



# **JAMES K. RUBLE SEMINAR**

## **Ruble Graduate Seminar**

IA&B of PA MD & DE  
June 13-14, 2023



**JAMES K. RUBLE SEMINAR**  
**Ruble Graduate Seminar**  
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## **A Letter from William J. Hold, President/CEO**

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Let's take the first step.

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





# James K. Ruble Seminar

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

## Section 1

# Hidden Policy Coverages





# Hidden Policy COVERAGES

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## SUPPLEMENTARY INFORMATION

### Personal Auto Policy - Who Is Permitted To Drive

**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."

• 1998 WORDING CHANGE

**A.** We do not provide Liability Coverage for any "insured":

8. Using a vehicle without a reasonable belief that that "insured" is entitled to do so. This exclusion (A.8) does not apply to a "family member" using "your covered auto" which is owned by you.

**WHO is/is not an insured non-permissive operator under the Personal Auto Policy?**

**Case Study 1-1**

Bill left his car running to dash into a convenience store. A man using a public telephone outside the store promptly jumped into his car and sped away. Running a red light a few blocks away, he plowed into another vehicle, severely injuring the driver and totaling her car. The driver sued the operator of Bill's vehicle, as well as Bill himself for negligence. *Will the Personal Auto Policy (PAP) respond to the claim against...*

*Bill?*

*The driver of Bill's car?*

**Case Study 1-2**

Ann's 16 year-old son, Greg, had just received his learner's permit when he asked his dad if he could take his 23-year old schoolmate, Bubba, for a drive in the family car. Ann said it was OK, but that Bubba was forbidden to operate the car because he had a poor driving record and it would violate his parole. After picking up Bubba, Greg wanted to test the new radar detector his dad had given him for Christmas, so he asked Bubba to drive due to his experience with high-speed chases. Following an at-fault accident, an injured party sued Bubba, Greg and Ann. *Will Ann's PAP respond to the claim against...*

*Ann?*

*Greg?*

*Bubba?*

## SUPPLEMENTARY INFORMATION

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### Personal Auto Policy - Who Is Insured

**A.** We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include pre-judgment interest awarded against the "insured". We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of judgments or settlements. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this Policy.

**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."

**WHO is/is not an insured non-permissive operator under the Personal Auto Policy?**

**Case Study 2-1**

Your car is in the shop for repairs. While at the office, you need to run a business errand for the boss and ask a fellow employee if you can borrow their car. In route, you negligently collide with another vehicle, and the driver sues everybody in sight. *Will YOUR PAP cover...*

*You?*

*Your co-worker?*

*Your employer?*

**Case Study 2-2**

Your friend, Tony, is a salesman for the Big Foot Shoe Company. His car is in the shop for repairs and he asks to borrow your car for a couple of business appointments. He negligently collides with another vehicle and the injured party sues everybody. *Will YOUR PAP cover...*

*You?*

*Tony?*

*Big Foot?*

**Case Study 2-3**

Will sent his employee, Charlie, on a business trip to Chicago by plane. Charlie rented a car from Hertz in his own name (of course). In an accident, Charlie negligently injured John, who sued Charlie, Will and Hertz. *Who is covered by which of the following policies?*

	WILL'S PAP	CHARLIE'S PAP
Charlie		
Hertz		
Will		

# SUPPLEMENTARY INFORMATION

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## Personal Auto Policy - Who Is "You" and Who Is "Family"

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### PART D – COVERAGE FOR DAMAGE TO YOUR AUTO

#### 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 loss to more than one “your covered auto” results from the same “collision”, only the highest applicable deductible will apply. We will pay for loss to “your covered auto” caused by:
1. Other than “collision” only if the Declarations indicate that Other Than Collision Coverage is provided for that auto.
  2. “Collision” only if the Declarations indicate that Collision Coverage is provided for that auto.

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.

#### LIABILITY COVERAGE

- B.** We do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle which:
  - a. Has fewer than four wheels; or
  - b. Is designed mainly for use off public roads.

This Exclusion (B.1.) does not apply:

- (1) While such vehicle is being used by an “insured” in a medical emergency;
- (2) To any “trailer”; or
- (3) To any non-owned golf cart.

2. Any vehicle, other than “your covered auto”, which is:
  - a. Owned by you; or
  - b. Furnished or available for your regular use.
3. Any vehicle, other than “your covered auto”, which is:
  - a. Owned by any “family member”; or
  - b. Furnished or available for the regular use of any “family member”.

However, this exclusion (B.3.) does not apply to you while you are maintaining or “occupying” any vehicle which is:

- (1) Owned by a “family member”; or
- (2) Furnished or available for the regular use of a “family member”.

**WHO is a spouse, and (not) an insured, under the Personal Auto & Homeowners policies?**

**Case Study 3-1**

Lori and Tony were married on October 16 and Lori's car was added to Tony's policy. She was not added as a named insured. On December 20th, they separated and Lori moved in with her mother and filed for a divorce, which was final on March 1. On February 16, she had an accident and totaled her car. *Will the PAP pay for the damages to her car?*

**Case Studies 3-2 through 3-4**

Anna Jane owns a car insured in her name with the Humongous Insurance Company. Her husband, Gene, owns a car insured in his name with the Itty Bitty Insurance Company. Their 20-year-old daughter, Julie, still lives at home and owns a car insured in her name with the Phlybynyte Insurance Company.

2. Gene drove Anna Jane's car to the adult book store one afternoon and had an at-fault accident. *Who is covered by the following policies?*
  - a. Anna Jane's PAP     does             does not    cover Anna Jane.
  - b. Anna Jane's PAP     does             does not    cover Gene.
  - c. Gene's PAP             does             does not    cover Gene.
  - d. Gene's PAP             does             does not    cover Anna Jane.
  
3. That evening, Gene borrowed Julie's car to meet a "friend" at a local tavern and had an at-fault accident while returning home the next morning. *Who is covered by the following policies?*
  - a. Julie's PAP             does             does not    cover Julie.
  - b. Julie's PAP             does             does not    cover Gene.
  - c. Gene's PAP             does             does not    cover Gene.
  - d. Gene's PAP             does             does not    cover Julie.
  
4. Gene and Anna Jane separated, and Anna Jane moved in with her mother. Two months later, Gene asked Anna Jane if he could borrow her car to take his new girlfriend to visit her mother. He had another at-fault accident. *Who is covered by the following policies?*
  - a. Anna Jane's PAP     does             does not    cover Anna Jane.
  - b. Anna Jane's PAP     does             does not    cover Gene.
  - c. Gene's PAP             does             does not    cover Gene.
  - d. Gene's PAP             does             does not    cover Anna Jane.

# SUPPLEMENTARY INFORMATION

## Personal Auto Policy - Who Is "You" and Who Is "Family"

POLICY NUMBER

PERSONAL AUTO  
PP 03 06 09 18

### EXTENDED NON-OWNED COVERAGE – VEHICLES FURNISHED OR AVAILABLE FOR REGULAR USE

Unless otherwise indicated below or in the Declarations, Extended Non-Owned Coverage is applicable only to the individual named in the Schedule or in the Declarations.

Name Of Individual:

If indicated below or in the Declarations, Extended Non-owned Coverage applies to:

- Named Individual and "Family Members" (including Named Individual's Spouse)

Coverage is provided where a premium is shown for coverage.

Extended Non-Owned Coverage	Premium
Liability	\$
Medical Payments	\$
Total Premium	\$

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

With respect to the individual(s) and coverages indicated in the Schedule or in the Declarations, the provisions of the policy apply unless modified by this endorsement.

#### I. Extended Non-Owned Coverage

The Extended Non-Owned Coverage provided by this endorsement does not afford coverage under Part A and Part B of the policy for any accident involving:

- A. A vehicle owned by an individual named in the Schedule or the Declarations;
- B. A vehicle owned by a "family member"; or
- C. A temporary substitute vehicle for such owned vehicle described in A or B, above.

#### II. Part A – Liability Coverage

Part A is amended as follows with respect to the individual(s) shown as applicable in the Schedule or in the Declarations:

- A. Exclusion B.2.b. does not apply to the coverages provided by this endorsement.

- B. We will provide Liability Coverage for any vehicle, other than "your covered auto", which is furnished or available for the regular use of the named individual.

#### III. Part B – Medical Payments Coverage

Part B is amended as follows, if a premium is shown in the Schedule or in the Declarations for Medical Payments Coverage, with respect to the individual(s) shown as applicable in the Schedule or in the Declarations.

- A. Exclusion 5.b. does not apply to the coverages provided by this endorsement.
- B. We will provide Medical Payments Coverage for "bodily injury" sustained while "occupying", or when struck by, any vehicle (other than "your covered auto") which is furnished or available for the regular use of the named individual.



**WHO is/is not an insured "family member" under the Personal Auto Policy?**

**Case Study 4-1**

Charlie has a PAP on his car with a Liability Limit of 250/500/100. His 20-year-old son, Kevin, lives at home while attending college and has his own PAP on his car with a Liability Limit of 25/50/15. His 17-year-old son, Dan, borrowed Kevin's car and had an at-fault accident resulting in a judgment of \$150,000 against him. *How much will each policy pay?*

Kevin's PAP ...

Charlie's PAP ...

**Case Study 4-2**

Assume that, prior to the above occurrence, Charlie had asked you to review his insurance program. Recognizing the potential gap in coverage when family members use each other's autos, you recommended that the *Extended Non-Owned Coverage for Named Individual* endorsement be added to Charlie's PAP. *How much will be paid by each policy in the above example?*

Kevin's PAP ...

Charlie's PAP ...

**Case Study 4-3**

Kevin decided to transfer to a college over 1,000 miles from home. Because of the higher tuition, he had to sell his car and drop his auto insurance. Several months later, he borrowed his roommate's car and had an at-fault accident. *Will Charlie's PAP pay for the loss?*

- HO 2000 CHANGE

<p><b>9.</b> "Insured" means</p> <p><b>a.</b> You and residents of your household who are:</p> <ul style="list-style-type: none"><li>(1) Your relatives; or</li><li>(2) Other persons under the age of 21 and in your care or the care of a resident of your household who is your relative;</li></ul> <p><b>b.</b> A student enrolled in school full-time, as defined by the school, who was a resident of your household before moving out to attend school, provided the student is under the age of:</p> <ul style="list-style-type: none"><li>(1) 24 and your relative; or</li><li>(2) 21 and in your care or the care of a resident of your household who is your relative; or</li></ul>
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## SUPPLEMENTARY INFORMATION

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### CGL - Who Isn't Covered

#### **e. Employer's Liability**

"Bodily injury" to:

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

This exclusion applies:

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

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

### **Employer's Liability**

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;
2. for care and loss of services; and
3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee;

provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

### **WHO is/is not covered by a CGL or WC policy when an employee is injured?**

#### **Case Study 5-1**

A warehouse contained a machine that manufactured wooden pallets. A worker entered the enclosed area and was injured by the machine. Although he collected the WC benefits prescribed by statute, he filed a products liability suit against the pallet machine manufacturer and was awarded \$10 million. The manufacturer, in turn, sued the warehouse owner for violating the safety rules for using the pallet machine and was awarded \$8 million. *Will the warehouse CGL or WC policy pay anything towards this award?*

#### **Case Study 5-2**

Following the above accident, the warehouse owner administered first aid to the injured worker. His actions compounded the injuries and the worker filed suit against him. *Will the warehouse CGL or WC policy respond to this lawsuit?*

#### **Case Study 5-3**

A soft drink deliveryman was injured by an exploding bottle when he set a case of soft drinks down. Although he collected WC benefits, he sued his employer because the soft drink was overly carbonated. *Will the soft drink distributor's CGL or WC policy cover this claim?*

#### **Case Study 5-4**

A warehouse dock worker's wife came to pick him up at work. She parked in the lot across from the loading dock where he was working. Being newlyweds, she lovingly watched every move he made and, as a result, saw him being crushed to death by a forklift truck. Although entitled to WC benefits from her husband, she sued his employer for a mild heart attack, mental anguish, pain and suffering, etc. *Will his employer's CGL or WC policy respond to this claim?*

## SUPPLEMENTARY INFORMATION

### CGL - Liquor Liability

#### 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.

**WHAT is/is not covered by host liquor liability in the CGL?**

**Case Study 6-1**

A liquor store owner had an open house for his valued customers and distributors. One of his customers became intoxicated and, following an argument, shot another customer. *Will the liquor store owner's CGL respond if he is sued?*

**Case Study 6-2**

A non-profit hunting club had a cash bar for the convenience of their members. A member became intoxicated and injured another party. *Will the club's CGL respond if it is sued?*

**Case Study 6-3**

A local CPCU chapter has a monthly dinner and speaker. A cash bar is provided, whereby members purchase tickets from an officer of the chapter, then exchange them for drinks from the bartender provided by the private club. *If sued by someone injured by an intoxicated member, will the chapter's CGL respond?*

**Case Study 6-4**

Concerned about their potential liability, the above CPCU chapter revised their cash bar procedures so that the private club had the sole responsibility of selling the tickets and exchanging them for drinks. No money exchanged hands between guests and the chapter, nor did the chapter profit in any way from the sale of liquor. *If sued by someone injured by an intoxicated member, will the chapter's CGL respond?*

**SUPPLEMENTARY INFORMATION**  
**Homeowners Tenant Form - No Coverage B?**

**9. Buildings Additions And Alterations.**

We cover under Coverage C the building improvements or installations made or acquired at your expense, to that part of the "residence premises" used exclusively by you. The limit of liability for this coverage will not be more than 10% of the limit of liability that applies to Coverage C.

This coverage is additional insurance.

HO 04 51 03 22

**BUILDING ADDITIONS AND ALTERATIONS –  
INCREASED LIMIT**

**SECTION I – PROPERTY COVERAGES**

**C. Additional Coverages**

**9. Building Additions And Alterations**

The limit of liability for this Building Additions And Alterations coverage is increased as noted below.

**Increase in Limit of Liability**

**Total Limit of Liability**

All other provisions of this Policy apply.

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

HO 04 51 03 22

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Page 1 of 1

HO 04 49 03 22

**BUILDING ADDITIONS AND ALTERATIONS – OTHER RESIDENCE**

Location Of The Building And Limit Of Liability:

Information required to complete this Schedule, if not shown above

\* Entries may be left blank if shown elsewhere in this policy for this coverage.

**SECTION I – PROPERTY COVERAGES**

We cover, up to the limit of liability in the Schedule above, the additions, alterations and improvements, made or acquired at an "insured's" expense, to that part of a building:

1. Which is rented to an "insured" as a residence; and
2. At the location shown in the schedule.

We insure for direct physical loss to this property caused by a Peril Insured Against.

All other provisions of this policy apply.

