Injury Protection Or Equivalent No-fault Coverage		Separately Stated in Each P.I.P. Endorsement	\$
Uninsured Motorists		\$_____ Each "Accident"	\$
Underinsured Motorists (Indicate Only When Coverage Is Not Included in <b>Uninsured Motorists Coverage</b> .)		\$_____ Each "Accident"	\$
Comprehensive		\$_____ Deductible For Each Covered Auto, For Loss Caused By Theft Or Mischief Or Vandalism OR \$_____ Deductible For All Perils For Each Covered Auto	\$
Collision		\$_____ Deductible For Each Covered Auto	\$
Specified Causes Of Loss		\$_____ Deductible For Each Covered Auto For Loss Caused By Theft Or Mischief Or Vandalism OR \$_____ Deductible For All Perils For Each Covered Auto	\$

Vehicle No.	Description Of Vehicles That Are Covered "Autos"

- A.** This endorsement provides only those coverages where a premium is shown in the Schedule. Each of these coverages applies only to the vehicles shown as covered "autos".
- B.** The vehicles described in the Schedule will be considered covered "autos" and not "mobile equipment".
- C.** Covered Autos Liability Coverage does not apply to "bodily injury", "property damage" or "covered cost or expense" resulting from the operation of any machinery or equipment that is on, attached to or part of any of these vehicles.

# SNOWMOBILES – CA 20 21

Named Insured:	
Endorsement Effective Date:	

## SCHEDULE

Coverages	Vehicle No.	Limit Of Insurance	Premium
Covered Autos Liability		\$ _____ Each Accident	\$ _____
Auto Medical Payments		\$ _____ Each Person	\$ _____
Uninsured Motorists		\$ _____ Each Accident	\$ _____
Underinsured Motorists (When Not Included In Uninsured Motorists Coverage)		\$ _____ Each Accident	\$ _____
Other (Nonphysical Damage) Auto Coverage:		\$ _____	\$ _____
<b>Total Premium</b>			<b>\$ _____</b>

Indicate below with an "X" which, if any, exclusion is deleted.

☐ Exclusion 1.  
☐ Exclusion 2.  
☐ Exclusion 3.

Vehicle No.	Description Of "Snowmobiles" Which Are Covered "Autos"

- A.** This endorsement provides only those coverages where a premium is shown in the Schedule or in the Declarations. **Each of these coverages applies only to the "snowmobiles" shown as covered "autos".**
- B.** The **following exclusions are added:**  
 For the vehicles shown in the Schedule, this insurance does not apply to:  
 1. The covered "auto" while rented or leased to others by you.  
 2. "Bodily injury", under Covered Autos Liability Coverage, to anyone "occupying" or towed by the covered "auto".  
 3. "Loss", under Physical Damage Coverage, to the covered "auto" resulting from breaking through ice.
- C.** **Exclusion 1., 2. or 3. above may be deleted by indicating with an "X" in the above Schedule. Refer to the Schedule or to the Declarations.**
- D.** The premium stated in the Schedule or in the Declarations applies for the period of coverage and will not be refunded if you cancel this insurance.
- E. Additional Definitions**  
 As used in this endorsement:  
 "Occupying" means in, upon, getting in, on, out or off.  
 "Snowmobile" means a land motor vehicle which is:  
 1. Designed for use on ice and snow, and mainly off public roads; and  
 2. Propelled only by mechanical means other than airplane-type propellers or fans.  
 "Snowmobile" also includes a trailer designed to be towed by a vehicle described above.

## FELLOW EMPLOYEE COVERAGE – CA 20 55

The **Fellow Employee** Exclusion contained under the **Covered Autos Liability Coverage** does not apply.

## FELLOW EMPLOYEE COVERAGE FOR DESIGNATED EMPLOYEES/POSITIONS – CA 20 56

Named Insured:

Endorsement Effective Date:

### SCHEDULE

Name Of Person(s), Job Title(s) Or Position(s):

The **Fellow Employee** Exclusion contained under the **Covered Autos Liability Coverage** does not apply to the "employee(s)", job title(s) or position(s) named or listed in the Schedule.

# COVERAGE FOR CERTAIN OPERATIONS IN CONNECTION WITH RAILROADS – CA 20 70

Named Insured:

Endorsement Effective Date:

## SCHEDULE

Scheduled Railroad	Designated Job Site

With respect to the use of a covered "auto" in operations for or affecting a railroad designated in the Schedule at a Designated Job Site, the two exceptions contained in the definition of "insured contract" relating to construction or demolition operations performed within 50 feet of a railroad do not apply.

❖ **When using CG 24 17, always use CA 20 70**

# GARAGEKEEPERS COVERAGE – CA 99 37

Named Insured:
Endorsement Effective Date:

## SCHEDULE

Location Number	Address Where You Conduct Garage Operations (Main Location)		
Coverages	Limit Of Insurance And Deductible		Premium
Comprehensive	\$	Limit Of Insurance	\$
	\$	Deductible For Each Customer's Auto For Loss Caused By Theft Or Mischief Or Vandalism	
	\$	Maximum Deductible For Loss Caused By Theft Or Mischief Or Vandalism In Any One Event	
	OR		
	\$	Limit Of Insurance	
	\$	Deductible For All Perils For Each Customer's Auto	
	\$	Maximum Deductible For All Loss In Any One Event	
	Specified Causes Of Loss	\$	
\$		Deductible For Each Customer's Auto For Loss Caused By Theft Or Mischief Or Vandalism	
\$		Maximum Deductible For Loss Caused By Theft Or Mischief Or Vandalism In Any One Event	
OR			
\$		Limit Of Insurance	
\$		Deductible For All Perils For Each Customer's Auto	
\$		Maximum Deductible For All Loss In Any One Event	
Collision		\$	Limit Of Insurance
	\$	Deductible For Each Customer's Auto	
<b>Total Garagekeepers Premium For All Locations</b>			\$

### Direct Coverage Options

Indicate below with an "X" which, if any, Direct Coverage Option is selected.

☐ **Excess Insurance**

If this box is checked, Garagekeepers Coverage remains applicable on a legal liability basis. However, coverage also applies without regard to your or any other "insured's" legal liability for "loss" to a "customer's auto" on an excess basis over any other collectible insurance regardless of whether the other insurance covers your or any other "insured's" interest or the interest of the "customer's auto's" owner.

☐ **Primary Insurance**

If this box is checked, Garagekeepers Coverage is changed to apply without regard to your or any other "insured's" legal liability for "loss" to a "customer's auto" and is primary insurance.

**A. This endorsement provides only those coverages:**



1. Where a Limit of Insurance and a premium are shown for that coverage in the Schedule; and
2. For the location shown in the Schedule.

## **B. Coverage**

1. We will pay all sums the "insured" legally must pay as damages for "loss" to a "**customer's auto**" or "**customer's auto**" left in the "insured's" care while the "insured" is attending, servicing, repairing, parking or storing it in your "garage operations" under:
  - a. Comprehensive Coverage  
From any cause except:
    - (1) The "customer's auto's" collision with another object; or
    - (2) The "customer's auto's" overturn.
  - b. Specified Causes Of Loss Coverage  
Caused by:
    - (1) Fire, lightning or explosion;
    - (2) Theft; or
    - (3) Mischief or vandalism.
  - c. Collision Coverage  
Caused by:
    - (1) The "customer's auto's" collision with another object; or
    - (2) The "customer's auto's" overturn.
2. We will have the right and duty to defend any "insured" against a "suit" asking for these damages. However, we have no duty to defend any "insured" against a "suit" seeking damages for "loss" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends for a coverage when the Limit of Insurance for that coverage has been exhausted by payment of judgments or settlements.

### C. Exclusions

1. This insurance does not apply to any of the following:

**a. Contractual**

Liability resulting from any contract or agreement by which the "insured" accepts responsibility for "loss". But this exclusion does not apply to liability for "loss" that the "insured" would have in the absence of the contract or agreement.

**b. Theft**

"Loss" due to theft or conversion caused in any way by you, your "employees" or by your stockholders.

**c. Defective Parts**

Defective parts or materials.

**d. Faulty Work**

Faulty "work you performed".

2. We will not pay for "loss" to any of the following:

**a.** Tape decks or other sound-reproducing equipment unless permanently installed in a "customer's auto".

**b.** Tape decks or other sound-reproducing equipment unless permanently installed in a "customer's auto".

**c.** Sound-receiving equipment designed for use as a citizens band radio, two-way mobile radio or telephone or scanning monitor receiver, including its antennas and other accessories, unless permanently installed in the dash or console opening normally used by the "customer's auto" manufacturer for the installation of a radio.

**d.** Any device designed or used to detect speed-measuring equipment, such as radar or laser detectors and any jamming apparatus intended to elude or disrupt speed-measuring equipment.

3. We will not pay for "loss" caused by or resulting from the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss":

**a.** War, including undeclared or civil war;

**b.** Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

**c.** Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

### D. Limits Of Insurance And Deductibles

1. Regardless of the number of "customer's autos", "insureds", premiums paid, claims made or "suits" brought, the most we will pay for each "loss" at each location is the Garagekeepers Coverage Limit Of Insurance shown in the Schedule for that location. Prior to the application of this limit, the damages for "loss" that would otherwise be payable will be reduced by the applicable deductibles for "loss" caused by:

**a.** Collision; or

**b.** With respect to Garagekeepers Coverage Comprehensive or Specified Causes Of Loss Coverage:

**(1)** Theft or mischief or vandalism; or

**(2)** All perils.

2. The maximum deductible stated in the Schedule for Garagekeepers Coverage Comprehensive or Specified Causes Of Loss Coverage is the most that will be deducted for all "loss" in any one event caused by:

**a.** Theft or mischief or vandalism; or

**b.** All perils.

3. To settle a claim or "suit", we may pay all or any part of the deductible. If this happens you must reimburse us for the deductible or that part of the deductible that we paid.

### E. Additional Definitions

As used in this endorsement:

1. "Customer's auto" means a land motor vehicle, "trailer" or semitrailer lawfully within your possession for service, repair, storage or safekeeping, with or without the vehicle owner's knowledge or consent. A "customer's auto" also includes any such vehicle left in your care by your "employees" and members of their households who pay for services performed.

2. "Loss" means direct and accidental loss or damage and includes any resulting loss of use.

3. "Garage operations" means the ownership, maintenance or use of locations for the purpose of a business of selling, servicing, repairing, parking or storing "customer's autos" and that portion of the roads or other accesses that adjoin these locations. "Garage operations" also includes all operations necessary or incidental to the performance of garage operations.

4. "Work you performed" includes:

**a.** Work that someone performed on your behalf; and

**b.** The providing of or failure to provide warnings or instructions.

# EXCLUSION OR EXCESS COVERAGE HAZARDS OTHERWISE INSURED – CA 99 40

Named Insured:

Endorsement Effective Date:

## SCHEDULE

Designation Or Description Of Covered "Autos" You Own:

When you do not want **Covered Autos Liability Coverage** to apply to the covered "autos" you own that are designated in this endorsement because you have other insurance, the following provision indicated by an "X" in the [ ]† will apply:

[ ] **Covered Autos Liability Coverage** does not apply.

[ ] **Covered Autos Liability Coverage** does not apply to "bodily injury" or "property damage" occurring before the other insurance ends.

Date other insurance ends: \_\_\_\_\_

[ ] **Covered Autos Liability Coverage** does not apply to "bodily injury" or "property damage" occurring before the other insurance ends except to the extent damages exceed the limits of the other insurance.

However, the most we will pay is the difference between the Limit of Insurance for Covered Autos Liability Coverage in this Coverage Form and the limits of the other insurance, if this Coverage Form's limits are higher.