HO 04 49 03 22

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**WHAT kind of property is a swimming pool under a Homeowners policy ... Coverage B or C?**

**Case Study 7-1**

Ray owned a machine shop in Rocky Point. He and his wife, Shirley, live in an apartment in the rear of the building. Primarily to cover their personal property in the apartment, Ray and Shirley obtained a Tenants HO form. Shortly thereafter, they installed an in-ground swimming pool for their personal use. The day after it was completed, it was damaged during a windstorm. Their insurance company denied the loss, stating that the pool was a structure and not personal property. *Do you agree?*

- FROM PERSONAL PROPERTY REPLACEMENT COST - HO 04 90

**A. Eligible Property**

1. Covered losses to the following property are settled at replacement cost at the time of loss:

a. Coverage C; and

b. If covered in this Policy:

(1) Awnings, outdoor antennas and outdoor equipment;

(2) Carpeting and household appliances;

whether or not attached to buildings.

15. "Residence premises" means:

a. The one-family dwelling where you reside;

b. The two-, three- or four-family dwelling where you reside in at least one of the family units; or

c. That part of any other building where you reside;

and which is shown as the "residence premises" in the Declarations.

"Residence premises" also includes other structures and grounds at that location.

## SUPPLEMENTARY INFORMATION

### f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned by or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such 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; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(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;

(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

(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:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal

electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) 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 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".

(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".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory requirement, or such claim or "suit" by or on behalf of a governmental authority.



**WHAT is "pollution" and when is/isn't it covered by the HO, PAP, CP, CGL, & BAP policies?**

EPA Definition

In general, the EPA defines pollution by a petroleum product to exist when its concentration exceeds the Recommended Maximum Contaminant Level (RMCL) of 5 parts-per-billion (ppb). The RMCL is the EPA-determined level where the health risk due to a chemical compound statistically increases. For example, if the risk of cancer is 0.25 %, the relative increased risk of cancer by being exposed to a compound at the RMCL is 0.250001%! To put this into perspective, according to one study, the following are the comparative risks of death among certain activities:

Smoking a pack of cigarettes a day .....	1,800,000
Drinking a daily glass of wine .....	650,000
Operating a motor vehicle .....	120,000
Being a police officer .....	110,000
Living in a home .....	55,000
Frequent flyer .....	25,000
Eating a daily "PBS" .....	4,000
Ingesting a chemical at the RMCL .....	1

**Case Studies 8-1 through 8-6**

Which of the following would be covered by a CGL policy?

1. **A customer at a grocery store slipped and fell in a puddle of Clorox bleach.**
2. **An apartment complex swimming pool water purifier exploded, emitting chlorine gas.**
3. **A contractor spray painting a house finally quit when it got too dark to see. The next morning, he discovered that the black Mercedes next door was now black and green.**
4. **A contractor was operating a bulldozer at a job site when he accidentally dug up an oil line, polluting the neighborhood.**
5. **A contractor repaired a leak in a gasoline storage tank at a customer's bulk plant. A fitting was improperly installed, causing the tank to rupture and pollute an adjacent river.**
6. **A fire broke out in a chemical plant. Hazardous chemical fumes were distributed into a neighborhood, killing 23 people and injuring almost 100.**

# SUPPLEMENTARY INFORMATION

## Homeowners Auto "Exclusion"

### 1991 Edition

**f.** Arising out of:

- (1) The ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an "insured";
- (2) The entrustment by an "insured" of a motor vehicle or any other motorized land conveyance to any person; or
- (3) Vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph (1) or (2) above.

### 2022 Edition

**B.** In addition, certain words and phrases are defined as follows:

1. "Aircraft Liability", "Hovercraft Liability", "Motor Vehicle Liability" and "Watercraft Liability", subject to the provisions in **b.** below, mean the following:
  - a. Liability for "bodily injury" or "property damage" arising out of the:
    - (1) Ownership of such vehicle or craft by an "insured";
    - (2) Maintenance, occupancy, operation, use, loading or unloading of:
      - (a) An aircraft, hovercraft or watercraft by any person; or
      - (b) A motor vehicle by an "insured";
    - (3) Entrustment of such vehicle or craft by an "insured" to any person;
    - (4) Failure to supervise or negligent supervision of any person involving such vehicle or craft by an "insured", and
    - (5) Vicarious liability, whether or not imposed by law, for the actions of a child or minor involving such vehicle or craft.

- 2022 CHANGE
- PREVIOUSLY, THE MOTOR VEHICLE EXCLUSION APPLIED TO "ANY PERSON"

**WHEN is/isn't auto liability covered by a "non-auto" policy such as an HO or CGL form?**

**Case Studies 9-1 through 9-6**

**Which of the following would be covered by a Homeowners policy?**

1. A pedestrian is hit by an auto when the passenger grabs the driver's arm. The passenger has only an HO policy.
2. A child released the handbrake on a neighbor's car, causing it to roll down the driveway and crash into a passing vehicle. The child's parents were sued, but had only HO coverage.
3. An insured dropped coverage on a vehicle he had for sale, leaving only a HO policy. Following the sale of the car, the owner ran into a building when the brakes failed.
4. A business owner asked his secretary to run a personal errand in her car. She had an accident and both of them were sued. He had no business nor personal auto insurance, only a HO policy.
5. A friend of an insured unknowingly sat on a pistol on the passenger side of the insured's car. The gun went off, shooting the friend in the .... The insured's PAP had lapsed for non-payment, leaving him only with HO coverage.
6. A girl died of carbon monoxide poisoning while "visiting" with her boyfriend in a Winnebago at his father's auto repair shop.

**The CGL Policy**

The CGL covers certain "*mobile equipment*" that, depending on use, might otherwise be considered to be an "*auto*". Another amazing example of "*auto*" coverage is a court case discussed later on the subject of "*next to the premises*".

The policy also covers incidental parking operations, e.g., valet parking, relative to BI and PD to vehicles other than the one being parked.

The CGL excludes coverage for the ownership, maintenance, use or entrustment of autos "... *owned or operated by or rented or loaned to...*" an insured. The presumption is that most other auto liability exposures would be covered. Similar to some of the HO cases cited above, this might include liability assumed from common or contract carriers (if the contractual liability exclusion does not come into play) or vicarious liability for accidents involving persons who are not "insureds".

# SUPPLEMENTARY INFORMATION

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## Personal Auto Program - Pickup Trucks & Vans Eligibility

### LIABILITY EXCLUSIONS

- A. We do not provide Liability Coverage for any “insured”:
- 7. Maintaining or using any vehicle while that person is employed or otherwise engaged in any “business” (other than farming or ranching) not described in Exclusion **A.6.**

This exclusion (**A.7.**) does not apply to the maintenance or use of a:

- a. Private passenger auto;
- b. Pickup or van ~~that you own~~; or
- c. “Trailer” used with a vehicle described in **a.** or **b.** above.

• 1998 CHANGE

### MEDICAL PAYMENTS EXCLUSIONS

- 8. Sustained while “occupying” a vehicle when it is being used in the “business” of an “insured.” This exclusion (**8.**) does not apply to “bodily injury” sustained while “occupying” a:

- a. Private passenger auto;
- b. Pickup or van ~~that you own~~; or
- c. “Trailer” used with a vehicle described in **a.** or **b.** above.

• 2005 CHANGE

### PHYSICAL DAMAGE EXCLUSIONS

We will not pay for

- 11. Loss to any “non-owned auto” being maintained or used by any person while employed or otherwise engaged in any “business” of:

- a. Selling;
- b. Repairing;
- c. Servicing;
- d. Storing; or
- e. Parking;

vehicles designed for use on public highways. This includes road testing and delivery.

• 1998 CHANGE

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**WHEN can a policy revision "broadening" coverage be misleading?**

***Case Study 10-1***

Bryan conducts insurance seminars in locations across the country, traveling in his 2002 Ford Explorer. Being a North Carolina resident (home of THE University of North Carolina Tar Heels), he provided coverage for the use of his SUV under a personal auto policy.

About a month after he insured his SUV for "full coverage" under a PAP, the Explorer's engine blew. In order to fulfill his 3-week commitment to teach some seminars in New Jersey, he rented another Explorer to use while his vehicle was being repaired. During his travels, he had an at-fault accident that totally destroyed the Explorer and injured him and two people in another vehicle he struck. *Does he have "full coverage" for these losses?*

## SUPPLEMENTARY INFORMATION

### CGL "Intentional" Loss Exclusion

#### a. Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

### Homeowners "Intentional" Loss Exclusion

#### E. Coverage E – Personal Liability and Coverage F – Medical Payments to Others

Coverages E and F do not apply to the following:

##### 1. Expected Or Intended Injury

"Bodily injury" or "property damage" which is expected or intended by an "insured" even if the resulting "bodily injury" or "property damage":

- a. Is of a different kind, quality or degree than initially expected or intended; or
- b. Is sustained by a different person, entity, or property, than initially expected or intended.

However, this exclusion E.1. does not apply to "bodily injury" or "property damage" resulting from the use of reasonable force by an "insured" to protect persons or property;

- 2011 CHANGE

#### 9. "Insured" means

Under both Sections I and II, when the word an immediately precedes the word "insured", the words an "insured" together mean one or more "insureds".

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**WHEN is a loss "intentional or expected" and (not) covered by a PAP, HO, CGL, or BAP policy?**

**Case Study 11-1**

Joe contracted Legionnaire's Disease and, as a result of a lengthy coma, suffered irreparable brain damage. He has been diagnosed as a manic depressive and, by at least one physician, a psychotic with violent tendencies. He lives at home and takes medication for his condition. He has been documented to believe that the CIA and FBI are "out to get him". One afternoon, believing that the FBI was operating out of his next door neighbor's house, he got a pistol and fired six rounds into his neighbor's front door to, in his words, put the "fear of God" into the FBI. The neighbor is now suing him for \$24,300 compensatory and \$150,000 punitive damages for property damage, pain and suffering, mental anguish, etc. *Will his Homeowners Insurer respond to this lawsuit?*

**Case Study 11-2**

Suspecting that John had stolen her jewelry, Chris armed herself and went to John's home. An argument ensued and John threw a brick at Chris, then pulled a knife and ran towards her. In self-defense, Chris shot and killed John. *Will Chris' Homeowners policy respond to the wrongful death lawsuit filed by John's spouse?*

**Case Study 11-3**

Following her parole, Chris returned home to her husband, Allen. Unbeknownst to her, her sister-in-law, Clara, had been having marital problems and, following a fight with her husband, Jimbo, used her key to Chris' house to let herself in the front door at 3:00 a.m. Mistaking her for John's widow Mildred from the case study above, she shot Clara. *Will Chris' Homeowners policy respond to this occurrence?*

**Case Study 11-4**

Clara had the bank lockbox of her husband, Jimbo, drilled open and discovered that it contained some money. She burned the contents of the box because she believed that the money had been obtained illegally. The bank then discovered that the lockbox, and the \$186,000 in cash, belonged to another person named James. *Will Clara's Homeowners policy respond?*

# SUPPLEMENTARY INFORMATION

## Personal Lines "Business" Exclusions

- 2022 CHANGE

- 2022 CHANGE,  
PREVIOUSLY \$2,000

3. "Business" means:
- A trade, profession or occupation engaged in on a full-time, part-time or occasional basis;
  - The leasing of the mineral rights of an "insured location";
  - "Home-sharing host activities"; or
  - Any other activity engaged in for money or other compensation except the following:
    - One or more activities, not described in (2) through (4) below, for which no "Insured" receives more than \$5,000 in total compensation for the 12 months before the beginning of the policy period;
    - Volunteer activities for which no money is received other than payment for expenses incurred to perform the activity;
    - Providing home day care services for which no compensation is received, other than the mutual exchange of such services; or
    - The rendering of home day care services to a relative of an "insured".

- 2022 CHANGE

2. **Business**
- "Bodily injury" or "property damage" arising out of or in connection with a "business" conducted from an "insured location" or engaged in by an "insured", whether or not the "business" is owned or operated by an "insured" or employs an "insured".

This exclusion **E.2.** applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business".
  - With respect to other than "home-sharing host activities", this exclusion **E.2.** does not apply to:
    - The rental or holding for rental of an "insured location";
      - On an occasional basis if used only as a residence;
      - In part for use only as a residence, unless a single-family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or
      - In part, as an office, school, studio or private garage; and
    - An "insured" under age 21 years involved in a part-time or occasional, self-employed "business" with no employees.



**WHEN is a business (not) a "business" under the HO & PAP policies?**

**Case Study 12-1**

Paul, a union official, was running for re-election and was sued by his opponent for slander. His Homeowners policy was endorsed to include personal injury liability coverage. *Will his policy respond to this lawsuit?*

**Case Study 12-2**

Paul's wife, Nan, would travel to garage sales around town on a daily basis from March to October. At the end of each month, she held a garage sale at home to sell junk she had bought at other garage sales. A visitor at one of her sales cut herself on some broken glassware. *Will her Homeowners policy respond?*

**Case Study 12-3**

Bryan drove to New Orleans for the 2004 Sugar Bowl to see the North Carolina Tar Heels play the Nebraska Cornhuskers for the NCAA national football championship. Although the stadium parking lot was full, he found a nearby Winn Dixie supermarket that was parking vehicles in their lot for only a \$4 fee. He turned his car over to the store manager, Justin, who ordered bag boy Goober to park the car. Misunderstanding Bryan's parking directions, Goober backed over two Nebraska fans who were having a tailgate party. *Will Bryan's Personal Auto Policy respond to the suit against Bryan, Winn Dixie, Justin, or Goober?*

**PERSONAL AUTO EXCLUSIONS**

6. While employed or otherwise engaged in the "business" of:

a. Selling;	d. Storing;
b. Repairing;	e. Parking;
c. Servicing;	

vehicles designed for use mainly on public highways. This includes road testing and delivery. This exclusion (A.6.) does not apply to the ownership, maintenance or use of "your covered auto" by:

a. You;
b. Any "family member"; or
c. Any partner, agent or employee of you or any "family member".

## SUPPLEMENTARY INFORMATION

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### Auto Policies - Comp vs. Collision Coverage

#### 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 loss to more than one “your covered auto” or “non-owned auto” results from the same “collision”, only the highest applicable deductible will apply. We will pay for loss to “your covered auto” caused by:

1. Other than “collision” only if the Declarations indicate that Other Than Collision Coverage is provided for that auto.
2. “Collision” only if the Declarations indicate that Collision Coverage is provided for that auto.

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.

**B.** “Collision” means the upset of “your covered auto” or a “non-owned auto” or their impact with another vehicle or object.