Date other insurance ends: \_\_\_\_\_ and Limits of Insurance: \$ \_\_\_\_\_

# **POLLUTION LIABILITY — BROADENED COVERAGE FOR COVERED AUTOS — BUSINESS AUTO AND MOTOR CARRIER COVERAGE FORMS - CA 99 48**

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

A. Covered Autos Liability Coverage is changed as follows:

1. Paragraph a. of the Pollution Exclusion applies only to liability assumed under a contract or agreement.
2. With respect to the coverage afforded by Paragraph A.1. above, Exclusion B.6. Care, Custody Or Control does not apply.

B. Changes In Definitions

For the purposes of this endorsement, Paragraph D. of the Definitions Section is replaced by the following:

D. "Covered pollution cost or expense" means any cost or expense arising out of:

1. Any 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
2. Any 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".

"Covered pollution cost or expense" does not include any cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- b. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured".

Paragraphs a. and b. above do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (1) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (2) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

# **COVERED AUTO DESIGNATION SYMBOL**

## **– CA 99 54**

Section I – Covered Autos in the Business Auto Coverage Form is amended by adding the following:

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols may be used (in addition to the numerical symbols described in the Coverage Form) to describe the "autos" that may be covered "autos". The entry of one of these symbols next to a coverage on the Declarations will designate the only "autos" that are covered "autos".

### **Symbol Description Of Covered Auto Designation Symbols**

For use with the Business Auto Coverage Form

**10 =**

## **BAP – A LAST LOOK!**

- I **suggest** to you that hired and non-owned coverage not be written as an endorsement to a CGL Policy or a BOP.
- Should be written as a BAP with symbols 8 and 9!
- WHY?
  - May subject the coverage to aggregate limits when written as an endorsement
  - May not permit you to “tailor” significant coverages
    - **Hired Auto Physical Damage Coverage**
    - **Employee Hired Autos – CA 20 54**
    - **Employees As Insureds – CA 99 33**
    - **Volunteer Hired Autos – CA 04 39**
    - **Non-Ownership Liability Coverage For Volunteers – CA 05 24**

And, watch out for:

**PUBLIC OR LIVERY PASSENGER CONVEYANCE  
EXCLUSION – CA 23 44 11 16**

**PUBLIC OR LIVERY PASSENGER CONVEYANCE  
AND ON-DEMAND DELIVERY SERVICES  
EXCLUSION – CA 23 45 11 16**

# **VOLUNTARY COMPENSATION AND EMPLOYERS LIABILITY COVERAGE ENDORSEMENT – WC 00 03 11**

## **A. How This Insurance Applies**

This insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must be sustained by an employee included in the group of employees described in the Schedule.
2. The bodily injury must arise out of and in the course of employment necessary or incidental to work in a state listed in the Schedule.
3. The bodily injury must occur in the United States of America, its territories or possessions, or Canada, and may occur elsewhere if the employee is a United States or Canadian citizen temporarily away from those places.
4. Bodily injury by accident must occur during the policy period.
5. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

## **B. We Will Pay**

We will pay an amount equal to the benefits that would be required of you if you and your employees described in the Schedule were subject to the workers compensation law shown in the Schedule. We will pay those amounts to the persons who would be entitled to them under the law.

## **C. Exclusions**

This insurance does not cover:

1. any obligation imposed by a workers compensation or occupational disease law, or any similar law.
2. bodily injury intentionally caused or aggravated by you.

## **D. Before We Pay**

Before we pay benefits to the persons entitled to them, they must:

1. Release you and us, in writing, of all responsibility for the injury or death.
2. Transfer to us their right to recover from others who may be responsible for the injury or death.
3. Cooperate with us and do everything necessary to enable us to enforce the right to recover from others.

If the persons entitled to the benefits of this insurance fail to do those things, our duty to pay ends at once. If they claim damages from you or from us for the injury or death, our duty to pay ends at once.

## **E. Recovery From Others**

If we make a recovery from others, we will keep an amount equal to our expenses of recovery and the benefits we paid. We will pay the balance to the persons entitled to it. If the persons entitled to the benefits of this insurance make a recovery from others, they must reimburse us for the benefits we paid them.

## **F. Employers Liability Insurance**

Part Two (Employers Liability Insurance) applies to bodily injury covered by this endorsement as though the State of Employment shown in the Schedule were shown in Item 3.A. of the Information Page.

### **Schedule**

Employees

State of Employment

Designated Workers  
Compensation Law

# **WORKERS COMPENSATION FOR WORKERS IN FOREIGN COUNTRIES Permanent OR Temporary**

Even though Workers Compensation Insurance is provided, this coverage does not provide for:



Endemic Diseases



Repatriation Expenses

**Endemic diseases are defined as those diseases indigenous to a particular geographic area.**

**Repatriation expenses are those expenses incurred to transport an injured employee back to the USA for treatment.**



## WAIVER OF OUR RIGHT TO RECOVER FROM OTHERS ENDORSEMENT – WC 00 03 13

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. **(This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)**

This agreement shall not operate directly or indirectly to benefit anyone not named in the Schedule.

### Schedule

# **ALLOCATING FAULT AND DAMAGES**

**Every state employs one of four basic systems for allocating fault and damages:**

- 1. Pure Contributory Negligence Rule/Defense**
- 2. Pure Comparative Fault System**
- 3. Modified Comparative Fault System**
- 4. Slight/Gross Negligence Comparative Fault System**

**“Contributory negligence” refers to the negligent conduct of the plaintiff.**

# JOINT AND SEVERAL LIABILITY

The rule of “joint and several liability” makes each of multiple defendants liable for the entirety of the plaintiff’s loss, regardless of each defendants’ degree of fault. For example, a defendant who is only 5 percent at fault might end up paying the entirety of the plaintiff’s damages – especially if the other defendants are insolvent. **States follow one of three approaches to joint and several liability.**

- 1. Pure Joint and Several Liability**
- 2. Modified Joint and Several Liability**
- 3. Pure Several Liability**

# CONTRIBUTION

Contribution is a method distributing loss among tortfeasors by requiring others to pay a proportionate share to one who has discharged their joint liability.

❖ **If there is joint and several liability, there is a right of contribution if a tortfeasor must pay the share of another – usually established by statute**

Example: right of contribution; accrual; pro rata share.

- (a) The right of contribution exists among joint tortfeasors.
- (b) A joint tortfeasor is not entitled to a money judgment for contribution until he or she has by payment discharged the common liability or has paid more than his or her pro rata share thereof.
- (c) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.
- (d) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares.

❖ **May not apply to certain causes of action**

# INDEMNIFICATION

**Indemnity** is an obligation by a person (**indemnitor**) to provide compensation for a particular loss suffered by another person (**indemnatee**).

- ❖ May be implied or expressed
- ❖ May vary by degree of responsibility
- ❖ May not be enforceable – varies by jurisdiction
  - ☐ Common law
  - ☐ Statutes

## **STATUTES OF LIMITATIONS**

A statute of limitations is the deadline for filing a lawsuit. Most lawsuits **MUST** be filed within a certain amount of time following the accrual of a right of action against another. In general, once the statute of limitations on a case “runs out”, the legal claim is not valid any longer. The period of time during which a lawsuit can be filed varies depending on the type of legal claim.

## **STATUTES OF REPOSE**

A statute of repose provides a date upon which the action no longer exists, whether it has accrued by that date or not; it entirely cuts off a person's right of action even before it accrues. It is a stricter deadline than a statute of limitations because it may not be tolled by fraud, discovery of injury, etc. A statute of repose is neither an avoidance nor a defense to a cause of action because the cause of action does not exist once the period of duration is passed. While a statute of limitations allows a party to avoid suit, a statute of limitations does not affect the validity of the claim; however, once the period of duration under a statute of repose is expired, there is no suit to avoid, because the statute of repose extinguishes the cause of action, and failure to plead the statute of repose as an affirmative defense could not resurrect a cause of action that no longer exists. A statute of repose bars an action after a specified period of time has run from the occurrence of some event other than the injury or damage which gave rise to the claim.

# **PUNITIVE DAMAGES**

- Insurance professional's "need to know":
  - Three questions
    - Are they recoverable?
      - Statutory limitations?
    - Are they insurable?
      - Directly assessed?
      - Vicariously assessed?
    - Are they covered?

# **CONCLUSION**

## **IDEAS/COMMENTS/QUESTIONS**







## James K. Ruble Seminar

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### Section 5

# **Ten Questions That Drive Me Crazy About The Business Auto Policy**



10 Questions that  
drive me  
***CRAZY***  
about the  
Business Auto Policy



Presented by:  
Patrick A. Deem, Sr., CIC, CSRM  
Austin TX

## I. The Questions

- A. Why are we told to write the Commercial General Liability Policy and the Business Auto Policy with the same carrier?
- B. Is Contractual Liability coverage in the Business Auto Policy the same issue as it is in the Commercial General Liability Policy?
- C. Is an “insured contract” defined in the Business Auto Policy the same as it is defined in the Commercial General Liability Policy?
- D. Is the pollution coverage granted in the Business Auto Policy broader or narrower than the coverage in the Commercial General Liability Policy?
- E. I was told that the Business Auto Policy will provide automatic coverage for most Additional Insured issues. If that is so, is coverage on a primary, non-contributory basis for all insureds – named, automatic or additional?
- F. When I buy a new truck, do I always have at least a minimum of 30 days coverage on that vehicle?

- G. What is the big deal about Hired Auto Coverage? The price is cheap, so how could my insured get into any problem with this coverage?
- H. My insured called and says the Certificate of Insurance I sent to the certificate holder does not indicate I eliminated the cross liability exclusion in the Business Auto Policy. I told him I did not show it on the Certificate because it does not have one. He said to send him proof the coverage is there. What do I do?
- I. My insured just bought a new Audi R-8, which we added to the Business Auto Policy because it was cheaper than adding it to his Personal Auto Policy, which the agency also writes. His son, Loser, was involved in a serious at fault accident in that auto. Are we ok if our insured is sued personally?
- J. If my client rents a vehicle on business, using a corporate credit card, and we provide Hired Car Physical Damage on the policy. Are we ok in advising him not to purchase the coverage offered by the Rental Car Company?

**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".

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

This exclusion does not apply to:

- (1)** A watercraft while ashore on premises you own or rent;
- (2)** A watercraft you do not own that is:
  - (a)** Less than 26 feet long; and
  - (b)** Not being used to carry persons or property for a charge;
- (3)** Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4)** Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

**(5)** "Bodily injury" or "property damage" arising out of:

- (a)** The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or
- (b)** The operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

II. Why are we told to write the Commercial General Liability (CGL) Policy and the Business Auto Policy (BAP) with the same carrier?

A. Exclusion g in the CGL

1. What types of autos do we really exclude?

- a. Owned by any insured
- b. Operated by **any insured**
- c. Rented or loaned to **any insured**
- d. Where is non-owned auto?

2. What is a non-owned auto?

Only those “autos” you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes “autos” owned by your “employees”, partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business or your personal affairs.

CA 00 01 10 13 Page 1 of 12.

- a. Defined in BAP, but not in CGL
- b. Does the CGL expect this exposure to be covered in the BAP?
- c. Could the CGL be excess to the BAP even if coverage is in the BAP?

B. Mobile Equipment vs. Auto

1. Is the definition of “Auto” the same in both policies? No!

a. **Auto – BAP**

- (1) Land motor vehicle
- (2) Trailer or semi-trailer
- (3) Designed for use on public roads
- (4) Any other land vehicle subject to compulsory or financial responsibility law or other motor vehicle insurance law where licensed or principally garaged
- (5) Not mobile equipment

b. **Auto – CGL**

- (1) **A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or**
- (2) Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.



2. Is the definition of Mobile Equipment definition the same in both BAP and CGL? Yes!

a. Mobile Equipment – Definition K

- (1) Vehicles designed for use principally off public roads
- (2) Vehicles maintained for use solely on or next to the premises you own or rent
- (3) Vehicles that travel on crawler treads
- (4) Vehicles, self-propelled or not, maintained to provide mobility to:
  - (a) Cranes, shovels, loaders, diggers or drills; or
  - (b) Road construction or resurfacing equipment
- (5) Vehicles that are not self-propelled, maintained to provide mobility to permanently attached:
  - (a) Air compressors, pumps
  - (b) Cherry pickers and similar devices used to raise or lower workers
- (6) Vehicles not previously described maintained for purposes other than the transportation of persons or cargo

However, self-propelled vehicles with the following attached equipment are **autos**:

- (a) equipment designed primarily for snow removal, road maintenance, street cleaning
- (b) Cherry pickers and similar devices
- (c) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting or well servicing equipment

3. What is the problem?

However, “mobile equipment” does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered “autos”

4. What is the solution? Know what **your** state requires to be registered as an “Auto”

- a. Google, Bing, Etc.
- b. [www.legis.state.\\_\\_\\_\\_.us](http://www.legis.state.____.us)  
(Legis for legislative. \_\_\_\_ for your state)
- c. [www.capitol.state.\\_\\_\\_\\_.us](http://www.capitol.state.____.us)  
(\_\_\_\_ for your state)

5. What about a Multi-State risk – Where are they:

- a. Licensed
- b. **or**
- c. Principally garaged
- d. Could more than one state law apply? Yes

Vehicle licensed in one state, but principally garaged in another state

- d. How do I solve that problem? Put both the CGL and BAP with the same company, and make sure the BAP has Symbol 1 or 2 or 19 for liability, **not symbol 7**

C. Loading and Unloading (CGL) vs. handling of Property (BAP)

1. Loading and unloading defined in CGL only

- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or “auto”;
- b. While it is in or on an aircraft, watercraft or “auto”; or
- c. While it is being moved from an aircraft, watercraft or “auto” to the place where it is finally delivered;

but “loading or unloading” does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or “auto”.

CG 00 01 04 13. Page 14 of 16.

2. Handling of Property – never defined in BAP, just excluded

“BI” or “PD” resulting from the handling of property:

- a. Before it is moved from the place where it is accepted by the “insured” for movement into or onto the covered “auto”; or
- b. After it is moved from the covered “auto” to the place where it is finally delivered by the “insured”.

CA 00 01 10 13. Page 4 of 12.

3. Handling of Property, exclusion 7, then amended by exclusion 8. Movement of Property by Mechanical Device

“Bodily injury” or “property damage” resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered “auto”.

CA 00 01 10 13. Page 4 of 12.

- D. What if the “auto” is one of those vehicles that formally was “mobile equipment”, but now is an “auto”. Is there any other problem?

"Bodily injury" or "property damage" arising out of the operation of:

- a. Any equipment listed in Paragraphs 6.b. and 6.c. of the definition of "mobile equipment"; or
- b. Machinery or equipment that is on, attached to or part of a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

CA 00 01 10 13. Page 4 of 12.

- E. What is the solution?

1. Write the CGL and BAP with the same company.
2. Make sure that symbol 1, 2, 8, 9 or 19, but not 7 is in item two of Declarations for Liability.
3. What if you cannot write the CGL and BAP with the same company?

OR

4. What if I can write the CGL and BAP with the same company, **but** the BAP has symbol 7 in item two of the Declarations for Liability?

OR

5. What if I cannot write the CGL and BAP with the same company, and the BAP has symbol 7 in item two for the Declarations for Liability?

[illegible]

III. Is Contractual Liability coverage in the Business Auto Policy the same issue as it is in the Commercial General Liability Policy?

A. No, because of the definition of Who is an Insured.

B. Definition of Who is an Insured in the BAP:

1. You for any covered auto
2. Anyone else using with your permission a covered “auto” you own, hire, or borrow except:
  - a. The owner or anyone else from whom you hire or borrow a covered “auto”. This exception does not apply if the covered “auto” is a “trailer” connected to a covered “auto” you own
  - b. Your employee – If the covered “auto” is owned by the employee or a member of his or her household
  - c. Someone using a covered “auto” while he or she is working in a business of selling, servicing, repairing, parking or storing autos unless that business is yours
  - d. Anyone other than your employees, partners, a lessee or borrower, or any of their employees while moving property to and from a covered “auto”
  - e. A partner of yours for a covered “auto” owned by him or her or a member of his or her household
3. Anyone liable for the conduct of an “insured” but only to the extent of that liability

## C. Contractual Exclusion – BAP vs. CGL

### 1. BAP Contractual Exclusion

Exceptions:

- a. Assumed under an “insured contract”
- b. Liability the “insured” would have in the absence of the contract

#### B. Exclusions

This insurance does not apply to any of the following:

##### 2. Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

- a. 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; or
- b. That the "insured" would have in the absence of the contract or agreement.

CA 00 01 10 13. Page 3 of 12.

### 2. CGL Contractual Exclusion

This insurance does not apply to “Bodily Injury” or “Property Damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily Injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided :
  - (a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same insured contract; and
  - (b) Such attorneys’ fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

D. The Uninsured Indemnatee

1. A CGL issue – definitely
2. A BAP issue – No
3. Item “c” from Who is an Insured



[illegible]

IV. Is an “insured contract” defined in the Business Auto Policy the same as it is defined in the Commercial General Liability Policy?

A. No, it is not – Insured Contract in the BAP:

1. Lease of Premises – see Item 8 below
2. Sidetrack agreement – same as Def 9.b in CGL
3. Easement agreements – same as Def 9.c in CGL
4. Municipal agreements – same as Def 9.d in CGL
5. Assumed tort liability – same as Def 9.f in CGL
6. Rental car agreement – except for property damage to rental vehicle – Peculiar to BAP
7. **Does not include contract that applies to:**
  - a. Railroad construction operations within 50 feet of railroad property – same as Def 9.f.1 in CGL
  - b. Autos leased with a driver – peculiar to BAP
  - c. Trucker indemnification – peculiar to BAP
8. No mention of: Damage to Premises Rented From Others, Def 9.a in CGL, elevator maintenance agreement, Def 9.e in CGL, or contracts with architects, engineers or surveyor for professional liability

B. Differences are for:

1. No hired car physical damage given via definitions of insured contract
2. No coverage for assumed liability in favor of rental company if vehicle rented with a driver, (meaning theirs and not named insureds).
3. No coverage for assumed liability in favor of person/organization for transporting property in a covered auto of named insureds under that person or organization's authority

In layman's language, the BAP is not going to pick up liability assumed via contract for what the MCS 90 may create

**D.** "Covered pollution cost or expense" means any cost or expense arising out of:

1. Any 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
2. Any 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".

"Covered pollution cost or expense" does not include any cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:
  - (1) Being transported or towed by, handled, or handled for movement into, onto or from the covered "auto";
  - (2) Otherwise in the course of transit by or on behalf of the "insured";
  - (3) Being stored, disposed of, treated or processed in or upon the covered "auto";
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured".

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Paragraph **a.** above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate, or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and
- (2) The "bodily injury", "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in Paragraph **6.b.** or **6.c.** of the definition of "mobile equipment".

Paragraphs **b.** and **c.** above do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (a) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (b) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

**CA 00 01 10 13. Page 11 of 12.**

- V. Is the pollution coverage granted in the Business Auto Policy broader or narrower than the coverage in the Commercial General Liability Policy?
- A. Broader, as it will “clean up” what it covers
- B. How pollution coverage applies in the BAP
1. Limited clean up coverage of “pollutants”
  2. Coverage applicable only to:
    - a. Fuels, lubricants, fluids, exhaust gases needed for or resulting from normal functioning of a covered auto
      - Does not apply to operations of equipment per exclusion 9 in BAP
    - b. Damage to others property causes discharge, release, dispersal, migration, escape, or seepage of pollutants if
      - (1) Occurs away from premises owned by or rented to an insured
      - (2) Results from maintenance or use of covered auto
- C. All Autos have three exposures
1. Cargo (what they carry with them)
  2. Vehicle itself (fluids needed to operate: proper receptacle)
  3. Third Party Liability
    - Must be a third party
    - Must take place OFF Named Insured premises

VI. I was told that the Business Auto Policy will provide automatic coverage for most Additional Insured issues. If that is so, is coverage on a primary, non-contributory basis for all insureds, named, automatic or additional?

A. The short answer is yes, maybe

1. General Conditions

- a. Bankruptcy
- b. Concealment, misrepresentation or fraud
- c. Liberalization
- d. No Benefit to Bailee – Physical Damage coverages
- e. Other insurance

- (1) Auto you own – **Primary**  
Auto you do not own – **Excess**

Trailer connected to auto you own – **Primary**  
Auto you do not own – **Excess**

- (2) For hired auto physical damage any “auto” you hire or borrow is deemed to be a covered “auto” you own

**However, any “auto” that is leased, hired, rented, or borrowed with a driver is not a covered “auto”**

- (3) Contractually assumed – **Primary**
- (4) Other insurance applies – **Pro rata**

## 5. Other Insurance

- a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. However, while a covered "auto" which is a "trailer" is connected to another vehicle, the Covered Autos Liability Coverage this Coverage Form provides for the "trailer" is:
  - (1) Excess while it is connected to a motor vehicle you do not own; or
  - (2) Primary while it is connected to a covered "auto" you own.
- b. For Hired Auto Physical Damage Coverage, any covered "auto" you lease, hire, rent or borrow is deemed to be a covered "auto" you own. However, any "auto" that is leased, hired, rented or borrowed with a driver is not a covered "auto".

- c. Regardless of the provisions of Paragraph a. above, this Coverage Form's Covered Autos Liability Coverage is primary for any liability assumed under an "insured contract".
- d. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

**CA 00 01 10 13. Page 9 of 12.**

## B. The Long Answer

- 1. If vehicle is owned by/titled in name of Named Insured and driver is an insured, **yes**, primary and non-contributory
- 2. If vehicle is hired auto (rental truck), and liability contractually assumed, **yes**, primary and maybe non-contributory
- 3. If vehicle is borrowed (also a hired auto by policy definition), **no**, neither primary or non-contributory
- 4. If the vehicle is non-owned by policy definition. (The most common is employee driving their owned auto for the business use of the Named Insured), **no**, neither primary or non-contributory
- 5. If BAP and any other coverage form covers on same basis, primary or excess, then BAP pays proportionate share, thereby is not non-contributory

VII. When I buy a new truck, do I always have at least a minimum of 30 days coverage on that vehicle?

A. Let's look...

Owned Autos you acquire after the policy begins  
(Also known as – newly acquired auto)

1. Symbols 1, 2, 3, 4, 5, 6 or 19
2. Symbol 7
  - a. Already cover all autos owned for that coverage
  - b. Replaces owned covered auto
  - c. Advise within 30 days

**B. Owned Autos You Acquire After The Policy Begins**

1. If Symbols **1, 2, 3, 4, 5, 6** or **19** are entered next to a coverage in Item Two of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.
2. But, if Symbol **7** is entered next to a coverage in Item Two of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if:
  - a. We already cover all "autos" that you own for that coverage or it replaces an "auto" you previously owned that had that coverage; and
  - b. You tell us within 30 days after you acquire it that you want us to cover it for that coverage.