Loss caused by the following is considered other than “collision:”

- |                                 |                                     |
|---------------------------------|-------------------------------------|
| 1. Missiles or falling objects; | 6. Hail, water or flood;            |
| 2. Fire;                        | 7. Malicious mischief or vandalism; |
| 3. Theft or larceny;            | 8. Riot or civil commotion;         |
| 4. Explosion or earthquake      | 9. Contact with bird or animal; or  |
| 5. Windstorm;                   | 10. Breakage of glass.              |

If breakage of glass is caused by a “collision,” you may elect to have it considered a loss caused by “collision.”

---

**WHEN is an auto claim "Comprehensive" and when is it "Collision" (or neither) under the PAP?**

**Case Study 13-1**

A covered auto, while jacked up to change a tire, fell and broke the rear axle. *Is this a comprehensive or a collision claim, or neither?*

**Case Study 13-2**

The manager of a supermarket discovered thieves loading merchandise on a rear loading dock. He pulled his car across the open gate in the fence around the delivery area in order to block their exit and they rammed his car. *Is this a comprehensive or a collision claim, or neither?*

**Case Study 13-3**

George grounded his 16-year-old son for five years when he came home at 4:00 a.m. one morning. In an angry rage, his son stormed out of the house and took an ax from the woodpile (adjacent to the woodshed that his father would find most useful in a matter of minutes). He proceeded to reduce his father's 1969 McLaren MG GT coupe into an extremely large paperweight. *Is this a comprehensive or a collision claim, or neither?*

## SUPPLEMENTARY INFORMATION

### Homeowners - Personal Property of Others Coverage(s)

- 2022 CHANGE

#### 4. Property Not Covered

##### f. Property of:

- (1) A 'home-sharing occupant';
- (2) Any other person occupying the "residence premises" as a result of any "home-sharing host activities"; and
- (2) Roomers, boarders and other tenants, except property of roomers and boarders related to an "insured";

- 2022 CHANGE

##### g. Property in:

- (1) A space while rented or primarily held for rental to a "home-sharing occupant": or
- (2) Subject to Paragraph **g.(1)**, an apartment regularly rented or held for rental to others by an "insured," except as provided under **E.9. Landlord's Furnishings** under Section I – Property Coverages;

- 2022 CHANGE,  
PREVIOUSLY \$1,000

#### C. Damage to Property of Others

1. We will pay, at replacement cost, up to \$5,000 per "occurrence" for "property damage" to property of others caused by an "insured".
2. We will not pay for "property damage":
  - a. To the extent of any amount recoverable under Section I;
  - b. Caused intentionally by an "insured" who is 13 years of age or older;

---

**WHERE is/isn't the "property of others" covered by the HO policy?****Case Study 14-1**

Joe was trimming some trees and bushes at his home one weekend. He had borrowed a gasoline-powered chipper from a neighbor to turn the cuttings into mulch for his garden. He accidentally dropped some gravel into the machine, breaking some of its cutting blades. It cost \$175 to repair the machine. Joe has a Homeowners Broad Form policy with a \$250 deductible. *How much, if anything, will his insurance company pay for this loss?*

**Case Study 14-2**

Ramona was giving a birthday party for her daughter and borrowed an expensive (\$300) punch bowl from her next door neighbor, Paula. When another neighbor was carrying the birthday cake to the table, she dropped it into the punchbowl, causing the bowl to flip into the air and break on the floor. Realizing that she was responsible for the bowl and, being an insurance agency CSR, Ramona told Paula that her unendorsed Homeowners Special Form would cover the damage. *Was that good advice?*

**Case Study 14-3**

Fred and Ethyl Mertz own and occupy the first floor of an old home. Lucy and Ricky Ricardo live in the second-floor apartment. Due to faulty wiring in the second-floor bedroom, a fire erupts, causing extensive damage to the Ricardo's personal belongings. *Is there any coverage anywhere in the Mertz's Homeowners Special Form policy for the damage to the property of the Ricardos?*

**F. Coverage E – Personal Liability**

Coverage E does not apply to:

3. "Property damage" to property rented to, occupied or used by or in the care of an "insured." This exclusion does not apply to "property damage" caused by fire, smoke or explosion;

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## SUPPLEMENTARY INFORMATION

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### CGL - "Autos" Covered "Next To" The Premises

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**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 in the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated 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 the operation 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".

- 11.** "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
- a.** Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
  - b.** Vehicles maintained for use solely on or next to premises you own or rent;

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**WHERE is "next to" the premises under the CGL policy?**

As previously outlined, the CGL does provide some auto coverage. For example, coverage is provided for the parking of an auto *"next to"* premises the insured owns or rents. In addition, it covers, within the definition of *"mobile equipment"*, the use of vehicles *"... maintained for use solely on or next to ..."* premises the insured owns or rents.

**Case Study 15-1**

ABC Corporation owns a multi-acre complex of warehouses on the south side of Raleigh. They have a licensed truck which is used by the maintenance supervisor, Ron, to travel and carry equipment around the complex. About twice a year, the truck is driven two miles down a public highway, US 1, to be serviced. *If an accident occurs, will ABC's CGL policy respond?*

**Case Study 15-2**

Continuing with the above insured, Ron's personal car was in the shop for repairs. He asked if he could borrow a pickup truck to visit his sick mother in Dunn. She lived off US 421, about 50 miles from the warehouse complex. While passing a nudist colony in a valley below US 1, Ron got his head caught in the sunroof of the pickup and began swerving all over the road. When he finally stopped, he had side-swiped or otherwise caused damage to 18 other vehicles. Ron had not had an auto accident in almost 15 years, so he had discontinued his personal auto coverage. *Will ABC's CGL respond to this occurrence?*

## SUPPLEMENTARY INFORMATION

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### CGL - "Contractor Exclusions"

**b. Contractual Liability**

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

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' 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.

**9. "Insured contract" means:**

- f. That part of any 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.

**I. Damage to Your Work**

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.



## WHERE is/isn't there coverage for contractors under the CGL policy?

### Case Study 16-1

A homebuilder sold a house to a customer in September. In December, the fireplace exploded, burning down the house. It was determined that the subcontractor had used regular brick rather than fire brick in the chimney. The homeowner sued both the general contractor and subcontractor. *Will the general contractor's CGL respond?*

COMMERCIAL GENERAL LIABILITY  
CG 22 94 10 01

## EXCLUSION – DAMAGE TO WORK PERFORMED BY SUBCONTRACTORS ON YOUR BEHALF

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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”.

CG 22 94 10 01

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### Case Study 16-2

In their home improvements department, the Serious & Robust Department Store sells kitchen cabinets which are installed by several independent contractors. Following an installation, S&R's customer was slicing onions on the kitchen counter when the cabinets fell off the wall, crushing both of her hands. She sued S&R, which has a hold-harmless agreement with the contractor requiring the latter to pay any damages assessed against S&R if the contractor is at fault. *Will the contractor's CGL pay for such contractual liability?*

### Case Study 16-3

A building contractor decided to hang up his hammer and retire to Florida. He contacted his agent about non-renewing his claims-made CGL policy. He was advised that he needed to purchase the Extended Reporting Period (ERP) endorsement in order to have coverage for claims after he retired. Although he thought the 200% cost of the ERP was a "rip-off", he grudgingly purchased it. A little over a year after his retirement, a building he had constructed partially collapsed, killing one person and injuring 18. *Does he have any coverage? Should he have originally purchased an occurrence form CGL?*

# SUPPLEMENTARY INFORMATION

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## Homeowners - Other Structures "Exclusion"

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### **B. Coverage B – Other Structures**

1. We cover other structures on the “residence premises” set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection.
2. We do not cover:
  - a. Land, including land on which the other structures are located;
  - b. Other structures rented or held for rental to any person not a tenant of the dwelling, unless used solely as a private garage;
  - c. Other structures from which any “business” is conducted; or
  - d. Other structures used to store “business” property. However, we do cover a structure that contains “business” property solely owned by an “insured” or a tenant of the dwelling provided that “business” property does not include gaseous or liquid fuel, other than fuel in a permanently installed fuel tank of a vehicle or craft parked or stored in the structure.
3. The limit of liability for this coverage will not be more than 10% of the limit of liability that applies to Coverage **A**. Use of this coverage will not reduce the Coverage **A** limit of liability.

HO 04 91 03 22

## COVERAGE B – OTHER STRUCTURES AWAY FROM THE RESIDENCE PREMISES – ACTUAL CASH VALUE LOSS SETTLEMENT

### **SECTION I – PROPERTY COVERAGES**

#### **B. Coverage B – Other Structures**

The following is added to Paragraph 1.:

We also cover other structures which are owned by you and located away from the “residence premises”, if used by you in connection with the “residence premises”.

The following is added to Paragraph 2.:

- e. With respect to other structures away from the “residence premises”, other structures:
  - (1) Being used as a dwelling;
  - (2) Capable of being used as a dwelling;
  - (3) From which any “business” is conducted;
  - (4) Used to store “business” property; or
  - (5) Rented or held for rental to any person not a tenant of the dwelling.

Paragraph 3. is replaced by the following;

3. The limit of liability for other structures on or away from the “residence premises” will not be more than 10% of the limit of liability that applies to Coverage **A**. Use of this limit does not reduce the Coverage **A** limit of liability.

### **SECTION I – CONDITIONS**

#### **D. Loss Settlement**

With respect to structures covered under this endorsement, Condition **D. Loss Settlement** is deleted and replaced by the following:

#### **D. Loss Settlement**

Covered losses will be settled at actual cash value at the time of loss, but not more than the amount required to repair or replace.

All other provisions of this policy apply.

HO 04 91 03 22

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**WHERE is/isn't there coverage for "other structures" under an HO policy?**

**Case Study 17-1**

Shirley, an independent insurance agent, owned a house at 115 Elm Street and insured it through the agency under a Homeowners Special Form. In order to have an enclosed structure to house her speedboat, she purchased a garage building across the alley from her house in the rear of her neighbor's home at 115 Oak Street. The garage and her boat were destroyed by a tornado. *Does she have any coverage for her loss under her policy?*

**Case Study 17-2**

Al Fleecem, a prominent attorney, had a Homeowners Special Form covering his \$200,000 lake house at 2121 Bay Cove Road. At the rear of his home was a boat house and dock on Old Hickory Lake valued at \$25,000. The boat house and dock were destroyed by lightning and the ensuing fire. *How much will his policy pay for this loss?*

HO 04 92 03 22

**SPECIFIC STRUCTURES  
AWAY FROM THE RESIDENCE PREMISES – ACTUAL  
CASH VALUE LOSS SETTLEMENT**

SCHEDULE

Description And Location Of Structure	Limit Of Liability

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

- A.** We cover each structure described in the Schedule above which is owned by you and located away from the "residence premises", if used by you in connection with the "residence premises". The Limit Of Liability shown in the Schedule for each structure is the most we will pay for loss to each structure.
- B.** We do not cover a structure:
  - 1. Being used as a dwelling;
  - 2. Capable of being used as a dwelling;
  - 3. From which any "business" is conducted;
  - 4. Used to store "business" property; or
- 5.** Rented or held for rental to any person not a tenant of the dwelling.
- C.** This coverage does not apply to land, including land on which the structure is located.
- D.** With respect to structures covered under this endorsement, **Section I Conditions, D. Loss Settlement** is replaced by the following:
  - D. Loss Settlement**
  - Covered losses will be settled at actual cash value at the time of loss, but not more than the amount required to repair or replace.
  - All other provisions of this policy apply.

# SUPPLEMENTARY INFORMATION

## "All Risks" Perils Coverage

### A. Coverage A – Dwelling And Coverage B – Other Structures

2. We do not insure, however, for loss:

c. Caused by:

(1) Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by the freezing. This provision does not apply if you have used reasonable care to:

- (a) Maintain heat in the building; or
- (b) Shut off the water supply and drain the systems and appliances of water.

However, if the building is protected by an automatic fire protective sprinkler system, you must use reasonable care to continue the water supply and maintain heat in the building for coverage to apply.

For purposes of this provision, a plumbing system or household appliance does not include a sump, sump pump or related equipment or a roof drain, gutter, downspout or similar fixtures or equipment;

(2) Freezing, thawing, pressure of weight of water or ice, whether driven by wind or not, to a :

- (a) Fence, pavement, patio or swimming pool;
- (b) Footing, foundation, bulkhead, wall, or any other structure or device, that supports all or part of a building or other structure;
- (c) Retaining wall or bulkhead that does not support all or part of a building or other structure; or
- (d) Pier, wharf or dock;

(3) Theft:

- (a) If such loss arises out of or results from "home-sharing host activities"; or
- (b) In or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied;

(4) Vandalism and malicious mischief, and any ensuing loss caused by any intentional and wrongful act committed in the course of the vandalism or malicious mischief, if:

- (a) The loss arises out of "home-sharing host activities"; or
- (b) The dwelling has been vacant for more than 60 consecutive days immediately before the loss. A dwelling being constructed, remodeled, renovated or repaired is not considered vacant;

(5) Mold, fungus or wet rot. However, we do insure for loss caused by mold, fungus or wet rot that is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure if such loss results from the accidental discharge or overflow of water or steam from within:

- (a) A plumbing, heating, air conditioning or automatic fire protective sprinkler system or a household appliance on the "residence premises" or
- (b) A storm drain, or water, steam or sewer pipes, off the "residence premises".

For purposes of this provision, a plumbing system or household appliance does not include a sump, sump pump or related equipment or a roof drain, gutter, downspout or similar fixtures or equipment;

(6) Any of the following:

- (a) Wear and tear, marring, deterioration;
- (b) Mechanical breakdown, latent defect, inherent vice or any quality in property that causes it to damage or destroy itself;
- (c) Smog, rust or other corrosion, or dry rot;
- (d) Smoke from agricultural smudging or industrial operations;
- (e) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against under Coverage C of this policy;

Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed;

- (f) Settling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings;
- (g) Birds, rodents, or insects;
- (h) Nesting or infestation or discharge or release of waste products or secretions, by any animals; or
- (i) Animals owned or kept by an "insured."