**CA 00 01 10 13. Page 2 of 12.**

B. General Condition 7, Policy Period, Coverage Territory

Under this coverage form, we cover “accidents” and “losses” occurring

1. During the policy period shown in Declarations  
AND
2. Within the coverage territory



### C. Examples

- Symbol 2, 8, 9 = Liability
- Symbol 7 = Physical Damage
- 02 = Liability Only
- 04 = Liability Only
- 07 = Liability & Physical Damage
- 08 = Liability & Physical Damage

#### ITEM FOUR

##### Schedule Of Hired Or Borrowed Covered Auto Coverage And Premiums

Covered Autos Liability Coverage – Cost Of Hire Rating Basis For Autos Used In Your Motor Carrier Operations (Other Than Mobile Or Farm Equipment)		
Covered Autos Liability Coverage	Estimated Annual Cost Of Hire For All States	Premium
Primary Coverage	\$	\$
Excess Coverage	\$	\$
<b>Total Hired Auto Premium</b>		<b>\$</b>

For "autos" used in your motor carrier operations, cost of hire means:

1. The total dollar amount of costs you incurred for the hire of automobiles (includes "trailers" and semitrailers) and, if not included therein,
2. The total remunerations of all operators and drivers' helpers, of hired automobiles, whether hired with a driver by lessor or an "employee" of the lessee, or any other third party, and
3. The total dollar amount of any other costs (e.g., repair, maintenance, fuel, etc.) directly associated with operating the hired automobiles, whether such costs are absorbed by the "insured", paid to the lessor or owner, or paid to others.

Covered Autos Liability Coverage – Cost Of Hire Rating Basis For Autos NOT Used In Your Motor Carrier Operations (Other Than Mobile Or Farm Equipment)			
Covered Autos Liability Coverage	State	Estimated Annual Cost Of Hire For Each State	Premium
Primary Coverage		\$	\$
Excess Coverage		\$	\$
<b>Total Hired Auto Premium</b>			<b>\$</b>

For "autos" **NOT** used in your motor carrier operations, cost of hire means the total amount you incur for the hire of "autos" you don't own (not including "autos" you borrow or rent from your partners or "employees" or their family members). Cost of hire does not include charges for services performed by motor carriers of property or passengers.

VIII. What is the big deal about Hired Auto Coverage? The price is cheap, so how could my insured get into any problem with this coverage?

A. Hired or Borrowed Covered Auto – Cost of Hire Definition

1. “Autos” used in motor carrier operations
2. “Autos” not used in your motor carrier operations

B. Audit issue

**6. Premium Audit**

- a. The estimated premium for this Coverage Form is based on the exposures you told us you would have when this policy began. We will compute the final premium due when we determine your actual exposures. The estimated total premium will be credited against the final premium due and the first Named Insured will be billed for the balance, if any. The due date for the final premium or retrospective premium is the date shown as the due date on the bill. If the estimated total premium exceeds the final premium due, the first Named Insured will get a refund.

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IX. My insured called and says the Certificate of Insurance I sent to the certificate holder does not indicate I eliminated the cross liability exclusion in the Business Auto Policy. I told him I did not show it on the Certificate because it does not have one. He said to send him proof the coverage is there. What do I do?

A. What is a cross liability exclusion?

“The policy does not apply to any liability arising out of any claim or suit by an insured against any other insured.”

B. Does the Business Auto Policy have one?

No, not without an endorsement.

C. What does it say?

1. Definition G. “Insured”

"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.  
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2. The definition not only does not exclude cross liability (insured vs. insured) it is stating it will honor an insured versus insured claim.

[illegible]

X. My insured just bought a new Audi R-8, which we added to the Business Auto Policy because it was cheaper than adding it to his Personal Auto Policy, which the agency also writes. His son, Loser, was involved in a serious at fault accident in that auto. Are we ok if our insured is sued personally?

A. It depends

1. For the named Insured: if a business, normally not an issue because of the liability symbol/symbols
  - a. 1
  - b. 2, 8, 9
  - c. 7, 8, 9 (assuming vehicle scheduled at time of loss)
2. If owner (how vehicle titled) is not the Named Insured, we have a problem
  - a. You for any covered auto
  - b. Anyone else using with your permission a covered "auto" you own, hire, or borrow except:

Your employee – If the covered "auto" is owned by the employee or a member of his or her household

(2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.

(5) A partner (if you are a partnership) or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.

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B. What about the Personal Auto Policy?

- B. We do not provide Liability Coverage for the ownership, maintenance or use of:
2. Any vehicle, other than "your covered auto", which is:
    - a. Owned by you; or

**PP 00 01 01 05. Page 3 of 13.**

C. Endorsements to the BAP that might help this situation

1. Employee as Lessor – CA 99 47 10 13
  - a. Used when “employee” is leasing a vehicle to the business
  - b. Makes leased auto a covered auto the business owns
  - c. Makes the “employee” leasing the auto to the business an insured, but only that employee, does not cover any family member
2. Employees as Insureds – CA 99 33 10 13
  - a. Covers all “employees”, cannot discriminate.
  - b. Only covers “employee”, no one else.
  - c. May be giving unintended coverage to others, “employees”, the business did not want to
3. Hired Auto Specified as Autos You Own – CA 99 16 10 13
  - a. Covers owner of described auto, only, as long as auto being used by or for the Named Insured
  - b. This endorsement is very similar to C.1, CA 99 47 10 13, makes the owner an insured, but not a family member

D. Endorsements that do not help

1. Drive Other Car Coverage – CA 99 10 10 13 – Excludes coverage for any “auto” owned by individual named in the endorsements
2. Lessor-Additional Insured and Loss Payee – CA 20 01 10 13 – Specifically excludes coverage for Lessor as owner of the vehicle, if they are operating. It may cover the son (Loser), but would not cover Dad.

XI. If my client rents a vehicle on business, using a corporate credit card, and we provide Hired Car Physical Damage on the policy. Are we ok in advising him not to purchase the coverage offered by the Rental Car Company?

A. What does the “usual” rental agreement hold your insured responsible for as liability?

1. Damage to the auto from any cause  
\*Some will exempt losses due to nature (hail)
2. Loss of use while being repaired
3. Diminution in value
4. Administrative costs

B. Is there contractual liability coverage for these issues?

NO, see question IV.

C. Then what does Hired Car Physical Damage cover?

1. From BAP

### **SECTION III – PHYSICAL DAMAGE COVERAGE**

#### **A. Coverage**

1. We will pay for "loss" to a covered "auto" or its equipment under:

##### **a. Comprehensive Coverage**

From any cause except:

- (1) The covered "auto's" collision with another object; or
- (2) The covered "auto's" overturn.

##### **b. Specified Causes Of Loss Coverage**

Caused by:

- (1) Fire, lightning or explosion;
- (2) Theft;
- (3) Windstorm, hail or earthquake;

(4) Flood;

(5) Mischief or vandalism; or

(6) The sinking, burning, collision or derailment of any conveyance transporting the covered "auto".

##### **c. Collision Coverage**

Caused by:

- (1) The covered "auto's" collision with another object; or
- (2) The covered "auto's" overturn.

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2. What is “loss”?

Definition J – “Loss” means direct and accidental loss or damage

3. What about loss of use expenses?

- a. Must have Hired Auto Physical Damage coverage
- b. Most paid – \$20 per day to maximum of \$600.00
- c. Optional limits – Loss of Use Expenses – CA 99 90

4. What about Diminution in value?

Exclusion 6 – Auto Physical Damage

“We do not pay for ‘loss’ to a ‘covered auto’ due to ‘diminution of value’”

5. What about administrative costs?

- a. Not direct damage
- b. Not loss of use expense
- c. No coverage

## XII. HOW DOES THE PERSONAL AUTO POLICY COVER THE EXPOSURE FACED BY THE INSURED?

### A. Liability for injury to others and damage to other's property

#### INSURING AGREEMENT

- A. We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident.
- B. "Insured" as used in this Part means:
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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- B. Question – If the insuring agreement includes “property damage” for which I, the Named Insured, become legally responsible because of an auto accident, then did I become legally responsible for damage to the rental car when I signed the rental car agreement?

Answer – yes

- C. Question – Then why is the damage to the rental car including loss of use not covered by my property damage limit?

Answer – Because exclusion A. 3. reads as follows:

**EXCLUSIONS**

A. We do not provide Liability Coverage for any "insured":

3. For "property damage" to property:

- a. Rented to;
  - b. Used by; or
  - c. In the care of;
- that "insured".

This Exclusion (A.3.) does not apply to "property damage" to a residence or private garage.

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- D. Due to exclusion A.3. there is no liability coverage for

- 1. Damage to the rental car
- 2. Loss of use of the rental car
- 3. Administrative fees
- 4. Diminution of value of the rental car

E. The only coverage for damage to the rental car is found in Part D – Coverage For Damage To Your Auto

F. Question – Could there be a problem if my rental is longer than 30 days?

Answer – Potentially, yes

B. We do not provide Liability Coverage for the ownership, maintenance or use of:

2. Any vehicle, other than "your covered auto", which is:

b. Furnished or available for your regular use.

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## **INSURING AGREEMENT**

- A.** We will pay for direct and accidental loss to "your covered auto" or any "non-owned auto", including their equipment, minus any applicable deductible shown in the Declarations

If there is a loss to a "non-owned auto", we will provide the broadest coverage applicable to any "your covered auto" shown in the Declarations.

- 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
2. Any auto or "trailer" you do not own while used as a temporary substitute for "your covered auto" which is out of normal use because of its:
  - a. Breakdown;
  - b. Repair;
  - c. Servicing;
  - d. Loss; or
  - e. Destruction.

## **TRANSPORTATION EXPENSES**

- A.** In addition, we will pay, without application of a deductible, up to a maximum of \$600 for:

1. Temporary transportation expenses not exceeding \$20 per day incurred by you in the event of a loss to "your covered auto". We will pay for such expenses if the loss is caused by:
  - a. Other than "collision" only if the Declarations indicate that Other Than Collision Coverage is provided for that auto.

- b. "Collision" only if the Declarations indicate that Collision Coverage is provided for that auto.

2. Expenses for which you become legally responsible in the event of loss to a "non-owned auto". We will pay for such expenses if the loss is caused by:

- a. Other than "collision" only if the Declarations indicate that Other Than Collision Coverage is provided for any "your covered auto".
    - b. "Collision" only if the Declarations indicate that Collision Coverage is provided for any "your covered auto".

However, the most we will pay for any expenses for loss of use is \$20 per day.

- B.** Subject to the provisions of Paragraph **A.**, if the loss is caused by:

1. A total theft of "your covered auto" or a "non-owned auto", we will pay only expenses incurred during the period:
  - a. Beginning 48 hours after the theft; and
  - b. Ending when "your covered auto" or the "non-owned auto" is returned to use or we pay for its loss.
2. Other than theft of a "your covered auto" or a "non-owned auto", we will pay only expenses beginning when the auto is withdrawn from use for more than 24 hours.

Our payment will be limited to that period of time reasonably required to repair or replace the "your covered auto" or the "non-owned auto".

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## G. Insuring Agreement

1. Covers direct and accidental loss to... any “non-owned auto”, including their equipment
2. Loss to “non-owned auto”, policy provides broadest coverage applicable to “your covered auto” shown in the Declaration
3. Definition of “non-owned auto”

## H. Transportation Expenses

1. \$20.00 per day to maximum of \$600.00
2. May apply to loss of use of “non-owned auto” (rental car) for Other Than Collision and/or Collision **if** provided for any of “your covered autos”
3. Limit at \$20.00 per day is very insufficient

I. Is the Personal Auto Policy primary for the damage to the rental car?

**OTHER SOURCES OF RECOVERY**

If other sources of recovery also cover the loss, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a "non-owned auto" shall be excess over any other collectible source of recovery including, but not limited to:

1. Any coverage provided by the owner of the "non-owned auto";
2. Any other applicable physical damage insurance;
3. Any other source of recovery applicable to the loss.

**PP 00 01 01 05. Page 10 of 13.**

J. Question – What if I rent a car on vacation in Europe, would the Personal Auto Policy apply?

Answer – no

1. Coverage Territory

There is no coverage for accidents that occur outside the policy territory

**POLICY PERIOD AND TERRITORY**

A. This policy applies only to accidents and losses which occur:

1. During the policy period as shown in the Declarations; and
2. Within the policy territory.

B. The policy territory is:

1. The United States of America, its territories or possessions;

2. Puerto Rico; or

3. Canada.

This policy also applies to loss to, or accidents involving, "your covered auto" while being transported between their ports.