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**WHY is an "all-risk" policy sometimes not "all-risk" (and vice versa)?****Case Study 18-1**

Skeeter owns a home in a rural part of Buncombe County. While he was mending fences on the lower 40, a herd of goats from a nearby farm entered through an open screened back door and did extensive damage to the structure. *Will his Homeowners Special Form pay for the damage?*

**Case Study 18-2**

Patsy owned a Victorian home in Chicago. She called her agent and said the house was unlivable due to ghostly apparitions, sulfur-smelling clouds, and other strange goings-on and she wanted to collect her insurance money and move. Her agent hung up the phone and, after recovering from a laughing attack, dutifully reported the claim to the company. *Can you predict the company's response (hint: never assume)?*

**Case Study 18-3**

Wild Bill has Commercial Property coverage with a Special Causes of Loss form. One day his employee, June, drove the company truck through the wall of Wild Bill's building. *Would the damage to the building be covered by the property policy or would his Business Auto Policy have to respond to the claim?*

**6. Care, Custody or Control**

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

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





# James K. Ruble Seminar

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

## Section 2

# Commercial Umbrella Issues





# COMMERCIAL UMBRELLA ISSUES

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## *LEARNING OBJECTIVES*

- To describe THE PURPOSES OF EXCESS LIABILITY POLICIES (*SEE PAGE 10*)
- To identify THE TYPES OF EXCESS LIABILITY POLICIES AND TO provide CHARACTERISTICS OF EACH TYPE (*SEE PAGE 14*)
- To describe THE TERM "SELF INSURED RETENTION" (SIR) AND BE ABLE TO apply IT TO A LOSS SITUATION (*SEE PAGE 57*)

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# **I. Development of the Umbrella Form**

## **A. Introduction of excess liability insurance forms**

## **B. Bodily Injury – Property Damage covered by separate excess policies**

## **C. Two distinct methods**

- 1. Certificate attached to underlying policy**
- 2. A separate policy with its own declarations, insuring agreement, definitions, exclusions, conditions and endorsements**

## **D. Introduction by Lloyd's of London in 1947**

- 1. Blanket Catastrophe Liability Insurance**
  - a) Term “umbrella” coined to facilitate ease of cabling*
  - b) Term “umbrella” descriptive icon for catastrophe liability coverage*
- 2. Initially designed as an errors and omissions contract**
- 3. Aimed at large buyers of insurance**
- 4. Original umbrella policy**
  - a) Price, Forbes & Company, London*
  - b) Lukis, Stewart & Company, Quebec*
  - c) Marsh & McLennan*

**DECLARATIONS**

ITEM 1. Named Assured:

ITEM 2. Limit of Liability – as Insuring Agreement II.

(a) Limit in all in respect of each occurrence \$

(b) Limit in the aggregate for each annual period where applicable \$

ITEM 3. Notice of Occurrence (Condition E) to: –

ITEM 4. Currency (Condition O): –

ITEM 5. Payment of Premium (Condition O) to: –

ITEM 6. Service of Process (Condition Q) upon: –

## UMBRELLA POLICY

Named Assured: As stated in Item 1 of the Declarations forming a part hereof

and/or subsidiary, associated, affiliated companies or owned and controlled companies as now or hereafter constituted. (*Hereafter called the "Named Assured"*).

### INSURING AGREEMENTS

#### I. COVERAGE –

Underwrites hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability

(a) imposed upon the Assured by law,

or (b) assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such,

for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss" on account of personal injuries, including death at any time resulting therefrom, and property damage, caused by or arising out of each occurrence happening in the world.

#### II. LIMIT OF LIABILITY –

Underwrites hereon shall only be liable for the ultimate net loss the excess of either

(a) the amount recoverable under underlying insurance as set out in the attached schedule

or

(b) \$ 25,000 ultimate net loss in respect of each occurrence not covered by said underlying insurance, (hereinafter called the "underlying limits");

and then only up to a further sum as stated in Item 2 (a) of the Declarations in all in respect of each occurrence – subject to a limit as stated in Item 2 (b) of the Declarations in the aggregate for each annual policy period during the currency of this Policy, separately in respect of Products Liability and in respect of Personal Injury (fatal or non-fatal) by Occupational Disease sustained by any employee of the Assured.

In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of losses paid thereunder, this policy shall

(1) in the event of reduction pay the excess of the reduced underlying limit

(2) in the event of exhaustion continue in force as underlying insurance.

The inclusion hereunder of more than one Assured shall not operate to increase Underwriters' limit of liability.

### THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS:

#### 1. ASSURED

The unqualified word "Assured", wherever used in this policy, includes not only the Named Assured but also: –

(a) any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such, and any organization or proprietor with respect to real estate management for the Named Assured;

(b) any person, organization, trustee or estate to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance such as afforded by this policy, but only with respect of operations by or on behalf of the Named Assured or of facilities of the Named Assured or used by them;

(c) any interest covered as an additional Assured under the underlying insurers;

(d) with respect to any automobile owned by the Named Assured or hired for use on behalf of the Named Assured, or to any aircraft hired for use on behalf of the Named Assured, any person while using such automobile or aircraft and any person or organization legally responsible for the use thereof, provided the actual use of the automobile or aircraft is with the permission of the Named Assured. The Insurance extended by this sub-division (d), with respect to any person or organization other than the Named Assured, shall not apply –

1. to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any occurrence arising out of the operations thereof;

2. to any manufacturer or aircraft, engines or aviation accessories, or any aviation sales or service or repair organization or airport or hanger operator or their respective employees or agents, with respect to any occurrence arising out of the operations thereof;

3. to any employee with respect to injury to or the death of another employee of the same Employer injured in the course of such employment in an occurrence arising out of the maintenance or use of an automobile or an aircraft in the business of such Employer;

4. with respect to any hired automobile or aircraft, to the owner thereof or any employee of such owner.

This sub-division (d) shall not apply if it restricts the insurance granted under sub-division (c) above.

## 2. PERSONAL INJURIES –

The term “personal injuries”, wherever used herein, shall include, but not by way of limitation:

(a) bodily injury, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, false eviction, detention, malicious prosecution, discrimination, humiliation, invasion of rights of privacy, libel, slander or defamation;

(b) (i) any infringement of copyright or of title or of slogan or

(ii) piracy, or unfair competition or idea misappropriation under implied contract

committed or alleged to have been committed in the conduct of the Assured’s advertising activities.

## 3. PROPERTY DAMAGE –

The term “property damage”, wherever used herein, shall include, but not by way of limitation, damage to or destruction or loss of property, excluding however damage to property owned by the Named Assured.

## 4. OCCURRENCE –

The term “occurrence”, wherever used herein, shall mean one happening or series of happenings arising out of or due to one event taking place during the term of this policy.

## 5. ULTIMATE NET LOSS –

The term “ultimate net loss” shall mean the total sum which the Assured, or any company as his insurer, or both, become obligated to pay by reason of personal injury or property damage claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Named Assured’s or of any underlying insurer’s permanent employees.

The Underwriters shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

## 6. AUTOMOBILE –

The term “automobile”, wherever used herein, shall mean a land motor vehicle, trailer or semi-trailer.

7. AIRCRAFT –

The term “aircraft”, wherever used herein, shall mean any heavier than air or lighter than air aircraft designed to transport persons or property.

8. PRODUCTS LIABILITY –

The term “products liability” means

- (a) liability arising out of the handling or use of, the existence of any condition in, or a warranty of goods or products manufactured, sold, handled, or distributed by the Named Assured, other than equipment rented to or located for use of others but not sold, after the Named Assured has relinquished possession thereof to others and away from premises owned, rented or controlled by the Named Assured.
- (b) liability arising from operations, if the occurrence occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from premises owned, rented or controlled by the Named Assured, except (a) pick-up and delivery, (b) the existence of tools, uninstalled equipment and abandoned or unused materials; provided operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

9. ANNUAL PERIOD –

The term “each annual period” shall mean each consecutive period of one year commencing from the inception date of this Policy.

**THIS POLICY IS SUBJECT TO THE FOLLOWING EXCLUSIONS:**

This policy shall not apply, except insofar as coverage is available to the Assured under the underlying insurance as set out in the attached Schedule: –

- (a) to any obligation for which the Assured or any company as its insurer may be held liable under any Workmen’s Compensation Law, provided, however, that this exclusion does not apply to liability of others assumed by the Named Assured under contract or agreement;
- (b) to liability of any Assured hereunder for assault and battery committed by or at the direction of such Assured except liability for Personal Injury or Death resulting from any act alleged to be assault and battery committed for the purpose of preventing or eliminating danger in the operation of aircraft; it being understood and agreed that this exclusion shall not apply to the liability of the Named Assured for personal injury to their employees, unless such liability is already excluded under Exclusion (a) above;
- (c) with respect to any aircraft owned by the Assured except liability of the Named Assured for aircraft not owned by them; it being understood and agreed that this exclusion shall not apply to the liability of the Named Assured for personal injury to their employees, unless such liability is already excluded under Exclusion (a) above;
- (d) with respect to any watercraft owned by the Assured, while away from premises owned, rented or controlled by the Assured, except liability of the Named Assured for watercraft not owned by them; it being understood and agreed that this exclusion shall not apply to the liability of the Named Assured for personal injury to their employees, unless such liability is already excluded under Exclusion (a) above;
- (e) to claims made against the Assured:
  - (i) for repairing or replacing any defective product or products manufactured, sold or supplied by the Assured or any defective part or parts thereof nor for the cost of such repair or replacement;
  - (ii) for the loss of use of any such defective product or products or part or parts thereof;
  - (iii) for improper or inadequate performance, design or specification of a product of the Assured; but nothing herein contained shall be construed to exclude claims against the Assured for personal injuries or property damage (other than damage to such product of the Assured) resulting from improper or inadequate performance, design or specification;

- (f) with respect to advertising activities, to claims made against the Assured:
  - (i) for failure of performance of contract, but this shall not relate to claims for the unauthorized appropriation of ideas based upon the alleged breach of an implied contract;
  - (ii) for infringement of registered trade-mark, service mark or trade-name by use thereof as the registered trade-mark, service mark or trade-name of goods and services sold, offered for sale or advertised, but this shall not relate to title(s) or slogan(s);
  - (iii) for incorrect description of any article or commodity;
  - (iv) for mistake in advertised price;
- (g) except in respect of occurrences taking place in the United States of America, its territories or possessions, or Canada, to any liability of the Assured directly or indirectly occasioned by, happening through, or in consequence of war, invasion, acts of foreign enemies, hostilities, (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority.

**THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS: –**

**A. PREMIUM –**

The premium for this Policy is a flat premium and is not subject to adjustment except as provided in Condition N.

**B. SPECIAL CONDITIONS APPLICABLE TO OCCUPATIONAL DISEASE –**

As regards personal injury (fatal or non-fatal) by occupational disease sustained by any employee of the Assured, this policy is subject to the same warranties, terms and conditions (except as regards the premium, the amount and limits of liability and the renewal agreement, if any) as are contained in or as may be added to the underlying insurances prior to the happening of an occurrence for which claim is made hereunder.

**C. INSPECTION AND AUDIT –**

Underwriters shall be permitted at all reasonable times during the policy period to inspect the premises, plants, machinery and equipment used in connection with the Assured's business, trade or work, and to examine the Assured's books and records at any time during the currency hereof and within one year after final settlement of all claims so far as the books and records relate to any payments made on account of occurrences happening during the term of this policy

**D. CROSS LIABILITY –**

In the event of claims being made by reason of personal injuries suffered by any employee or employees of one Assured hereunder for which another Assured hereunder is or may be liable, then this policy shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder.

In the event of claims being made by reason of damage to property belonging to any Assured hereunder for which another Assured is, or may be, liable then this policy shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder.

Nothing contained herein shall operate to increase Underwriters' limit of liability as set forth in Insuring Agreement II.

**E. NOTICE OF OCCURRENCE –**

Whenever the Assured had information from which the Assured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which, in the event that the Assured should be held liable, is likely to involve this Policy, notice shall be sent as stated in Item 3 of the Declarations as soon as practicable, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims.



#### F. ASSISTANCE AND CO-OPERATION –

The Underwriters shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured but Underwriters shall have the right and shall be given the opportunity to associate with the Assured or the Assured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve Underwriters, in which event the Assured and Underwriters shall co-operate in all things in the defense of such claim, suit or proceeding.

#### G. APPEALS –

In the event the Assure or the Assured's underlying insurers elect not to appeal a judgment in excess of the underlying limits, Underwriters may elect to make such appeal at their cost and expense, and shall be liable for the taxable costs and disbursements and interest incidental thereto, but in no event shall the liability of Underwriters for ultimate net loss exceed the amount set forth in Insuring Agreement II for any one occurrence and in addition the cost and expense of such appeal.

#### H. LOSS PAYABLE –

Liability under this policy with respect to any occurrence shall not attach unless and until the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The Assured shall make a definite claim for any loss for which the Underwriters may be liable under the policy within twelve (12) months after the Assured shall have paid an amount of ultimate net loss in excess of the amount borne by the Assured or after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured the claimant, and Underwriters. If any subsequent payments shall be made by the Assured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.

#### I. BANKRUPTCY AND INSOLVENCY –

In the event of the bankruptcy or insolvency of the Assured or any entity comprising the Assured, the Underwriters shall not be relieved thereby of the payment of any claims hereunder because of such bankruptcy or insolvency.

#### J. OTHER INSURANCE –

If other valid and collectible insurance with any other insurer is available to the Assured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance.

#### K. SUBROGATION –

Inasmuch as this policy is "Excess Coverage", the Assured's right of recovery against any person or other entity cannot be exclusively subrogated to the Underwriters. It is, therefore, understood and agreed that in case of any payment hereunder, the Underwriters will act in concert with all other interests (including the Assured) concerned, in the exercise of such rights of recovery. The apportioning of any amounts which may be so recovered shall follow the principle that any interests (including the Assured) that shall have paid an amount over and above any payment hereunder, shall first be reimbursed up to the amount paid by them; the Underwriters are then to be reimbursed out of any balance then remaining up to the amount paid hereunder; lastly, the interests (including the Assured) of whom this coverage is in excess are entitled to claim the residue, if any. Expenses necessary to the recovery of any such amounts shall be apportioned between the interests (including the Assured) concerned, in the ratio of their respective recoveries as finally settled.

#### L. CHANGES –

Notice to or knowledge possessed by any person shall not effect a waiver or change in any part of this policy or estop Underwriters from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part thereof, signed by Underwriters.

#### M. ASSIGNMENT –

Assignment of interest under this policy shall not bind Underwriters until their consent is endorsed hereon.

#### N. CANCELLATION –

This policy may be cancelled by the Named Assured or by the Underwriters or their representatives by sending by registered mail notice to the other party stating when, not less than thirty (30) days thereafter, cancellation shall be effective. The mailing of notice as aforesaid by Underwriters or their representatives to the Named Assured at the address shown in this policy shall be sufficient proof of notice, and the issuance under this policy shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the Named Assured or by the Underwriters or their representatives shall be equivalent to mailing.

If this policy shall be cancelled by the Named Assured the Underwriters shall retain the customary short rate proportion of the premium for the period this policy has been in force. If this policy shall be cancelled by the Underwriters the Underwriters shall retain the pro rata proportion of the premium for the period this policy has been in force. Notice of cancellation by the Underwriters shall be effective even though Underwriters make no payment or tender of return premium with such notice.

#### O. CURRENCY –

The premiums and losses under this policy are payable in the currency stated in Item 4 of the Declarations. Payment of Premium shall be made as stated in Item 5 of the Declarations.