**PP 00 01 01 05. Page 12 of 13.**

### XIII. BEST ADVICE TO GIVE TO AN INSURED

- A. Have Physical Damage coverage on at least one vehicle in the fleet
  - 1. Comprehensive or Specified Perils
  - 2. Collision
  - 3. The same coverage will apply to the rental vehicle on a primary basis, **if** the loss is excluded from the LDW/CDW coverage
  - 4. Have Symbol 8
- B. Purchase the LDW/CDW from the rental car company

### XIV. Conclusion



POLICY NUMBER:

COMMERCIAL AUTO  
CA 99 47 10 13

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

## **EMPLOYEE AS LESSOR**

This endorsement modifies insurance provided under the following:

AUTO DEALERS COVERAGE FORM  
BUSINESS AUTO COVERAGE FORM  
MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

**Named Insured:**

**Endorsement Effective Date:**

### **SCHEDULE**

**Description Of "Auto":**

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

**A.** Any "auto" described in the Schedule will be considered a covered "auto" you own and not a covered "auto" you hire, borrow or lease.

**B.** While any covered "auto" described in the Schedule is leased to you by one of your "employees", the **Who Is An Insured** provision under **Covered Autos Liability Coverage** is changed to include that "employee" as an "insured".

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

## **EMPLOYEES AS INSURED**

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM  
MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

The following is added to the **Section II – Covered Autos Liability Coverage**, Paragraph **A.1. Who Is An Insured** provision:

Any "employee" of yours is an "insured" while using a covered "auto" you don't own, hire or borrow in your business or your personal affairs.

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

## **HIRED AUTOS SPECIFIED AS COVERED AUTOS YOU OWN**

This endorsement modifies insurance provided under the following:

AUTO DEALERS COVERAGE FORM  
BUSINESS AUTO COVERAGE FORM  
MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

**Named Insured:**

**Endorsement Effective Date:**

### **SCHEDULE**

**Description Of Auto:**

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

**A.** Any "auto" described in the Schedule will be considered a covered "auto" you own and not a covered "auto" you hire, borrow or lease.

**B. Changes In Covered Autos Liability Coverage**

The following is added to the **Who Is An Insured** provision:

While any covered "auto" described in the Schedule is rented or leased to you and is being used by or for you, its owner or anyone else from whom you rent or lease it is an "insured" but only for that covered "auto".

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

## **EMPLOYEE AS LESSOR**

This endorsement modifies insurance provided under the following:

AUTO DEALERS COVERAGE FORM  
BUSINESS AUTO COVERAGE FORM  
MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

**Named Insured:**

**Endorsement Effective Date:**

### **SCHEDULE**

**Description Of "Auto":**

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

**A.** Any "auto" described in the Schedule will be considered a covered "auto" you own and not a covered "auto" you hire, borrow or lease.

**B.** While any covered "auto" described in the Schedule is leased to you by one of your "employees", the **Who Is An Insured** provision under **Covered Autos Liability Coverage** is changed to include that "employee" as an "insured".

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

## **DRIVE OTHER CAR COVERAGE – BROADENED COVERAGE FOR NAMED INDIVIDUALS**

This endorsement modifies insurance provided under the following:

AUTO DEALERS COVERAGE FORM  
BUSINESS AUTO COVERAGE FORM  
MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

**Named Insured:**

**Endorsement Effective Date:**

### **SCHEDULE**

<b>Name Of Individual:</b>			
<b>Covered Autos Liability Coverage</b>	<b>Limit:</b>	<b>\$</b>	<b>Premium: \$</b>
<b>Auto Medical Payments</b>	<b>Limit:</b>	<b>\$</b>	<b>Premium: \$</b>
<b>Comprehensive</b>	<b>Deductible:</b>	<b>\$</b>	<b>Premium: \$</b>
<b>Collision</b>	<b>Deductible:</b>	<b>\$</b>	<b>Premium: \$</b>
<b>Uninsured Motorists</b>	<b>Limit:</b>	<b>\$</b>	<b>Premium: \$</b>
<b>Underinsured Motorists</b>	<b>Limit:</b>	<b>\$</b>	<b>Premium: \$</b>
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

**Note:** When Uninsured Motorists Coverage is provided at limits higher than the basic limits required by a financial responsibility law, Underinsured Motorists Coverage is included, unless otherwise noted. If Underinsured Motorists Coverage is provided as a separate coverage, make appropriate entry in the Schedule above.

A. This endorsement changes only those coverages where a premium is shown in the Schedule.

**B. Changes In Covered Autos Liability Coverage**

1. Any "auto" you don't own, hire or borrow is a covered "auto" while being used by any individual named in the Schedule or by his or her spouse while a resident of the same household except:
  - a. Any "auto" owned by that individual or by any member of his or her household.
  - b. Any "auto" used by that individual or his or her spouse while working in a business of selling, servicing, repairing or parking "autos".
2. The following is added to **Who Is An Insured:**  
Any individual named in the Schedule and his or her spouse, while a resident of the same household, are "insureds" while using any covered "auto" described in Paragraph B.1. of this endorsement.

**C. Changes In Auto Medical Payments And Uninsured And Underinsured Motorists Coverages**

The following is added to **Who Is An Insured:**

Any individual named in the Schedule and his or her "family members" are "insureds" while "occupying" or while a pedestrian when being struck by any "auto" you don't own except:

Any "auto" owned by that individual or by any "family member".

**D. Changes In Physical Damage Coverage**

Any private passenger type "auto" you don't own, hire or borrow is a covered "auto" while in the care, custody or control of any individual named in the Schedule or his or her spouse while a resident of the same household except:

1. Any "auto" owned by that individual or by any member of his or her household.
2. Any "auto" used by that individual or his or her spouse while working in a business of selling, servicing, repairing or parking "autos".

**E. Additional Definition**

As used in this endorsement:

"Family member" means a person related to the individual named in the Schedule by blood, marriage or adoption who is a resident of the individual's household, including a ward or foster child.

POLICY NUMBER:

COMMERCIAL AUTO  
CA 20 01 10 13

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

## **LESSOR – ADDITIONAL INSURED AND LOSS PAYEE**

This endorsement modifies insurance provided under the following:

AUTO DEALERS COVERAGE FORM  
BUSINESS AUTO COVERAGE FORM  
MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

**Named Insured:**

**Endorsement Effective Date:**

### **SCHEDULE**

**Insurance Company:**

**Policy Number:**

**Effective Date:**

**Expiration Date:**

**Named Insured:**

**Address:**

**Additional Insured (Lessor):**

**Address:**

**Designation Or Description Of "Leased Autos":**

Coverages	Limit Of Insurance
Covered Autos Liability	\$ Each "Accident"
Comprehensive	Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ Deductible For Each Covered "Leased Auto"
Collision	Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ Deductible For Each Covered "Leased Auto"
Specified Causes Of Loss	Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus \$ Deductible For Each Covered "Leased Auto"
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

#### A. Coverage

- Any "leased auto" designated or described in the Schedule will be considered a covered "auto" you own and not a covered "auto" you hire or borrow.
- For a "leased auto" designated or described in the Schedule, the **Who Is An Insured** provision under **Covered Autos Liability Coverage** is changed to include as an "insured" the lessor named in the Schedule. However, the lessor is an "insured" only for "bodily injury" or "property damage" resulting from the acts or omissions by:
  - You;
  - Any of your "employees" or agents; or
  - Any person, except the lessor or any "employee" or agent of the lessor, operating a "leased auto" with the permission of any of the above.
- The coverages provided under this endorsement apply to any "leased auto" described in the Schedule until the expiration date shown in the Schedule, or when the lessor or his or her agent takes possession of the "leased auto", whichever occurs first.

#### B. Loss Payable Clause

- We will pay, as interest may appear, you and the lessor named in this endorsement for "loss" to a "leased auto".

- The insurance covers the interest of the lessor unless the "loss" results from fraudulent acts or omissions on your part.
- If we make any payment to the lessor, we will obtain his or her rights against any other party.

#### C. Cancellation

- If we cancel the policy, we will mail notice to the lessor in accordance with the Cancellation Common Policy Condition.
- If you cancel the policy, we will mail notice to the lessor.
- Cancellation ends this agreement.

- The lessor is not liable for payment of your premiums.

#### E. Additional Definition

As used in this endorsement:

"Leased auto" means an "auto" leased or rented to you, including any substitute, replacement or extra "auto" needed to meet seasonal or other needs, under a leasing or rental agreement that requires you to provide direct primary insurance for the lessor.





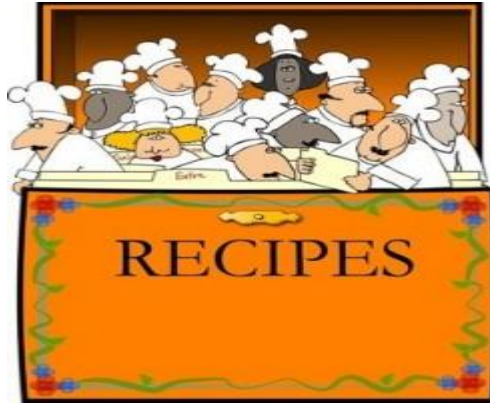
## James K. Ruble Seminar

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

### Section 6

# **Recipes For Commercial Property Coverages For The Food & Beverage Industry**





**Recipes**  
for  
**Commercial Property Coverages**  
for  
**The Food & Beverage Industry**

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**830-481-7997**

# Recipes for Commercial Property Coverages

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- I. Overview
  - A. Types of businesses (discussions could be applicable to other types of risks as well)
    - 1. Restaurants
    - 2. Taverns
    - 3. Private Clubs
  - B. Types of property
    - 1. Owned
    - 2. Rented
    - 3. Leased
    - 4. Otherwise in named insured's care custody or control
      - a. Parking – e.g., operates valet parking service or subcontracts it
      - b. Storing – e.g., valet parking, coat check, musicians' equipment
      - c. On consignment – e.g., displays or sells art of others
      - d. Use interest – e.g., tenant's improvements and betterments
  - C. Types of losses
    - 1. Direct
    - 2. Indirect
      - a. Business income
      - b. Extra Expense
      - c. Other types of consequential loss
        - 1.) Food spoilage
        - 2.) Lease cancellation
  - D. Formal, consistent method of exposure identification
  - E. "Agency standards" for this class of business

# Recipes for Commercial Property Coverages

## II. Building and Personal Property Coverage Form - BUILDING

### A. Remodeling or Renovation (business is just opening)

remodel

To alter the structure of

renovate

To restore to a former, better state (as by cleaning, repairing, or rebuilding)

1. Many Builders Risk Forms/Installation Forms do not cover damage to an existing building – existing building is Property Not Covered
2. Must examine Building And Personal Property Form – Vacancy Condition on existing building policy

#### 6. Vacancy

##### a. Description of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:

(a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

(b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:

(i) Rented to a lessee or sub-lessee and used by the lessee or sub-lessee to conduct its customary operations; and/or

(ii) Used by the building owner to conduct customary operations.

(2) Buildings under construction or renovation are **not** considered vacant.

##### b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

(a) Vandalism;

(b) Sprinkler leakage, unless you have protected the system against freezing;

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

(2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

## Recipes for Commercial Property Coverages

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- a. Some insurance company proprietary forms do not allow renovation as an exception to the vacancy provision
  - b. Courts have stated that renovation is different from construction
  - c. What is insurer position regarding remodeling/renovation?
  - d. And how do you ask the question of vacancy for a new business?
- **Vacancy Permit CP 04 50** – waives the application of the vacancy clause for a specific time period shown on the endorsement

B. Tenant is insuring entire building – required by contract

1. **Additional Insured – Building Owner - CP 12 19**

- Adds building owner as a named insured as respects the building coverage

2. **Loss Payable Provisions - CP 12 18**

- Used to add building owner under Building Owner Loss Payable Clause
- Used to add mortgageholder under Lender's Loss Payable Clause

C. Tenant is contractually responsible for maintenance/repairs to a portion of the building – e.g., HVAC, glass, etc.

1. Building Coverage may be needed

- Must activate Agreed Value to avoid potential coinsurance “problem”

2. **Building Glass – Tenant's Policy - CP 14 70 – withdrawn with 2017 filing**

- Not needed if there is building coverage – if used, can have its own deductible

But ISO has made it easier – 2017 – new endorsements filed – GO ISO!!!!

- **Scheduled Building Property – Tenant's Policy - CP 14 01 09 17**
- **Unscheduled Building Property – Tenant's Policy – CP 14 02 09 17**

We will pay for direct physical loss of or damage to building property at the building shown in the Schedule caused by or resulting from a **Covered Cause of Loss shown in the Schedule**, provided that:

- ❖ You are a tenant of the building shown in the Schedule; and
- ❖ You have a contractual responsibility to insure such property, or a contractual responsibility to pay for loss or damage to such property.

The value of building property covered under this endorsement will be determined in accordance with the terms of the **Valuation Condition indicated in the Schedule**, or at the amount for which you are liable under contract, whichever is less. If required by law, glass is covered at the cost of replacement with safety glazing material. However, the most we will pay for the coverage provided under this endorsement is the applicable Limit Of Insurance shown in the Schedule.

The Coinsurance Condition applies to the property covered under this endorsement **only if a Coinsurance percentage is shown in the Schedule.**

Any coverage provided under this Coverage Form or Policy for Your Business Personal Property or Personal Property Of Others does not apply to the property covered under this endorsement.

## Recipes for Commercial Property Coverages

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### D. Other “building” considerations for coverage

#### 1. **Increased Cost of Loss and Related Expenses for Green Upgrades – CP 04 02**

- Provides coverage for the increased costs of repairing or replacing covered property damaged by a covered cost of loss with materials that provide enhanced energy efficiency or use of environmentally-preferable, sustainable materials, products or methods in design, construction, manufacture or operations
- Can also provide coverage for related expenses of waste reduction and recycling, design and engineering professional expenses, certification fees and related equipment testing and building air-out and related air testing

#### 2. **Ordinance Or Law Coverage – CP 04 05**

- Can provide coverage for loss to the undamaged portion of the **building**, demolition costs for undamaged portion of the **building**, and increased costs of construction of the **building** to comply with ordinances or laws in effect **at the time of loss**
- **ISO made changes in 2017 - CP 04 05** has been revised to add an option to include an ordinance or law that **is promulgated or revised after the loss but prior to commencement** of reconstruction or repair, provided such ordinance or law requires compliance as a condition precedent to obtaining a building permit or certificate of occupancy

#### 3. **Debris Removal Additional Insurance – CP 04 15**

- Used to increase the additional debris removal coverage granted in the Coverage Form (\$25,000) to the amount specified in the endorsement

#### 4. **Functional Building Valuation – CP 04 38**

- Designed to insure an older building whose architectural style has become obsolete or simply unnecessary to the named insured’s current use (replacement cost unnecessary in a total loss – ACV does not meet needs in a partial loss)
- Coinsurance does not apply
- Ordinance or Law Coverage as part of Limit of Insurance
- **ISO made changes in 2017 – CP 04 38** has been revised to add an option to include an ordinance or law that is promulgated or revised after the loss but prior to commencement of reconstruction or repair, provided such ordinance or law requires compliance as a condition precedent to obtaining a building permit or certificate of occupancy

## Recipes for Commercial Property Coverages

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### 5. Earthquake and Volcanic Eruption Endorsement – CP 10 40

- Adds the indicated causes of loss – all earthquake shocks or volcanic eruptions occurring within a 168-hour period are a single occurrence – does NOT change Covered Property – need **Additional Covered Property – CP 14 10**

### 6. Flood Coverage Endorsement – CP 10 65

- Designed to **wrap around** (not supplement) coverage provided by the NFIP (allows insurer to waive requirement by specific location) – applies in excess of coverage available under NFIP (even if coverage does not exist) – defines flood under the endorsement as a general and temporary condition of partial or complete inundation of normally dry land areas
- Includes mudslide
- Includes coverage for back up and overflow from sewers, drains and sumps if such discharge occurs within 72 hours after the flood recedes
- Provides coverage for loss to underground foundations and underground pipes/flues/drains
- Excludes coverage for bulkheads/pilings/piers/wharves/docks/retaining walls even if they are covered property
- Covers removal of flood-borne debris of covered property and other property (excluding mud deposits)
- Covers removal of debris of covered property from premises other than the named insured's premises
- An annual aggregate limit applies
- Coinsurance applies unless the NO COINSURANCE OPTION is selected

### 7. Discharge From Sewer, Drain or Sump (Not Flood Related) – CP 10 38

- Includes coverage for discharge of water or waterborne material from a sewer, drain (including a roof drain) or sump located on the described premises, provided such discharge is not induced by flood or flood-related conditions
- Does not apply if discharge results from insured's failure to perform routine maintenance or repairs OR to sump pump failure resulting from power failure unless policy is endorsed to cover power failure affecting the described premises – need **CP 04 17**
- Discharge limit for property damage to Covered Property and business income (if carried) as well as optional Annual Aggregate Limitation

### 8. Equipment Breakdown Cause Of Loss – CP 10 46

- Used to add coverage for causes of loss otherwise excluded/limited
- Deletes exclusions related to artificially generated electrical, magnetic and electromagnetic energy; mechanical breakdown; explosion of steam equipment
- Deletes limitations applicable to steam equipment and water heating equipment
- Add exclusions for pressure or electrical testing as well as wear and tear and inherent vice
- Coverage for Ammonia Contamination and Hazardous Substance is limited to the lesser of 10% of the Limit of Insurance or \$25,000 – higher limits may be selected



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## Recipes for Commercial Property Coverages

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### 9. Additional Covered Property – CP 14 10

- Used to add coverage for otherwise excluded property
- For example, if earthquake added as a cause of loss, then would need to add coverage for foundation, underground pipes/flues/drains, cost of excavations
- If restaurant on water, may want coverage for pilings, piers, wharves or docks
- If there is a fence or retaining wall, will want coverage for “full” perils

### 10. Additional Building Property – CP 14 15

- Adds coverage for fixtures, machinery, and equipment that are not permanently installed under the building coverage - building rate will apply
- For example, would allow walk-in coolers/freezers to be building items
- Could also “add” tenants improvements and betterments **for the tenant** as building

### 11. Outdoor Trees, Shrubs and Plants – CP 14 30

- Adds trees, shrubs, and plants to the definition of Covered Property for Basic, Broad, or Special Causes of Loss
- Limit of Insurance chosen for each tree/shrub/plant as well as all items combined (includes debris removal in Limit of Insurance for All Items)
- In addition to Causes of Loss exclusions/limitations adds exclusions for dampness or dryness of atmosphere, changes in or extremes of temperature, and rain/snow/ice/sleet – option for Vehicle Exclusion

### 12. Outdoor Signs – CP 14 40

- Increases the BPP limitation of \$2500 per occurrence for all outdoor signs to the limits shown for the described signs
- Will want to properly “address” awnings that are signs

### 13. Radio or Television Antennas – CP 14 50

- Adds radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers, as described in the schedule to the definition of Covered Property for Basic, Broad or Special Causes of Loss
- Limit of Insurance chosen
- In addition to Causes of Loss exclusions/limitations adds exclusions for dampness or dryness of atmosphere, changes in or extremes of temperature, and rain/snow/ice/sleet

### 14. Increase In Rebuilding Expenses Following Disaster (Additional Expense Coverage On Annual Aggregate Basis) – CP 04 09

- 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;

## Recipes for Commercial Property Coverages

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### III. Building and Personal Property Coverage Form – YOUR BUSINESS PERSONAL PROPERTY

#### A. Tenant's Improvements & Betterments

- (6)** 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;

1. Specifically defined in Coverage Form - may be different from what the named insured thinks these are – **example**
2. Can be insured as a separate item of YBPP and building rate used in rating

- **Your Business Personal Property – Separation of Coverage – CP 19 10**

3. Only for direct damage – may need coverage for loss of use interest resulting from lease cancellation and application of ordinances or laws

- **Leasehold Interest Coverage Form – CP 00 60**

- Provides coverage for unamortized portion of use interest in improvements and betterments when lease cancellation results from a Covered Cause of Loss

- **Additional Building Property – CP 14 15**

- Can be used to make tenants improvements and betterments for the tenant building in order to provide coverage for destruction due to enforcement of ordinance or law by adding **Ordinance Or Law Coverage – CP 04 05**

- **Ordinance Or Law Coverage For Tenant's Interest In Improvements And Betterments (Tenant's Policy) – CP 04 26**

- Provides coverage similar to **Ordinance Or Law Coverage – CP 04 05** for tenant

4. Coverage for improvements and betterments may be needed/provided for both tenant and building owner

- **Additional Property Not Covered – CP 14 20**

- Tenants improvements and betterments can/should be excluded from landlord's BPP Coverage Form (potential coinsurance issue for landlord) if landlord has a contract where tenant must insure and replace

## Recipes for Commercial Property Coverages

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### B. Leased Personal Property

<b>7. Leased personal property for which you have a <u>contractual responsibility to insure</u>, unless otherwise provided for under Personal Property Of Others.</b>
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1. Specifically must have a contractual responsibility to insure
2. A contractual responsibility for loss is not enough

- **Leased Property – CP 14 60**

- Provides coverage for leased property as Your Business Personal Property
- Valuation may be on an agreed value (stipulated loss value) basis
- Should be attached to every policy even if no leased property at inception
- Schedule of endorsement should indicate “all leased property”
- Agreed value should indicate “as required by the lease”

### C. Additional Business Personal Property Considerations

1. May want to modify causes of loss

- **Utility Services - Direct Damage – CP 04 17**

- Adds coverage for damage to covered property resulting from interruption of any of the utility services identified if the interruption results from a covered cause of loss – overhead transmission lines must be specifically included
- Provides coverage for direct damage only

- **Spoilage Coverage – CP 04 40**

- Adds coverage for damage to perishable stock due to breakdown or contamination (mechanical breakdown or mechanical failure of refrigerating, cooling or humidity control apparatus or equipment and contamination by the refrigerant)
- Adds coverage for damage to perishable stock for power outage beyond named insured's control
- May be written to include selling price
- Has own set of exclusions/limitations applicable – e.g., disconnection from a source of power, turning the power switch off, breaking of glass that is part of unit, etc.
- May receive a credit for a refrigeration maintenance agreement but if declared agreement is voluntarily terminated, coverage is suspended

- **Earthquake and Volcanic Eruption Endorsement – CP 10 40**

- **Flood Coverage Endorsement – CP 10 65**

- **Discharge From Sewer, Drain or Sump (Not Flood Related) – CP 10 38**

- **Equipment Breakdown Cause Of Loss – CP 10 46**

## Recipes for Commercial Property Coverages

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2. May not want to include “junk in basement” in coverage as would be included in calculation for compliance with coinsurance

- **Additional Property Not Covered – CP 14 20**

3. Valuation may not meet need

### 3. Replacement Cost

- a. 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:
  - (1) *Personal property of others;*
  - (2) *Contents of a residence;*

- Need for specific coverage for personal property of others
- Activate **Extension Of Replacement Cost To Personal Property Of Others – Optional Coverage**

4. May want coverage for business personal property stored in a building for which building coverage is not wanted

- b. Your Business Personal Property** consists of the following property located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the building or structure or within 100 feet of the premises described in the Declarations, whichever distance is greater:

- Solution - schedule building but show no Limit of Insurance for the building; show Limit of Insurance for Your Business Personal Property

5. May want coverage for business personal property stored in portable storage units

### f. Business Personal Property Temporarily In Portable Storage Units

- (1) You may extend the insurance that applies to Your Business Personal Property to apply to such property while temporarily stored in a portable storage unit (including a detached trailer) located within 100 feet of the building or structure described in the Declarations or within 100 feet of the premises described in the Declarations, whichever distance is greater.
- (2) If the applicable Covered Causes of Loss form or endorsement contains a limitation or exclusion concerning loss or damage from sand, dust, sleet, snow, ice or rain to property in a structure, such limitation or exclusion also applies to property in a portable storage unit.
- (3) Coverage under this Extension:
  - (a) Will end 90 days after the business personal property has been placed in the storage unit;

## Recipes for Commercial Property Coverages

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(b) Does not apply if the storage unit itself has been in use at the described premises for more than 90 consecutive days, even if the business personal property has been stored there for 90 or fewer days as of the time of loss or damage.