#### P. CONFLICTING STATUTES –

In the event that any provision of this policy is unenforceable by the Assured under the laws of any State or other jurisdiction wherein it is claimed that the Assured is liable for any injury covered hereby, because of non-compliance with any statute thereof, then this policy shall be enforceable by the Assured with the same effect as if it complied with such Statute.

#### Q. SERVICE OF SUIT CLAUSE –

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made as stated in Item 6 of the Declarations, and that in any suit instituted against any one of them upon this policy, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal. The person or firm named in Item 6 are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon Underwriters' behalf in the event of such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officers specified (or that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Assured or any beneficiary hereunder arising out of this policy of insurance, and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

#### R. MAINTENANCE OF UNDERLYING INSURANCE –

It is a condition of this policy that the policy or policies referred to in the attached "Schedule of Underlying Insurances" shall be maintained in full effect during the currency of this policy except for any reduction of the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Assured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the Underwriters shall only be liable to the same extent as they would have been had the Assured complied with the said condition.

## **E. United States entry into the market**

- 1. Indemnity Insurance Company of North America introduced the “Big Top” in June of 1957**
- 2. Continental Casualty Company late in 1958**
- 3. Employers’ Surplus Lines in January of 1959**
- 4. Travelers Indemnity Company in September of 1959**

## **F. Early misuse of umbrella contracts**

- 1. Inclination to decrease underlying limits of liability**
- 2. Liberal interpretation of language by courts**

## **G. Redesigned in 1960 by Lloyd's**

- 1. New exclusions inserted**
- 2. Now most large companies write**

## **H. Because of newness, pricing and wording not standard**

## II. Functions of the Umbrella Form

LEARNING Objective: To describe the purposes of Excess Liability Policies

### A. Increase liability limits of underlying policies

1. Primary coverage must be comprehensive
2. Primary policies must be at specified limits
3. Limits not level at the top

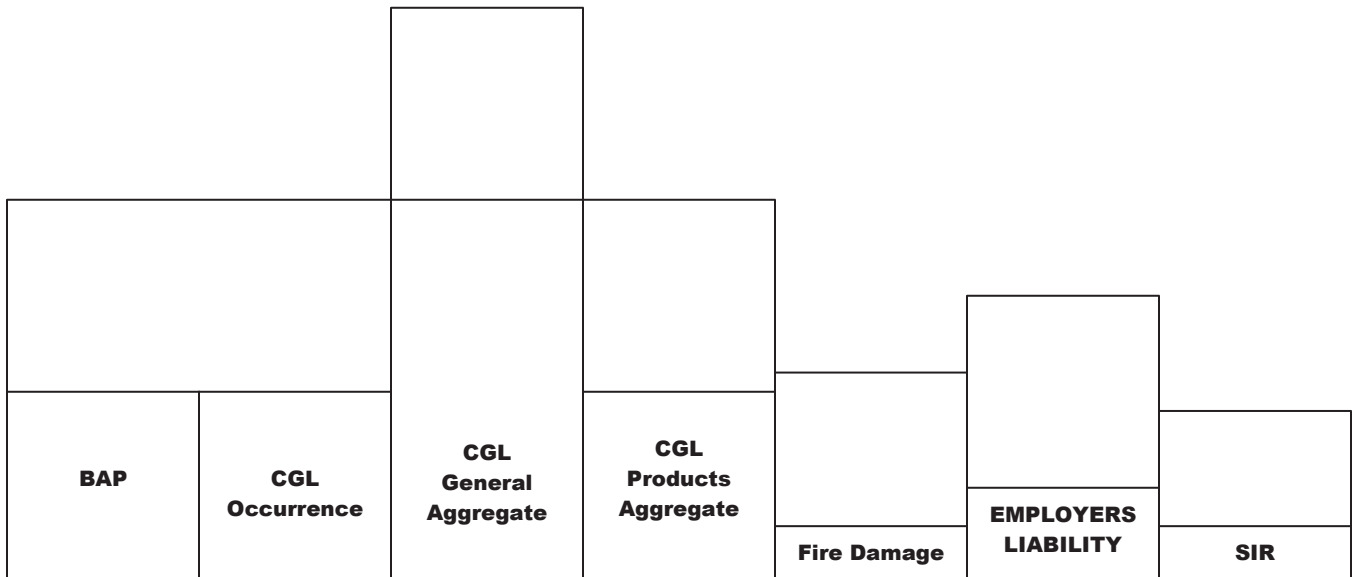
- PAY THOSE SUMS
- EXCESS of UNDERLYING
- COVERAGE PROVISIONS of UNDERLYING policies
- EXCEPT if NOT CONSISTENT
- OCCURS during policy PERIOD

#### I. COVERAGE

##### A. Coverage A

We will pay those sums that the "insured" becomes legally obligated to pay as damages arising out of an "occurrence" which are in excess of the underlying insurance stated in Schedule A of this policy. The coverage provisions of the scheduled underlying policies are incorporated as a part of this policy except for (a) Medical Payment, (b) Uninsured or Underinsured Motorist Coverage, (c) any duty to investigate or defend any claim, or to pay for any investigation or defense, (d) the limits of insurance or (e) any other provision that is not consistent with a provision in this policy.

This insurance applies only to Bodily Injury, Personal Injury, Property Damage, or Advertising Liability which occurs during the policy period.



## B. May provide broader coverage

1. **Umbrella policies should provide broader coverage than the combined scope of the underlying insurance**
2. **However, while umbrella policies may provide broader insurance protection in some areas may, in fact, be more restrictive**
  - a) *Coverage territory in umbrella is worldwide – broader*
  - b) *Pollution exclusion is absolute – narrower*
3. **Broader insurance protection is subject to a self-insured retention**

**LEARNING OBJECTIVE:** TO DESCRIBE THE TERM "SELF INSURED RETENTION (SIR) AND BE ABLE TO APPLY IT TO A LOSS SITUATION.

a) *Defined*

- (1) Applies to the loss when covered under the Umbrella policy and no underlying coverage is required for that exposure

b) *Often confused with term deductible*

- (1) SIR losses usually need not be brought to the insurer's attention; deductible does not negate duty to report losses

- (2) SIR has no effect on available policy limits; deductible may reduce policy limits

c) *SIR requirements vary*

d) *Carrier may set SIR based on size of account*

e) *State regulation may mandate minimum SIR*

f) *SIR may be a "Per Occurrence" basis or a "Policy Period" basis*

### VI. SELF-INSURED RETENTION - AGGREGATE

You will pay up to the amount in item 4(e) of the Declarations for any claim for which insurance is provided in Coverage B. The amount so stated is the most you will have to pay during any annual policy term.

*g) There is no SIR when underlying coverage does apply*

- WARRANTED IN UNDERLYING
- PAY ON YOUR BEHALF
- EXCESS OF SIR
- IMPOSED BY LAW
- ASSUMED UNDER CONTRACT

**B. Coverage B.**

With respect to any loss covered by the terms and conditions of this policy, but not covered as warranted by the underlying policies listed in Schedule A, or any other underlying insurance, we will pay on your behalf for loss caused by an "occurrence" which is in excess of the "retained limit" for liability imposed on you by law or assumed by you under contract for Bodily Injury, Personal Injury, Property Damage or Advertising Injury.

This insurance applies only to Bodily Injury, Personal Injury, Property Damage, or Advertising Injury which occurs during the policy period.

*h) In determining SIR, several factors should be considered*

- (1) The financial ability of the insured to assume a portion of losses not covered by primary
- (2) Pricing, theoretically, the larger the SIR, the lower the premium
- (3) Underwriting considerations – will a somewhat larger SIR make the risk acceptable to the preferred carrier/
- (4) Does the umbrella being considered cover defense costs from first-dollar in the retained area? If so, a somewhat higher SIR may be acceptable

## **C. Drop-down Feature**

- 1. When underlying aggregate limits are exhausted through the payment of loss(es), the umbrella becomes the primary insurance for defense, indemnity and related expenses**

**2. May “drop-down” on terms of primary, terms of umbrella or may be ambiguous**

*a) Underlying terms and conditions*

- ADVANTAGEOUS if UNDERLYING INSURANCE HAS BROAD TERMS AND CONDITIONS

In the event of the reduction or exhaustion of an aggregate limit(s) of liability of the underlying policy(ies) listed in the Schedule of Underlying Insurance by reason of losses paid thereunder, this policy:

- (1) in the event of reduction, shall pay the “ultimate net loss” in excess of the reduced underlying limit; or
- (2) in the event of exhaustion, shall continue in force as underlying insurance and except for the limits of liability of this policy, shall be subject to all the other terms and conditions of the exhausted underlying policy.

*b) Umbrella terms and conditions*

- ADVANTAGEOUS if UMBRELLA INSURANCE HAS BROAD TERMS AND CONDITIONS

In the event of the reduction or exhaustion of an aggregate limit(s) of liability of the underlying policy(ies) listed in the Schedule of Underlying Insurance by reason of losses paid thereunder, this policy is subject to its Insuring Agreements, Definitions, Exclusions, Conditions and other terms shall:

- (1) in the event of reduction, shall pay the “ultimate net loss” in excess of the reduced underlying limit; or
- (2) in the event of exhaustion, shall continue in force as underlying insurance.

*c) Ambiguous*

- AMBIGUOUS AS TO WHICH TERMS AND CONDITIONS APPLY

In the event of the reduction or exhaustion of an aggregate limit(s) of liability of the underlying policy(ies) listed in the Schedule of Underlying Insurance by reason of losses paid thereunder, this policy:

- (1) in the event of reduction, shall pay the “ultimate net loss” in excess of the reduced underlying limit; or
- (2) in the event of exhaustion, shall continue in force as underlying insurance.

### **III. Types of Excess Liability Policies**

LEARNING OBJECTIVE: To identify the types of Excess Liability Policies and to provide characteristics of each type.

#### **A. "True" Umbrella**

- 1. Additional/higher limits of liability protection**
- 2. Covers everything underlying policies cover**
- 3. Affords broader coverage for exposures not covered by underlying policies**
- 4. Drop down provision - automatic replacement coverage for underlying liability policies which are exhausted by a loss**
  - a) When underlying policy limits (aggregates) are reduced*
  - b) When underlying policy limits (aggregates) are exhausted*
- 5. "Non-standard" forms of coverage**
  - a) Concepts are the same*
  - b) Each must be analyzed*

#### **B. Follow Form Excess**

- 1. Provide additional limits of liability**
- 2. Provides *only* additional layer of protection on specific exposures selected**
- 3. Only comes into play when payment has been made under primary layer**



**4. True versus pure follow form**

- a) *“True Follow Form” means that every term and condition of the primary is incorporated into the excess policy – no exceptions*

The coverage provisions of the scheduled ‘Underlying Policies’ are incorporated as part of this policy.

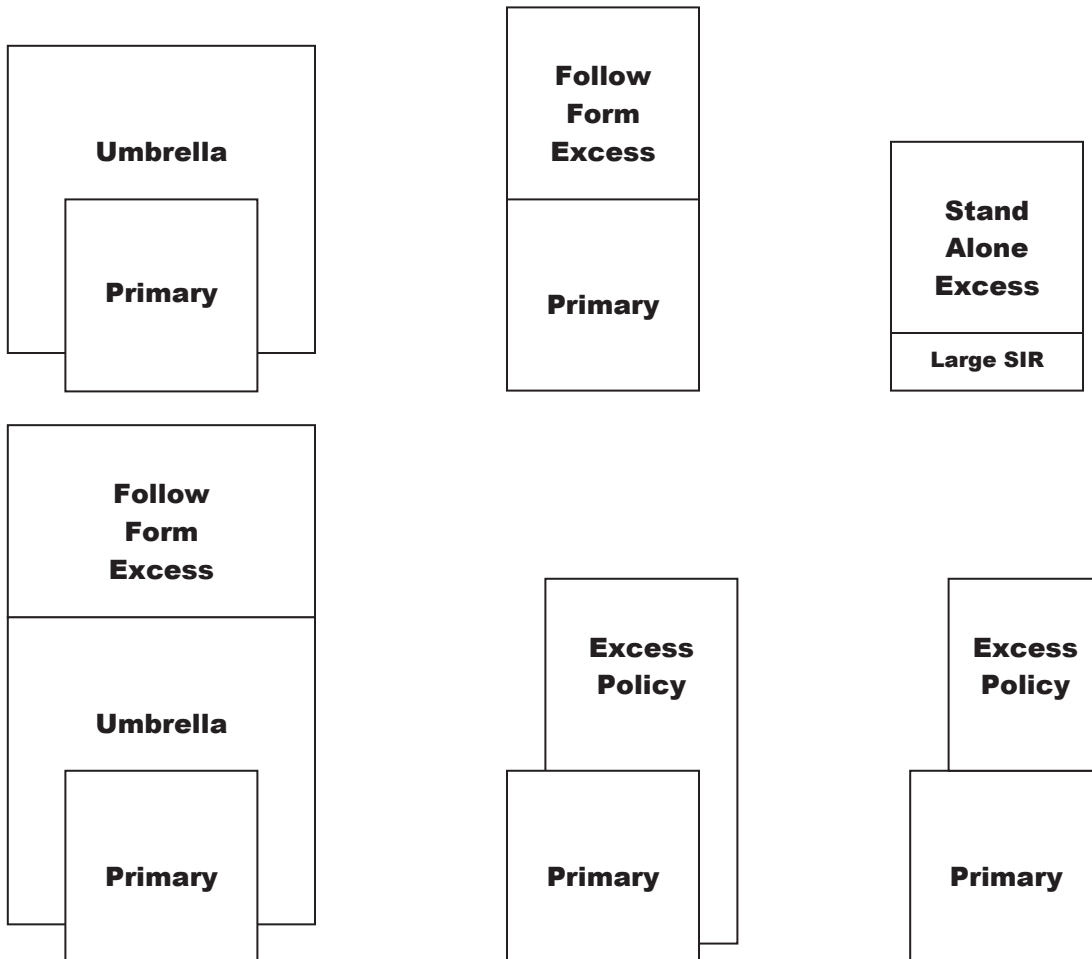
- b) *“Pure Follow Form” means most, if not all, of the coverages in the underlying form are adopted but there may be variances in certain terms and/or conditions*

Except insofar as coverage is available in underlying policies this policy does not cover . . .”

**5. No standard form**

**C. Stand alone excess**

**EXCESS AND UMBRELLA COVERAGE ILLUSTRATION**



## UMBRELLA VERSUS EXCESS

<i>Feature</i>	<i>Umbrella</i>	<i>Excess</i>
Increase Limits	Yes	Yes
Drop Down Feature	Yes	May be
Broader Coverage	Yes	May be  Can be more restrictive
Insuring Agreement, Exclusions, Conditions	Own	May be own or follow form
Self Insured Retention	Always	Sometimes
Limits Applications	Excess of underlying	Excess or may include underlying
Underlying Coverage Requirements	Yes	Yes
Underlying Limits Requirements	Yes	Yes

## HIGHER UNDERLYING LIMITS VERSUS UMBRELLA

<i>Feature</i>	<i>High Limits</i>	<i>Umbrella</i>
Increase Limits	Yes	Yes
Drop Down Feature	N/A	Yes
Broader Definitions (Personal Injury)	No	Yes
Broader Insuring Agreement	No	Yes
Exclusions	Standard	Fewer
Cost of Policy	More Expensive	Lower Cost
Legal Representation	Local Service	Best Legal Brains
Territory	U.S. & Canada	World, Universe
Number of Policies Required	Each Policy	Over All Policies

## IV. Policy Terms and Conditions

### A. Structure

#### 1. One insuring agreement

- ONE AGREEMENT APPLIES TO BOTH LOSSES COVERED BY UNDERLYING AND LOSSES ONLY COVERED BY THE UMBRELLA

##### A. WE WILL PAY

We will pay on behalf of the “Insured” the “ultimate net loss” for “occurrences” during the policy period in excess of the “underlying insurance” or for “occurrences” covered by this policy which are either excluded or not covered by “underlying insurance” in excess of the “retained limit” because of “Personal Injury”, “Property Damage”, or “Advertising Injury” anywhere in the world,

#### 2. Two insuring agreements

##### a) Coverage A – excess liability relating to the underlying policies

- FOLLOWING FORM “EXCEPT”

##### Coverage A – Excess Follow Form Liability Over Claims Made or Occurrence Coverage

We will pay, on behalf of an insured, damages in excess of the total Limits of Liability of Underlying Insurance as stated in the Schedule of Underlying Insurance. The terms and conditions of the Scheduled Underlying Insurance are with respect to Coverage A made a part of this policy, except for:

- a. any definition, term or condition therein relating to: any duty to investigate and defend, the Limits of Liability, premium, cancellation, other insurance, our right to recover payment, Extended Reporting Periods, or
- b. any renewal agreement, and any exclusion or limitations attached to this policy by endorsement or included in the Exclusions applicable under Coverage A and B of this policy.

With respect to **a.** and **b.** above, the provisions of this policy will apply.

With respect to all Scheduled Underlying Policies, the injury or damage must be caused by an occurrence which takes place on or after the Effective Date (or the Retroactive Date shown in the Declarations Page of this policy in the case of claims made policies) and before the termination of this policy provided that if a Scheduled Underlying Policy provides coverage on a claims made basis, the coverage afforded by this policy is also limited to those claims which are first made against the insured during this policy period and the Extended Reporting Period,

b) Coverage B – “umbrella” for those losses not covered by the underlying policies

- BROADER COVERAGE THAN UNDERLYING SUBJECT TO SIR

**Coverage B – Umbrella Occurrence Based Liability Coverage Over Retained Limit**

We will pay, on behalf of an insured, damages with respect to liability loss in excess of the Retained Limit as specified in Item 4(d) of the Declarations, or the amount payable by any other insurance, whichever is greater. We will pay such damages when liability is imposed on the insured by law or assumed by the insured under an insured contract because of bodily injury or property damage which occurs during the policy period and is caused by an occurrence; and we will pay such damages when liability is imposed on the insured by law or assumed by the insured under an insured contract because of personal injury or advertising injury to which this insurance applies, caused by an offense committed during the policy period.

Also, Coverage B will **NOT** apply to any loss for which insurance is afforded under Coverage A or which arises out of subjects of insurance or exposures to loss for which Underlying Policies are required to be maintained hereunder.

c) Policy provisions may apply to Coverage A, Coverage B, or to both Coverage A AND Coverage B

3. Follows CGL format

**B. Insuring Agreement**

1. Pay on behalf of

- May NOT BE USED IN ALL JURISDICTIONS
- Affords THE INSURER STRICTER CONTROL OVER INVESTIGATION, DEFENSE AND OUT-OF COURT SETTLEMENTS

The Company will pay on behalf of the Insured the ultimate net loss for occurrences during the policy in excess of the underlying insurance or for occurrences covered by this policy which are either excluded or not covered by underlying insurance in excess of the retained limit stated in the Declarations because of Bodily Injury, Property Damage, Personal Injury or Advertising Injury anywhere in the world.

## 2. Indemnify

- INSURED MAY BE OBLIGATED TO USE HIS/HER OWN FUNDS FOR DEFENSE, DAMAGES AND SUPPLEMENTARY PAYMENTS
- AFFORDS THE INSURED STRICTER CONTROL OVER INVESTIGATION, DEFENSE AND OUT-OF COURT SETTLEMENTS

The Company agrees to indemnify the insured for ultimate net loss (as defined herein) in excess of the retained limit hereinafter stated which the insured may sustain by reason of liability because of:

- 1.) bodily injury
- 2.) property damage
- 3.) personal injury
- 4.) advertising injury

as defined and to which this insurance applies, caused by an occurrence during the policy period.

## 3. Indemnity based on legal obligation to pay

- SOFTENS CRITERIA FOR INSURER PAYMENT FROM ACTUAL PAYMENT OF DAMAGES BY INSURED TO LEGAL OBLIGATION OF INSURED TO PAY
- BUT INSURED MAINTAINS CONTROL

The Company agrees to indemnify the insured for ultimate net loss which the insured shall become legally obligated to pay as damages, in excess of the underlying insurance or retained limit, because of:

- 1.) personal injury
- 2.) property damage
- 3.) advertising injury

as defined and to which this policy applies, caused by an occurrence during the policy period.

## 4. May limit types of damages covered

- DOES NOT NEED TO SPECIFICALLY EXCLUDE PUNITIVE DAMAGES

The Company will pay on behalf of the Insured that portion of the ultimate net loss in excess of the retained limit as hereinafter defined, which the Insured will become legally obligated to pay as compensatory damages (excluding all fines, penalties, punitive or exemplary damages) because of Personal Injury, Property Damage, Liability or Advertising Liability, caused by an occurrence to which this insurance applies due to:

- 1.) liability imposed upon the insured by law or
- 2.) liability assumed by the Insured under contract as defined and/or restricted in this policy.

## 5. May be limited to “following form”

- Following form policies often contain additional exclusions beyond those found in the underlying insurance

... except to the extent the insuring agreements, terms, definitions, conditions and exclusions of this policy differ, the coverage provided by this policy shall follow the insuring agreements, definitions, conditions and exclusions of the first underlying insurance policy as shown in the schedule of underlying policies

### a) Preferred way to assure continuity is endorsement

- REMEMBER, ONE REASON TO PURCHASE AN UMBRELLA IS TO PROVIDE THE CATASTROPHE PROTECTION EXCESS OF PRIMARY LIMITS

In the event that the insured suffers a loss which is covered by the underlying insurance set out in the schedule attached to this policy, the excess of which would be payable under this policy except for terms and conditions of this policy which are not consistent with the underlying insurance, then in spite of anything in this policy to the contrary, this policy is amended to follow and be subject to the terms and conditions of such underlying insurance in respect of such loss.

## C. Key Definitions

### 1. Insured

#### a) Broadened named insured

- COVERAGE SHOULD APPLY TO NEWLY FORMED ORGANIZATIONS AS WELL AS NEWLY ACQUIRED ORGANIZATIONS
- Specific policies may state 30, 60 or 90 days
- SOME policies REQUIRE NOTICE

Each of the following is an Insured under this policy to the extent set forth below:

(a) The Named Insured as shown in the Declarations and if such organization is a corporation also includes:

(1) Any subsidiary company of such organization, including any subsidiary company thereof:

- a. Existing at the effective date of this policy, or
- b. Acquired during the policy period.

(2) Any other Company controlled and actively managed by such organization or any such subsidiary:

- a. At the effective date of this policy.
- b. If the control and active management thereof was acquired during the policy period.

- Notice requirement

- Could CREATE POTENTIAL COVERAGE GAP

All subsidiary, associated, affiliated companies, owned or controlled companies as now or hereinafter constituted and of which prompt notice has been given the company.

- *American Motor Inns, Inc. v Harbor Insurance Co., 590 F Supp 468 (WD Va 1984)*

*b) Spouse*

- LIMITATION SHOULD NOT APPLY AS TO "RESIDENT" SPOUSE

Each of the following is an Insured under this policy to the extent set forth below:

- (b) If the Named Insured designated in the Declarations is an individual, you are an insured but only for the conduct of a business of which you are the sole proprietor, and your spouse, if a resident of the same household, is an insured for the conduct of the business.

*c) Partners, members*

- SHOULD BE EXTENDED TO SPOUSES OF PARTNERS OR MEMBERS

Each of the following is an Insured under this policy to the extent set forth below:

- (c) If the Named Insured designated in the Declarations is a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof, but only with respect to his liability as such.

*d) Those required by written contract*

- NOT AUTOMATICALLY PROVIDED BY UNDERLYING INSURANCE
- "ONGOING" OPERATIONS CONFUSES THE COMPLETED OPERATIONS HAZARD

Each of the following is an Insured under this policy to the extent set forth below:

- (d) Any person, organization, trustee or estate with respect to which you are obligated by virtue of a written contract to provide insurance such as afforded by this policy, but only with respect to ongoing operations by or on behalf of, or to facilities of or used by you.

- May expose entire limits of umbrella for this insured
- Endorsement or modified wording

; and, then only to the extent of the coverage required by such contract and for the limits of liability specified in such contract, but in no event for insurance not afforded by this policy nor for liability within your "Retained Limits" or in excess of the applicable limits of liability of this policy.

*e) Real estate managers*

- TERM REAL ESTATE MANAGER IS NOT DEFINED

Each of the following is an Insured under this policy to the extent set forth below:

- (e) Any person or organization while acting as your real estate manager.

*f) Officers, directors, employees*

- EXECUTIVE OFFICER, EMPLOYEE ARE NOT DEFINED TERMS
- EXPOSURE FOR LEASED WORKERS, TEMPORARY WORKERS

Each of the following is an Insured under this policy to the extent set forth below:

- (f) Any executive officer, director, other employee or stockholder of yours while acting within the scope of his duties as such.

*g) Additional insureds in underlying*

- NOT ALL REQUIRE NAMED INSURED'S CONSENT

Each of the following is an Insured under this policy to the extent set forth below:

- (g) At your option and subject to the terms of the coverage of this insurance, any additional Insured(s) included in the underlying insurance listed in Schedule A, but only to the extent that insurance is provided for such additional Insured(s) thereunder.

- Endorsement or modified wording

- Modify WORDING if NOT CONTINGENT ON NAMED INSURED'S CONSENT

This policy shall not afford such person or organization limits of insurance in excess of:

- (1) the minimum limit of insurance you agreed to provide; or
  - (2) the limit of insurance under this policy
- whichever is less.

- Some may be conditional

- NOTICE MUST BE GIVEN
- NOT DEPENDENT ON PREMIUM CHARGE IN UNDERLYING POLICIES

In the event of additional insureds being added to the coverage under the underlying insurance during the policy period, prompt notice shall be given to the Company and the Company shall be entitled to charge an appropriate additional premium hereto.

- NOTICE MUST BE GIVEN
- DEPENDENT ON PREMIUM CHARGE IN UNDERLYING POLICIES

In the event of additional insureds being added to the coverage under the underlying insurance prompt notice shall be given to the Company and if an additional premium has been charged for such addition on the underlying insurance, the company shall be entitled to charge an appropriate additional premium hereon.

- EVEN THOUGH PREMIUM FOR UMBRELLA IS A FLAT CHARGE, EXCEPTION IS MADE FOR ADDITIONAL INSURED

The premium for this policy is a flat premium and is not subject to adjustment except that additional premiums may be required for additional insureds.



*h) Any insured under primary*

- LIMITED TO COVERAGE PROVIDED BY THE UNDERLYING

Each of the following is an Insured under this policy to the extent set forth below:

**(h)** Any other person or organization who is an Insured under a policy of “underlying insurance”. The coverage afforded such Insureds under this policy will be no broader than the “underlying insurance” except for this policy’s Limit of Insurance.

*i) Who is NOT an insured*

- NO COVERAGE FOR UNNAMED PARTNERSHIPS/JOINT VENTURES

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

- May need to endorse

- SUITABLE FOR CONTRACTORS OR SERVICE PROVIDERS
- WOULD CHANGE FOR MANUFACTURERS OR ASSEMBLERS OF PRODUCTS

**BLANKET PARTNERSHIP/JOINT VENTURE COVERAGE**

The following is added to Section II – **WHO IS AN INSURED.**

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 member, even though this partnership or joint venture is not shown as a Named Insured in the Declarations. This coverage will not inure to the benefit of any other party except you.

**2. Ultimate net loss**

- a) *Determines specifically the expenses or types of payments which the policy covers or excludes within the limits of liability stated in the policy declarations*
- b) *Some policies use loss, damages, net final payment*
- c) *Some policies use ultimate net loss and then use another defined term such as “Damages” in the definition of ultimate net loss*

- “DEFENSE COSTS” ARE INCLUDED IN DEFINITION AND MAY BE INCLUDED WITHIN LIMITS OF LIABILITY

Ultimate Net Loss means the total sum which the Insured shall become obligated to pay as Damages and/or Defense Expenses on account of Personal Injury, Property Damage or Advertising Offense, either by final judgment against the Insured after trial or by settlement approved in writing by the Company after making proper deduction for all recoveries and salvages collectible.

DEFENSE COSTS	DAMAGES
ULTIMATE NET LOSS	

- “DEFENSE COSTS” ARE NOT INCLUDED IN DEFINITION AND WILL NOT ORDINARILY BE INCLUDED WITHIN LIMITS OF LIABILITY

Ultimate Net Loss means the total amount for which the insured is found liable for a covered “incident” either by adjudication or settlement to which we agree in writing including deduction for recoveries and salvages which have or will be paid. However, it does not include all of the expenses incurred by the insured or us or any Underlying Insurance carrier in connection with defending the “incident”, claim or suit.

DEFENSE COSTS	DAMAGES
	ULTIMATE NET LOSS

- d) *Ultimate net loss definition may include other supplementary payments as well (i.e., bond premiums, accrued interest, lost wages, etc.)*
- e) *In addition to the definition of ultimate net loss, the defense clauses and limits section should be reviewed; when defense costs are paid in addition to the limits of liability, they should not be included in the definition of ultimate net loss to avoid confusion*

### 3. Retained amounts

- a) *Coverage provided will not attach until some specified amount has been met by the insured*

- RETAINED LIMIT APPLIES TO CLAIMS AND/OR DEFENSE COSTS INCLUDED AS UNDERLYING INSURANCE OR SUBJECT TO SIR

“Retained Limit” is the sum stated in the Declarations as such. If the policies of “underlying insurance” do not apply to the “occurrence” or “offense” covered by this insurance, the insured shall retain the amount stated as a Self Insured Retention with respect to:

- a. “Bodily injury” or “property damage” caused by an “occurrence”; or
- b. “Personal injury” or “advertising injury” sustained by any one person or organization and caused by an “offense”.