(4) Under this Extension, the most we will pay for the total of all loss or damage to business personal property is \$10,000 (unless a higher limit is indicated in the Declarations for such Extension) regardless of the number of storage units. Such limit is part of, not in addition to, the applicable Limit of Insurance on Your Business Personal Property. Therefore, payment under this Extension will not increase the applicable Limit of Insurance on Your Business Personal Property.

(5) This Extension does not apply to loss or damage otherwise covered under this Coverage Form or any endorsement to this Coverage Form or policy, and does not apply to loss or damage to the storage unit itself.

6. May want to change valuation for alcoholic beverages

- **Distilled Spirits and Wines Market Value – CP 99 05**
  - Retailers of alcoholic beverages can cover distilled spirits and wine on a market value basis
  - Bottled distilled spirits are valued at the market price as of the time and place of loss or damage
  - Bottled winery products are valued at the market price the case goods could have been sold as of the time and place of loss or damage
  - Establishes that paid and unpaid taxes that are refundable federal excise taxes and customs duties as well as refundable state and local taxes are either deducted from the value or recoverable by the insurer – these are refundable when they are “damaged” by any peril except theft
- **Alcoholic Beverages Tax Exclusion – CP 99 10**
  - Allows insured to exclude value for refundable federal excise taxes and customs duties as well as refundable state and local taxes from value of business personal property held for sale that consist of distilled spirits, wines, rectified products (e.g., Everclear) and beer for all perils other than theft and increase value of this business personal property for the peril of theft

## Recipes for Commercial Property Coverages

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### 7. Business personal property off premises

#### a. As Coverage Extension in Coverage Form

##### **d. Property Off-premises**

- (1) You may extend the insurance provided by this Coverage Form to apply to your Covered Property while it is away from the described premises, if it is:
  - (a) Temporarily at a location you do not own, lease or operate;
  - (b) In storage at a location you lease, provided the lease was executed after the beginning of the current policy term; or
  - (c) At any fair, trade show or exhibition.
- (2) This Extension does not apply to property:
  - (a) In or on a vehicle; or
  - (b) In the care, custody or control of your salespersons, unless the property is in such care, custody or control at a fair, trade show or exhibition.
- (3) The most we will pay for loss or damage under this Extension is \$10,000.

#### b. As Coverage Extension in Causes of Loss – Special Form

##### **1. Property In Transit**

This Extension applies only to your personal property to which this form applies.

- a. You may extend the insurance provided by this Coverage Part to apply to your personal property (other than property in the care, custody or control of your salespersons) in transit more than 100 feet from the described premises. Property must be in or on a motor vehicle you own, lease or operate while between points in the coverage territory.
- b. Loss or damage must be caused by or result from one of the following causes of loss:
  - (1) Fire, lightning, explosion, windstorm or hail, riot or civil commotion, or vandalism.
  - (2) Vehicle collision, upset or overturn. Collision means accidental contact of your vehicle with another vehicle or object. It does not mean your vehicle's contact with the roadbed.
  - (3) Theft of an entire bale, case or package by forced entry into a securely locked body or compartment of the vehicle. There must be visible marks of the forced entry.
- c. The most we will pay for loss or damage under this Extension is \$5,000.

- Not the best method for insuring this exposure
- **Specified Business Personal Property Temporarily Away From Premises - CP 04 04**
  - Schedule shows Limit Of Insurance as well as type(s) or item(s) of business personal property
  - Not intended to apply to stock or salespersons samples unless at fair, trade show, or exhibit and theft from a vehicle must be visible signs of forced entry
- **BUT** potential for wine, etc., shipped at named insured's risk – need to check purchase orders, shipping documents, etc. – may need inland marine coverage such as a Transportation Policy

## Recipes for Commercial Property Coverages

### IV. Building and Personal Property Coverage Form – PERSONAL PROPERTY OF OTHERS

#### A. As a Coverage Extension

##### **b. Personal Effects And Property Of Others**

You may extend the insurance that applies to Your Business Personal Property to apply to:

(1) Personal effects owned by you, your officers, your partners or members, your managers or your employees. This Extension does not apply to loss or damage by theft.

(2) Personal property of others in your care, custody or control.

The most we will pay for loss or damage under this Extension is \$2,500 at each described premises. Our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

1. Limited to \$2,500 and would not apply to Property NOT Covered
2. Previously stated - valuation is also limited

##### **3. Replacement Cost**

a. 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:

(1) **Personal property of others;**

(2) Contents of a residence;

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

#### B. Covered Property - Personal Property of Others

##### **C. Personal Property Of Others** that is:

(1) In your care, custody or control; and

(2) Located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the building or structure or within 100 feet of the premises described in the Declarations, whichever distance is greater.

However, our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

1. Still subject to Property NOT Covered
2. Still subject to Causes of Loss Exclusions/Limitations

#### Causes of Loss – Special Form

**3.** The special limit shown for each category, **a.** through **d.**, is the total limit for loss of or damage to all property in that category. The special limit applies to any one occurrence of theft, regardless of the types or number of articles that are lost or damaged in that occurrence. The special limits are (unless a higher limit is shown in the Declarations):

**a.** \$2,500 for furs, fur garments and garments trimmed with fur.

## Recipes for Commercial Property Coverages

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3. Valuation under CPP may be Replacement Cost, if extended

**4. Extension Of Replacement Cost To Personal Property Of Others**

- a. If the Replacement Cost Optional Coverage is shown as applicable in the Declarations, then this Extension may also be shown as applicable. If the Declarations show this Extension as applicable, then Paragraph **3.b.(1)** of the Replacement Cost Optional Coverage is deleted and all other provisions of the Replacement Cost Optional Coverage apply to replacement cost on personal property of others.

- b. With respect to replacement cost on the personal property of others, the following limitation applies:

If an item(s) of personal property of others is subject to a written contract which governs your liability for loss or damage to that item(s), then valuation of that item(s) will be based on the amount for which you are liable under such contract, but not to exceed the lesser of the replacement cost of the property or the applicable Limit of Insurance.

- C. Other types of coverages are needed

1. Types of property

- a. Destruction of food due to contamination/cleaning of equipment
- b. Automobiles – valet parking
- c. Contents of these automobiles
- d. Coat check, etc.
- e. Art on consignment/loaned to named insured
- f. Real and personal property for equipment breakdown
- g. Money & securities

2. Types of coverages for these exposures

- a. “Food Contamination”

• **Food Contamination (Business Interruption And Extra Expense) – CP 15 05**

- Ordered closed by Board of Health or any other governmental authority as the result of or suspicion of food contamination, as defined
- Expenses to clean equipment as required, cost to replace contaminated or alleged contaminated food, vaccinations of workers potentially infected if not covered by work comp, loss of Business Income (24 hour waiting period deductible) and advertising expenses to restore reputation
- One annual aggregate limit for all expenses except advertising – separate annual aggregate limit for advertising -
  - b. Garagekeepers – direct primary only – does NOT cover contents
  - c. Bailees Customers Coverage – direct primary only – may want replacement cost valuation
  - d. Equipment Breakdown Policy/Endorsement
  - e. Money & Securities/Employee Dishonesty – Commercial Crime

3. Alternatives

- a. Exculpatory agreements
- b. Limitation of liability clauses



## Recipes for Commercial Property Coverages

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- **Garagekeepers Coverage - CA 99 37**
    - Exposure exists whether named insured is providing or provided by independent contractor
    - But only covers auto and auto equipment with some exclusions – ***but not “stuff” inside (e.g., golf clubs)***
    - And excludes theft by employees – might want Employee Theft
    - Need **Bailee’s Customers Coverage** – again, looking for payment without regard to legal liability
      - Again, usually excludes theft by employees
      - Valuation may be ACV – want Replacement Cost for goodwill
  - **Other personal property in named insured’s care, custody or Control**
    - **Coat check**
    - **Art on consignment**
    - **Musicians’ equipment**
  - **Additional Property Considerations (real and personal property)**
    - Causes of Loss Forms do not cover boiler explosion, artificially generated electric current, mechanical breakdown
    - These risks have exposure for power surge and mechanical breakdown
    - Need **Equipment Breakdown Coverage Form**
    - Need **Equipment Breakdown Cause Of Loss – CP 10 46**
  - **Commercial Crime Considerations**
    - **Employee Theft**
    - **Money & Securities**
    - **Fraudulent Impersonation**
- D. Watch out for
1. Protective safeguards endorsements
- **Protective Safeguards Endorsement – CP 04 11**
    - Specific provision for Automatic Commercial Cooking Exhaust And Extinguishing System
    - **ISO 2017** ... “actively engage and maintain in the "on" position at all times any automatic fire alarm or other automatic system listed in the Schedule”
  - **Burglary And Robbery Protective Safeguards – CP 12 11**
    - **ISO 2017** ... “actively engage any automatic burglary alarm or other automatic system listed in the Schedule and maintain it in the "on" position during all non-work hours and whenever the premises are unoccupied”
2. Warranty endorsements that may void coverage

## Recipes for Commercial Property Coverages

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### V. Business Income Coverage Form

#### A. Business Income Defined

##### A. Coverage

##### 1. Business Income

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*.  
For manufacturing risks, Net Income includes the net sales value of production.

1. Profit not required
2. Net loss subtracted from continuing normal operating expenses incurred in determining amount of business income
3. While payroll is included in this definition, Loss Determination Loss Condition states that payroll is included only to the extent that it is necessary to resume operations with the same quality of service that existed just before the loss
  - And, will tips be included in definition of payroll?

#### Loss Condition

##### 3. Loss Determination

- a. The amount of Business Income loss will be determined based on:

(3) The operating expenses, including payroll expenses, necessary to resume "operations" ***with the same quality of service that existed just before the direct physical loss or damage***; and

- Possibility of insurer/insured disagreement as to what payroll is necessary
- **Discretionary Payroll Expenses – CP 15 04** eliminates any possibility of dispute
  - Job Classifications or Employees are shown in schedule
  - Includes this payroll if paid for period of restoration/extension of period of restoration (any/all) unless otherwise limited by schedule in endorsement

#### B. Options

Coverage is provided as described and limited below for one or more of the following options for which a Limit Of Insurance is shown in the Declarations:

- (1) Business Income Including "Rental Value".
- (2) Business Income Other Than "Rental Value".
- (3) "Rental Value".

- Named insured could have tenant occupancy – e.g., rents upstairs apartment – and would need to include "rental value" – CAUTION: options create opportunity for errors

## Recipes for Commercial Property Coverages

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### C. Coverage "trigger"

We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.