*b) In the next example, the retained amount must be met by indemnity payments*

- ANY PAYMENTS WITHIN THE RETAINED AMOUNT PAID FOR DEFENSE AND INVESTIGATION COSTS DO NOT APPLY TOWARD MEETING THE RETAINED AMOUNT
- POTENTIAL COVERAGE GAP EXISTS IF DEFENSE COSTS ARE INCLUDED WITH POLICY LIMITS OF UNDERLYING POLICY
- SIR APPLIES PER OCCURRENCE OR OFFENSE; IN SOME CASES, PER POLICY YEAR

“Retained Limit” is the sum stated in the Declarations as such. If the policies of “underlying insurance” do not apply to the “occurrence” or “offense” covered by this insurance, the insured shall retain the amount stated as a Self Insured Retention with respect to:

- “Bodily injury” or “property damage” caused by an “occurrence”; or
- “Personal injury” or “advertising injury” sustained by any one person or organization and caused by an “offense”.

These “retained limits” shall only comprise indemnity payments. The named insured shall bear all legal costs and expenses incurred until such time as the “retained limits” are exhausted by indemnity payments.

*c) In the next example, the retained amount must be met by claims covered under this policy*

- ANY PAYMENTS WITHIN THE RETAINED AMOUNT PAID FOR DEFENSE AND INVESTIGATION COSTS AS WELL AS CLAIMS COVERED BY UNDERLYING BUT NOT THIS INSURANCE DO NOT APPLY TOWARD MEETING THE RETAINED AMOUNT

“Retained Limit” is the sum stated in the Declarations as such. If the policies of “underlying insurance” do not apply to the “occurrence” or “offense” covered by this insurance, the insured shall retain the amount stated as a Self Insured Retention with respect to:

- “Bodily injury” or “property damage” caused by an “occurrence”; or
- “Personal injury” or “advertising injury” sustained by any one person or organization and caused by an “offense”.

These “retained limits” shall only be reduced or exhausted by payment of “claims” that would be insured by this policy. The named insured shall bear all legal costs and expenses incurred until such time as the retained amounts are exhausted by payment of “claims” that would be insured by this policy.

- Potential coverage gap exists if defense costs are included within policy limits by any underlying policy
- Potential coverage gap exists if any claims are provided coverage by underlying but not this policy
- Again, SIR applies per occurrence of offense

#### 4. Personal injury

**PERSONAL INJURY** means:

- (1) bodily injury, shock, fright, mental injury, mental anguish, disability, sickness or disease sustained by any person, including death at any time resulting therefrom;
- (2) injury arising out of false arrest, detention or imprisonment malicious prosecution, wrongful entry or eviction or other invasion of the right of private occupancy, humiliation or discrimination because of race, religion, age, sex or physical disability (unless insurance therefore is prohibited by law); and
- (3) except with respect to injury occurring in the course of the Named Insured's advertising activities, injury arising out of the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy.

- a) *May include bodily injury within definition; if separately defined, can restrict the application of certain exclusions to bodily injury only*
- b) *Bodily injury should include mental anguish, mental shock, mental injury*
- c) *Personal injury should include humiliation and discrimination as covered offenses; insurers that cover only racial and/or religious discrimination do not satisfy the needs of insureds*
- d) *Preferred definition of personal injury would contain the words “**personal injury includes but is not limited to**” before the list of specified offenses*
- e) *If definition of personal injury (bodily injury) does not include assault and battery if committed to prevent or eliminate danger to persons or property, than an endorsement should be considered*

. . . assault and battery not committed by or at the direction of the Insured, but assault and battery that is committed by or at the direction of the Insured for the purpose of preventing or eliminating danger to persons or property is insured.

## 5. Property damage

“Property damage” means (1) physical injury to or damage of tangible property, including loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed.

- a) *Tangible property must be physically injured; diminution in value claims may not be covered*
- b) *In order to be as broad as insurance provided by underlying, CGL must cover three types of property damage*

(1) Physical injury to or destruction of tangible property

(2) Loss of use of damaged or destroyed tangible property

(3) Loss of use of tangible property which has not been physically injured or destroyed

## 6. Advertising injury

The term “advertising injury” wherever used herein shall mean:

- (1) Libel, slander or defamation;
- (2) Any infringement of copyright or of title or slogan;
- (3) Piracy or unfair competition or idea misappropriation under an implied contract;
- (4) Any invasion of right or privacy;

committed or alleged to have been committed in an advertising, article, broadcast or telecast and arising out of the named insured’s advertising activities.

- THE ENUMERATED OFFENSES, I.E., INFRINGEMENT OF COPYRIGHT, ARE ONLY COVERED OFFENSES IF COMMITTED IN THE COURSE OF ADVERTISING GOODS OR SERVICES

## 7. Occurrence

- RELIES ON ACCIDENT TO TRIGGER COVERAGE
- UNDESIRABLE FOR PI AND AI

“Occurrence” means an accident, including continuous and repeated exposure to conditions, which result in personal injury, property damage or advertising injury neither expected nor intended from the standpoint of the insured.

- Includes words HAPPENING OR EVENT TO TRIGGER COVERAGE FOR PI AND AI

“Occurrence” means an accident, happening or event or a continuous or repeated exposure to conditions, which unexpectedly or unintentionally results in personal injury, property damage or advertising injury.

- a) *Both definitions are flawed; the personal injury, property damage or advertising injury must still be unexpected or unintended, insurer could attempt to deny a loss by alleging an honest mistake was foreseeable and is therefore not covered*
- b) *Better if personal injury or advertising injury is not tied to a definition of “occurrence”*
- c) *Result could be achieved in the insuring agreement*

- PERSONAL INJURY AND/OR ADVERTISING INJURY NOT TRIGGERED BY DEFINITION OF OCCURRENCE

This insurance applies to:

- (1) “Bodily injury” or property damage” occurring during the policy period and caused by an “occurrence” and
- (2) “Personal injury” or “advertising injury” caused by an offense during the policy period.

- d) *Result could be achieved in definition of occurrence*

- DEFINITION OF OCCURRENCE SEPARATED INTO TWO SECTIONS; IN EFFECT, PROVIDES SEPARATE DEFINITIONS APPLICABLE TO BODILY INJURY AND PROPERTY DAMAGE ON ONE HAND AND PERSONAL INJURY AND ADVERTISING INJURY ON THE OTHER

“Occurrence” means

- (1) with respect to “bodily injury” or “property damage”: an accident, including continuous or repeated exposure to conditions, which results in “bodily injury” or “property damage” neither expected nor intended from the standpoint of the “insured”.
- (2) with respect to “advertising injury” and “personal injury”: an offense described in one of the numbered subdivisions of the definition of those terms in this policy.

- e) *And definition of occurrence may include a “batch clause”*

- Multiple CLAIMS EQUAL ONE OCCURRENCE

All exposures to substantially the same general harmful condition existing at or emanating from one premises location shall be deemed one occurrence. Also, if products from the same lot or batch cause injury or damage, all injury resulting from the common cause will be considered as arising out of one occurrence.

## 8. Contract

a) *Few umbrellas define “contract” or “contractual liability”; a definition usually restricts coverage in an umbrella*

b) *Umbrella may extend contractual liability coverage for any contract or agreement but limits coverage by stating who may create a contract*

- PRECLUDES LIABILITY CONTRACTUALLY ASSUMED BY EMPLOYEES OR OTHERS WHO ARE NOT NAMED

... liability assumed under contract by your officers, your directors, your stockholders or your partners while acting in their capacity as such.

c) *Precludes coverage for implied contracts*

... any written or oral contract or agreement entered into by the insured in the usual course of the insured’s business or operation, except a labor union contract or agreement

- Prevents umbrella from becoming an excess group medical policy because of the requirements of certain labor agreements; but other indemnification may be present for which coverage should not be excluded

d) *Excludes coverage for liability assumed under contract; exception applies for insured contract*

- EXCLUDES COVERAGE FOR LIABILITY ASSUMED UNDER CONTRACT; EXCEPTION APPLIES FOR INSURED CONTRACT

- COVERAGE ONLY APPLIES TO WRITTEN CONTRACTS

- NO CONTRACTUAL FOR INTENTIONAL TORTS

... insured contract means a written contract of the following types:

- (1) indemnification of employees or fellow employee injury;
- (2) authorized use of owned or hired autos;
- (3) agreements to indemnify any non-employee person or organization for bodily injury or property damage.

e) *Follows CGL/BAP verbiage but limits coverage to written contracts*

- PRECLUDES COVERAGE FOR ORAL OR IMPLIED CONTRACTS

... insured contract means a written contract pertaining to:

## 9. Products-completed operations hazard

- PRIMARY REASONS TO DEFINE ARE EXCLUSIONS APPLICABLE AND LIMITS APPLICABLE
  - PARAGRAPH A. MODIFIED UNDER CGL BY ENDORSEMENT TO ALLOW CONSUMPTION ON PREMISES – PRODUCTS AGGREGATE COULD APPLY TO UNDERLYING AND GENERAL AGGREGATE TO UMBRELLA
  - PARAGRAPH C.(3) SHOULD NOT BE IN AN UMBRELLA; UMBRELLA POLICIES DO NOT CONTAIN A SCHEDULE OF CLASSIFICATIONS OR EXPOSURES AND THE POLICY SHOULD NOT BE SUBJECT TO AN UNKNOWN
  - WITHOUT PARAGRAPH C.(3), GENERAL AGGREGATE COULD APPLY TO UNDERLYING – PRODUCTS AGGREGATE COULD APPLY TO UMBRELLA
  - DEFINITION COULD BE DELETED IF UMBRELLA AGGREGATE FOLLOWS ANY AGGREGATE LIMIT FOR HAZARDS AS DEFINED IN THE PRIMARY LIMITS
- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>a. “Products-completed operations hazard” 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:           <ol style="list-style-type: none"> <li>(1) Products that are still in your possession; or</li> <li>(2) Work that has not yet been completed or abandoned.</li> </ol> </li> <li>b. “Your work” will be deemed completed at the earliest of the following times:           <ol style="list-style-type: none"> <li>(1) When all of the work called for in your contract has been completed.</li> <li>(2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.</li> <li>(3) 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.</li> </ol> <p>Work that may need service, maintenance, connection, repair or replacement, but which is otherwise complete, will be treated as completed.</p> </li> <li>c. This hazard does not include “bodily injury” or “property damage” arising out of:           <ol style="list-style-type: none"> <li>(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle created by the “loading or unloading” or it;</li> <li>(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or</li> <li>(3) Products or operations for which the classification in this Coverage Part or in our manual of rules includes products or completed operations.</li> </ol> </li> </ul> |  |
|---|--|



## D. Defense Coverage

1. **An affirmative duty to defend should be contained in the policy terms and conditions**
2. **Duty should apply when no underlying insurer is obligated to defend and one the underlying insurance limits have been exhausted (occurrence and/or aggregates)**

- SPECIFICALLY ADDRESSES EXHAUSTION OF UNDERLYING
- PROVIDES DEFENSE WITHIN SIR

- a. We will have no duty to defend any claim or "suit" that any other insurer has a duty to defend. If we elect to join in the defense of such claims or "suits", we will pay all expenses we incur.
- b. We will have the right and duty to defend any "suit" for damages which are payable under Coverages A or B (including damages wholly or partly within the "retained limit") but which are not payable by a policy of "underlying insurance", or any other available insurance, because:
  - (1) Such damages are not covered; or
  - (2) The "underlying insurance" has been exhausted by the payment of claims.
- c. We may investigate and settle any claim or "suit" in **b.** above at our discretion.
- d. Our right and duty in **b.** above end when we have used up the "applicable limit of insurance" in the payment of judgments or settlements.
- e. We will pay, with respect to any claim or "suit" we defend in **b.** above:
  - (1) All expenses we incur.
  - (2) The cost of appeal bonds and bonds to release attachments, but only for bond amounts within the "applicable limit of insurance". We do not have to furnish these bonds.
  - (3) All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$100 a day because of time off from work.
  - (4) All costs taxed against the insured in the "suit".
  - (5) All interest on the full amount of any judgment that accrues after entry of the judgment and before we have:
    - (a) paid, or offered to pay; or
    - (b) deposited in court;the part of the judgment that is within the "applicable limit of insurance".These payments will not reduce the limits of insurance.

- SUPPLEMENTARY PAYMENTS WILL NOT REDUCE LIMITS

## E. Limits of Insurance

### 1. Combined single limit policy aggregate

- All claims under the policy reduce the aggregate

This policy is subject to an aggregate limit of liability as stated in the Declarations. This aggregate limit of liability is the maximum amount which will be paid under this policy and coverage shall cease to apply after the aggregate limit has been exhausted by payment of that portion of ultimate net losses for which we are liable.

### 2. Separate aggregates apply to selected coverages

- Aggregate applies to products-completed operations hazard
- Aggregate applies to all other coverages (including employers liability) except auto liability

This policy is subject to an aggregate limit of liability as stated in the Declarations. This aggregate limit of liability is the maximum amount which will be paid under this policy for all claims during the policy period and it applies separately to:

- a.) The products hazard and the completed operations hazard combined; and
- b.) All other coverages combined, except automobile liability which is not subject to any aggregate limit.

### 3. Follows aggregates in underlying

- If there is an underlying aggregate, there is an umbrella aggregate

The aggregate limit of liability stated in the Declarations is the most we will pay for ultimate net loss arising out of all incidents during each consecutive annual policy period commencing from its effective date. The aggregate limit applies on the same basis as the aggregate limit of liability of any underlying insurance that provides coverage subject to an aggregate limit and to which this policy also applies.

## F. Policy Territory

### 1. Policy silent

Policy does not address coverage territory; unless underlying restrictions are somehow incorporated into the excess policy, coverage applies to occurrences/offenses and resulting in suits anywhere in the world

### 2. Occurrence/offense anywhere in the world, suit anywhere in the world

- Coverage is worldwide in scope

(A) This policy applies to personal injury, property damage or advertising injury occurring anywhere in the world.

### 3. Occurrence/offense anywhere in the world, suit within defined coverage territory

- Limited worldwide

“Coverage Territory” means anywhere in the world if the insured’s responsibility to pay damages is determined in a “suit” on the merits, in the United States of America (including its territories and possessions), Puerto Rico or Canada, or in a settlement we agree to.

### 4. Where occurrence/offense must take place is outlined, suit within defined coverage territory

- Follows COVERAGE TERRITORY of CGL; MORE LIMITED THAN ABOVE

“Coverage territory” means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or
- c. All parts of the world if:
  - (1) The injury or damage arises out of:
    - (a) Goods or products made or sold by you in the territory described in a. above; or
    - (b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
  - (2) 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.