With respect to the requirements set forth in the preceding paragraph, if you occupy only part of a building, your premises means:

- (a)** The portion of the building which you rent, lease or occupy;
- (b)** Any area within 100 feet of the building or within 100 feet of the premises described in the Declarations, whichever distance is greater (with respect to loss of or damage to personal property in the open or personal property in a vehicle); and
- (c)** Any area within the building or at the described premises, if that area services, or is used to gain access to, the portion of the building which you rent, lease or occupy.

#### 1. Suspension

##### **6.** "Suspension" means:

- a.** The slowdown or cessation of your business activities; or
- b.** That a part or all of the described premises is rendered untenable, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

#### 2. Operations

##### **2.** "Operations" means:

- a.** Your business activities occurring at the described premises; and
- b.** The tenantability of the described premises, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

## Recipes for Commercial Property Coverages

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### 3. Period of Restoration

3. "Period of restoration" means the period of time that:

a. Begins:

- (1) **72 hours after** the time of direct physical loss or damage for Business Income Coverage; or
  - (2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;
- caused by or resulting from any Covered Cause of Loss at the described premises; and

b. Ends on the earlier of:

- (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
- (2) The date when business is resumed at a new permanent location.

"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".

The expiration date of this policy will not cut short the "period of restoration".

- 72 hours may be too long as a waiting period deductible – endorsement needed
- **Business Income Changes – Beginning Period of the Period of Restoration – CP 15 56** - to change to 24 hours or eliminate entirely
- **Note:** when period of restoration ends
- Remember ordinance or law exposure – if endorsed to policy for direct damage, should endorse to policy for time element coverage
- **Ordinance or Law – Increased Period of Restoration - CP 15 31 - ISO made changes in 2017** - CP 15 31 has been revised to add an option to include an ordinance or law that is **promulgated or revised after the loss but prior to commencement** of reconstruction or repair, provided such ordinance or law requires compliance as a condition precedent to obtaining a building permit or certificate of occupancy
- For most food and beverage risks this time period will not be sufficient – need to extend period for payment of business income loss beyond “period of restoration”

## Recipes for Commercial Property Coverages

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- **Additional Coverage – Extended Business Income** – gives 60 days coverage

### **C. Extended Business Income**

#### **(1) Business Income Other Than "Rental Value"**

If the necessary "suspension" of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

**(a)** Begins on the date property (except "finished stock") is actually repaired, rebuilt or replaced and "operations" are resumed; and

**(b)** Ends on the earlier of:

**(i)** The date you could restore your "operations", with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage had occurred; or

**(ii)** 60 consecutive days after the date determined in **(1)(a)** above.

However, Extended Business Income does not apply to loss of Business Income incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

#### **(2) "Rental Value"**

If the necessary "suspension" of your "operations" produces a "Rental Value" loss payable under this policy, we will pay for the actual loss of "Rental Value" you incur during the period that:

**(a)** Begins on the date property is actually repaired, rebuilt or replaced and tenantability is restored; and

**(b)** Ends on the earlier of:

**(i)** The date you could restore tenant occupancy, with reasonable speed, to the level which would generate the "Rental Value" that would have existed if no direct physical loss or damage had occurred; or

**(ii)** 60 consecutive days after the date determined in **(2)(a)** above.

However, Extended Business Income does not apply to loss of "Rental Value" incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of "Rental Value" must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

- Should be extended beyond 60 days
- Available as one of the **Optional Coverages**

### **4. Extended Period Of Indemnity**

Under Paragraph **A.5.c., Extended Business Income**, the number 60 in Subparagraphs **(1)(b)** and **(2)(b)** is replaced by the number shown in the Declarations for this Optional Coverage.

- Should be extended for period needed for exposure

## Recipes for Commercial Property Coverages

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### 4. Described premises

- Losses may occur at other than the described premises that will affect named insured's business income

#### a. Policy may provide automatically

### 5. Additional Coverages

#### a. Civil Authority

In this Additional Coverage, Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

- (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
- (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.

Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:

- (1) Four consecutive weeks after the date of that action; or
- (2) When your Civil Authority Coverage for Business Income ends; whichever is later.

- Must be caused by action of civil authority
- Proximity to described premises limited
  - May need to endorse – **Civil Authority Changes – CP 15 32** – increase radius
- Covered Cause of Loss required
- Duration of coverage limited
  - May need to endorse – **Civil Authority Changes – CP 15 32** – increase duration

## Recipes for Commercial Property Coverages

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b. Endorsements may be attached

- **Off-Premises Interruption of Business – Vehicles and Mobile Equipment – CP 15 06**
  - Adds coverage for business income loss, extra expense loss, or both, resulting from loss or damage to vehicles and mobile equipment on which the business depends
- **Business Interruption Coverage – CA 99 05**
  - Adds coverage for business income and extra expense or business income only resulting from loss or damage to vehicles and mobile equipment on which the business depends
- **Business Income from Dependent Properties – Broad Form – CP 15 08**
  - Extends named insured's business income limits to dependent property locations listed on endorsement – may extend coverage as well to secondary contributing or secondary recipient locations (neither named)
- **Business Income from Dependent Properties – Limited Form – CP 15 09**
  - Shows business income limits applicable to dependent property locations listed on endorsement - may extend coverage as well to secondary contributing or secondary recipient locations (neither named)

5. Covered Cause of Loss

- a. Many of the same concerns as for building/business personal property
- But special need for **Utility Services – Time Element – CP 15 45**
  - Need to be sure to properly address overhead transmission lines
  - 2017 ISO changes allow for multiple options in waiting period deductible
  - Need for loss of business income due to “shut down” of business by Board of Health or any other governmental authority due to discovery or suspicion of “food contamination” – tainted food purchased - food which has been improperly stored, handled or prepared – a communicable disease transmitted through one or more of the employees
  - **Food Contamination (Business Interruption And Extra Expense) – CP 15 05**
- May have need for **DIC** (Difference In Conditions) for additional causes of loss

## Recipes for Commercial Property Coverages

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- b. But **Causes of Loss – Special Form - CP 10 30** has specific exclusions applicable

### 4. Special Exclusions

The following provisions apply only to the specified Coverage Forms.

**a. Business Income (And Extra Expense) Coverage Form, Business Income (Without Extra Expense) Coverage Form, Or Extra Expense Coverage Form**

We will not pay for:

**(1)** Any loss caused by or resulting from:

- (a)** Damage or destruction of "finished stock"; or
- (b)** The time required to reproduce "finished stock".

This exclusion does not apply to Extra Expense.

**(2)** Any loss caused by or resulting from direct physical loss or damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers.

**(3)** Any increase of loss caused by or resulting from:

- (a)** Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
  - (b)** Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the "suspension" of "operations", we will cover such loss that affects your Business Income during the "period of restoration" and any extension of the "period of restoration" in accordance with the terms of the Extended Business Income Additional Coverage and the Extended Period Of Indemnity Optional Coverage or any variation of these.
- (4)** Any Extra Expense caused by or resulting from suspension, lapse or cancellation of any license, lease or contract beyond the "period of restoration".
- (5)** Any other consequential loss.

- No coverage for business income or extra expense losses resulting from loss or damage to radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers – delete exclusion – **Radio or Television Antennas – Business Income or Extra Expense - CP 15 50**
- No coverage for cancellation of any contract beyond “period of restoration”, Extended Business Income Additional Coverage, and Extended Period Of Indemnity Optional Coverage
  - May have a need for Extended Period Of Indemnity for more than a year



## Recipes for Commercial Property Coverages

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### D. Additional Business Income Considerations

1. **Business Income – Landlord as Additional Insured (Rental Value) – CP 15 03** - "rental value" is defined as the net income that would have been earned as rental income from the occupancy of the rented premises by the named insured, plus the continuing normal operating expenses that are the legal obligation of the insured tenant and would otherwise be the obligation of the additional insured landlord
  - Mortgageholder may want to be added as additional insured as well – no standard endorsement available from ISO – mortgage is not BI
2. **Payroll Limitation Or Exclusion – CP 15 10** - the endorsement is used to exclude or limit coverage for the payroll of all employees payroll may be limited to a specific number of days or excluded in its entirety – may now exclude all employees and job classifications including officers, executives, management personnel and contract employees **OR** may exclude all employees and job classifications other than officers, executives, management personnel and contract employees **OR** may exclude all employees and job classifications (including officers, executives, management personnel and contract employees), **except OR** may excluded only the job classifications and/or employees listed **AND** may do this by premises and building
3. Disparagement of reputation and loss of business income
  - Nonstandard coverage - difficult to prove loss – difficult to establish “trigger” of coverage
4. Ingress/egress and loss of business income
  - Nonstandard coverage

### VI. Other Considerations

- A. Waivers of Subrogation
- B. Exculpatory Agreements
- C. Notice of Cancellation Requirements

## Recipes for Commercial Property Coverages

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### VII. Leasehold Interest Coverage Form

#### A. Exposure

- Lease provisions that cancel the lease when property is damaged at or near the named insured's premises

#### B. Coverage

#### ***Leasehold Interest Coverage Form - CP 00 60***

##### **A. COVERAGE**

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 or damage to property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

##### **1. Covered Leasehold Interest**

Covered Leasehold Interest means the following for which an amount of "net leasehold interest" at inception is shown in the Leasehold Interest Coverage Schedule:

##### **a. Tenant's 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 leased.

##### **b. Bonus Payments**, meaning the unamortized portion of 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.

##### **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.

##### **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.

- CAUTION: - care must be exercised when showing "described premises" – NOT suite #

# Recipes for Commercial Property Coverages

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## ***Causes of Loss – Special Form - CP 10 30***

### **b. Leasehold Interest Coverage Form**

- (1) Paragraph **B.1.a.**, Ordinance Or Law, does not apply to insurance under this Coverage Form.
- (2) We will not pay for any loss caused by:
  - (a) Your cancelling the lease;
  - (b) The suspension, lapse or cancellation of any license; or
  - (c) Any other consequential loss.

## VIII. Legal Liability Coverage Form

### A. The Exposure

- Named insured can be legally liable for more than just fire – but jurisdiction may follow “Sutton Rule” and named insured is considered a co-insured under landlord’s policy

### B. The Coverage

## ***Legal Liability Coverage Form CP 00 40***

### **A. Coverage**

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. We will have the right and duty to defend any "suit" seeking those damages. However, we have no duty to defend you against a "suit" seeking damages for direct physical loss or damage to which this insurance does not apply. We may investigate and settle any claim or "suit" at our discretion. But:

- (1) The amount we will pay for damages is limited as described in Section **C. Limits Of Insurance**; and
- (2) Our right and duty to defend end when we have used up the Limit of Insurance in the payment of judgments or settlements.

#### **1. Covered Property And Limitations**

Covered Property, as used in this Coverage Form, means tangible property of others in your care, custody or control that is described in the Declarations or on the Legal Liability Coverage Schedule.

Covered Property does not include electronic data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This paragraph does not apply to electronic data which is integrated in and operates or controls the building’s elevator, lighting, heating, ventilation, air conditioning or security system

- Tort liability only – no coverage for liability assumed under contract

## Recipes for Commercial Property Coverages

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### ***Causes of Loss – Special Form - CP 10 30***

#### **c. Legal Liability Coverage Form**

**(1)** The following exclusions do not apply to insurance under this Coverage Form:

- (a)** Paragraph **B.1.a.**, Ordinance Or Law;
- (b)** Paragraph **B.1.c.**, Governmental Action;
- (c)** Paragraph **B.1.d.**, Nuclear Hazard;
- (d)** Paragraph **B.1.e.**, Utility Services; and
- (e)** Paragraph **B.1.f.**, War And Military Action.

**(2)** The following additional exclusions apply to insurance under this Coverage Form:

##### **(a) Contractual Liability**

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.

##### **(b) Nuclear Hazard**

We will not defend any claim or "suit", or pay any damages, loss, expense or obligation, resulting from nuclear reaction or radiation, or radioactive contamination, however caused.

IX. Recap - conclusion