## G. Selected Conditions

### 1. Appeals

- SHOULD ALWAYS BE MADE PAYABLE IN ADDITION TO LIMITS
- MAY NEED TO CHECK DEFENSE, LIMITS OF LIABILITY AND ULTIMATE NET LOSS ALSO

- a. If the insured or the insured’s “underlying insurer” elects not to appeal a judgment which exceeds the “applicable underlying limit”, we may do so.
- b. If we do, we will pay all costs of the appeal. We will also pay all costs on appeals related to the defense of the insured as provided in SECTION I.2. These sums are in addition to the “applicable limit of insurance”. In no event shall our liability for “ultimate net loss” exceed the “applicable limit of insurance”.

## 2. Bankruptcy/financial impairment

### a) *Of the insured*

- (1) Majority of the contracts

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this insurance.

- (2) Not permissible in some jurisdictions

In the event of the insolvency of the insured or upon takeover of the insured's business by any State or Federal Official or Agency, or by any receiver or liquidator, this policy shall be cancelled immediately without the necessity of underwriter's notice of such cancellation and, as a consequence, coverage will terminate immediately.

### b) *Of the underlying insurer*

- (1) Some policies are silent, making it possible to successfully litigate and force the umbrella insurer to drop down.

- (2) Leaves unresolved the question of the umbrella insurer's responsibility to defend of the underlying insurer is unable to do so

In the event there is no recovery available to the Insured as a result of the bankruptcy or insolvency of the underlying insurer, the coverage hereunder shall apply in excess of the applicable limit of liability specified in the underlying schedule of insurance.

- (3) Courts reject any argument for the umbrella insurer's obligations to drop down under these circumstances

Our liability under this policy shall in no way be increased or expanded as a result of the receivership, insolvency or inability to pay of any underlying insurer, with respect to both the duty to indemnify and the duty to defend.

### 3. Cancellation

- a. You may cancel this insurance by mailing or delivering to us advance written notice of cancellation.
- b. We may cancel this insurance by mailing or delivering to you written notice of cancellation at least:
  - (1) 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
  - (2) 30 days before the effective date of cancellation if we cancel for any other reason.
- c. We will mail or deliver our notice to your last mailing address known to us.
- d. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
- e. If this insurance is cancelled, we will send you any premium refund due. If we cancel, the refund will be pro rata. If you cancel, the refund will be pro rata less 10% of the pro rata unearned premium. The cancellation will be effective even if we have not made or offered a refund.
- f. If notice is mailed, proof of mailing will be sufficient proof of notice.

a) *May be modified by state specific endorsement*

b) *May introduce concept of first named insured*

**First Named Insured.** The first Named Insured in Item 1 of the Declarations, shall be responsible for payment of all premiums, and shall act on behalf of all other insureds with respect to the giving and receiving of notice of cancellation and the receipt of any return premium, that may become payable under this policy.

c) *May also have a self-destruct clause*

• Avoid if possible

• At a minimum, an additional provision for automatic reinstatement if underlying reinstated

If at any time a scheduled underlying insurance policy written on an occurrence basis is cancelled or non-renewed while this policy is in force, coverage will cease under this policy on the same date and the same time as coverage ceases under the scheduled underlying policy.

### 4. Duties in the event of occurrence, offense, claim or suit

a) *May follow CGL/BAP format*

b) *More specific language may be stated in the requirement for "immediate notice of any occurrence or offense reasonably expected to result in a claim"*

- c) *Some policies mandate notice if a percentage of the underlying may be exceeded by the claim*

**Notice of Claim or Circumstances**

As a condition precedent to rights under this Policy, the Insured shall as soon as practicable give the company:

- (1) written notice of any Claim made against any Insured either specifying an amount, or estimated by the insured to involve Ultimate Net Loss, in excess of fifty percent (50%) of the underlying limits shown in Item 6 of the Declarations, whichever is applicable; or
- (2) notice of circumstances, which shall include but not be limited to information as to the nature of any Occurrence or circumstances, the actual or anticipated injury or damage resulting therefrom, the names of any claimant(s) or potential claimant(s), and the manner in which the Insured first became aware of the Occurrence or circumstances.

and such information and cooperation as a Company may reasonably require. Neither application for this Policy or for any renewals thereof nor any information contained therein shall constitute a notice of Claim or Notice of Circumstances.

- d) *More burdensome provision may place the burden on the insured to determine if the policy may be triggered; and, if so, the insured must give notice as soon as possible*

**B.** Immediate notice must be given to the Insurer, whenever the Insured has information from which the Insured could reasonably conclude that any occurrence may deplete the underlying limits of liability by 25% or more.

- e) *Harbor Insurance Co. v Trammell Crow Company, Inc., 854 F 2d 94 (1988)*

**Notice of Occurrence.** Whenever the Insured has information from which the Insured may conclude that an occurrence covered hereunder involves injuries or damages which, in the event that the Insured should be held liable may involve this policy, notice shall be sent to the company or to any authorized agent of the company as soon as reasonably possible. Notice to any authorized agent shall be deemed notice to the company.

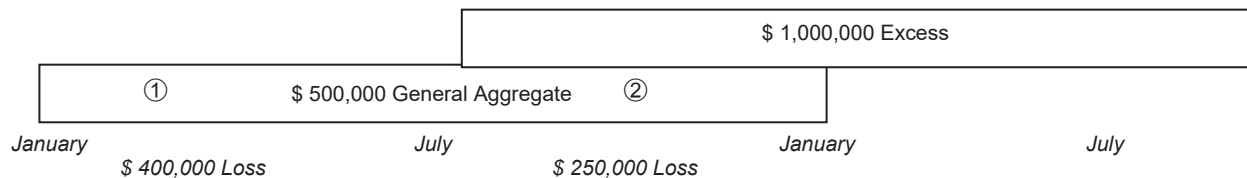
## 5. Maintenance of underlying insurance

- a) *A feature of virtually all umbrella policies is a condition that requires the insured to maintain underlying insurance as scheduled when the umbrella policy is written*

While this policy is in force, the insured agrees that the policies listed as scheduled underlying insurance and their renewals and replacements shall be maintained without alteration of limits of liability, terms or conditions during the currency of this policy except for any reductions or exhaustion of liability in the scheduled underlying insurance provided such reduction or exhaustion is solely the result of happenings taking place during the policy period, and not before. If the insured fails to maintain scheduled underlying insurance, this condition shall not invalidate this policy, but in the event of such failure, we will only be liable to the same extent as if the insured had maintained the scheduled underlying insurance.

- (1) Non-compliance may leave the insured uninsured for the difference between the limit actually maintained, if any, and the limit that should have been maintained
- (2) A potential gap may exist when policies are not concurrent with regard to effective dates

### Example



- b) *Loss ① occurs in April for \$ 400,000*

- (1) Primary policy pays \$ 400,000
- (2) General Aggregate reduced to \$ 100,000

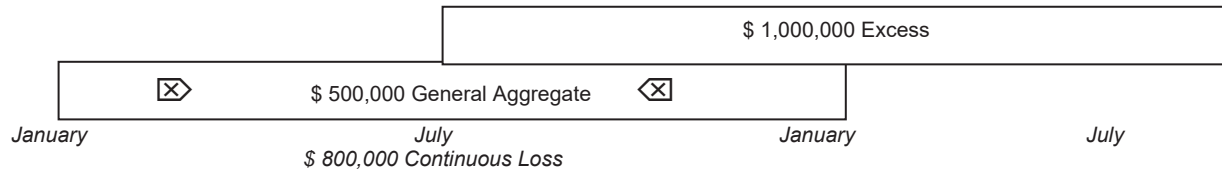
- c) *Loss ② occurs in November for \$ 250,000*

- (1) Primary policy pays \$ 100,000, the remaining General Aggregate
- (2) Excess policy will not respond
- (3) \$ 150,000 gap exists between primary and excess
- (4) \$ 250,000 gap exists in the excess for the remainder of the policy period

d) *Continuous or repeated exposure*

- (1) Occurrence type losses can result from continuous and repeated exposure
- (2) This means that the underlyers and umbrellas should have the same dates *and the underlying limits shown on the declarations unimpaired*

Example



e) *\$ 800,000 continuous loss from April to October (Seven months)*

- (1) Primary policy pays \$ 500,000
- (2) General Aggregate reduced to \$ 0

f) *Excess in effect four of seven months*

Continuous or Repeated Concurrency			
Months excess in force			
-----	X	Amount of Loss =	Aggregate Satisfied
Length of occurrence			
Four months			
----- (57 %)	X	\$ 800,000 =	\$ 456,000
Seven months			

- (1) \$ 456,000 does not exceed underlying requirement
- (2) \$ 300,000 **is not** paid by the excess
- (3) \$ 44,000 gap exists in the excess for the remainder of the policy period



*g) Solution – CONCURRENCY (there are alternatives to avoid the potential problem created by non-concurrency of effective dates)*

- (1) Limits of the primary policy are increased, following the loss, for the amount of the loss – IMPRACTICAL
- (2) Cancel and rewrite the primary coverage as of the effective date of the umbrella – MAY OR MAY NOT BE PRACTICAL
- (3) Endorse the umbrella – MAY NOT BE AVAILABLE

- IN EFFECT, AGREES TO ACCEPT IMPAIRED OR EXHAUSTED AGGREGATES

In the period of time of the primary and/or other underlying policy or policies of insurance, including renewal or replacement thereof, with respect to which this policy applies in excess thereof but is non-current with regard to inception thereto, it is agreed that in consideration of the premium for which this policy is written, the following shall apply:

In the event of reduction or exhaustion of the aggregate limits designated in the underlying policy or policies of insurance solely by payment of losses in respect to “occurrences” or offenses during the policy period of such underlying policy or policies, it is hereby agreed and understood that such insurance as is afforded by this policy shall apply in excess of the reduced underlying insurance or if such insurance is exhausted shall apply as underlying insurance, subject to its Insuring Agreements, Definitions, Exclusions, Conditions and other terms, in spite of anything to the contrary hereto or in conflict herewith in the other terms and conditions of this policy.

*h) Additional underlying requirements*

- (1) In some cases the umbrella carrier may require that the underlying CGL be endorsed to provide separate general aggregate limits per project or separate general aggregate limits per location

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## DESIGNATED CONSTRUCTION PROJECT(S) GENERAL AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### SCHEDULE

**Designated Construction Projects:**

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

- 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 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.

SAMPLE

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## DESIGNATED LOCATIONS(S) GENERAL AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### SCHEDULE

**Designated Locations:**

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

- 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 Construction Project 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 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 ongoing 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.

SAMPLE

***i) Some umbrella policies contain additional requirements for notice and reinstatement of primary limits***

- NOT CLEAR WHAT IS TO BE CONSIDERED A REASONABLE EFFORT
  - NOTICE REQUIREMENT COULD MANDATE CONTINUAL COMMUNICATION WITH UMBRELLA INSURER
- |   |
|---|
| Upon notice that any underlying aggregate limit has been exhausted, the Named Insured shall immediately make all reasonable efforts to reinstate the limit. The Named Insured shall notify the company in writing as soon as practicable of any change in the scope of underlying coverage or in the limits of insurance available under any underlying policy, and the termination of any coverage or exhaustion of underlying aggregate limits/ |
|---|

**6. Other insurance**

***a) Can be categorized as excess, pro rata or escape/nonliability clauses***

***b) Pro-rata***

When both this insurance and other insurance apply to loss on the same basis, the company shall not be liable under this policy for a greater <u>proportion of the loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability</u> of all valid and collectible insurance against such loss.
---

***c) Equal shares basis***

If all of the other insurance permits <u>contribution by equal shares</u> , we will follow this method also. Under this approach each insurer <u>contributes equal amounts</u> until it has paid its applicable limit of insurance or more of the loss remains, whichever comes first.
--

***d) Escape***

Provides coverage for the insured " <u>but only if no other valid and collectible insurance</u> , either primary or excess, <u>is available</u> to such person.
---

***d) Excess***

Any insurance we provide will be excess over any other collectible insurance, self-insurance, or bond. Any insurance we provide for use of a covered auto by any person other than you will be <u>excess over any other collectible insurance</u> , self-insurance, or bond.
--

e) *Excess over excess*

Any insurance we provide shall be excess over any other collectible insurance. Any insurance we provide for use of your covered auto by any person other than you or any family member will be excess over any other collectible insurance, self-insurance or bond stated to be primary, contributing, excess or contingent.

f) *Super excess*

Any insurance we provide shall be excess after exhaustion of all insurance, whether primary, contributing, excess or contingent.

g) *In most states where there are conflicting other-insurance provisions (i.e., both excess) the loss involved is prorated among the insurers involved*

h) *Some other insurance conditions add a paragraph to specifically address umbrella policies written on a quota share basis (where more than one insurer participates in a given layer of coverage)*

- POLICIES WRITTEN ON A QUOTA SHARE BASIS SHOULD CONTAIN AN APPROPRIATE OTHER INSURANCE CONDITION

This insurance is excess over any other insurance except insurance which is specifically written on a quota share basis for the same coverage as to which this insurance applies. Whenever both this insurance and other insurance are specifically written to apply to the loss on this basis, we shall not be liable for a greater proportion of such loss than as specified in the limits of liability.

		Type of Clause In First Policy Being Analyzed					
Type of Clause In Second Policy Being Analyzed	Clause Type	Pro rata	Escape	Not insured if covered under another policy	Excess	Excess over excess	Super Excess
	Pro rata	<i>Pro rata</i>	<i>Pro rata</i> policy is primary	<i>Pro rata</i> policy is primary	<i>Pro rata</i> policy is primary	<i>Pro rata</i> policy is primary	<i>Pro rata</i> policy is primary
	Escape	<i>Pro rata</i> policy is primary	Both policies primary <i>pro rata</i>	Escape policy is primary	Escape policy is primary	Escape policy is primary	Escape policy is primary
	Not insured if covered by other insurance	<i>Pro rata</i> policy is primary	Escape policy is primary	Both polices primary <i>pro rata</i>	Excess is primary	Excess over excess is primary	Super excess is primary
	Excess	<i>Pro rata</i> policy is primary	Escape policy is primary	Excess is primary	Both polices primary <i>pro rata</i>	Both polices primary <i>pro rata</i>	Excess is primary
	Excess over excess	<i>Pro rata</i> policy is primary	Escape policy is primary	Excess over excess is primary	Both polices primary <i>pro rata</i>	Both polices primary <i>pro rata</i>	Excess over excess is primary
	Super excess	<i>Pro rata</i> policy is primary	Escape policy is primary	Super excess is primary	Excess is primary	Excess over excess is primary	Both polices primary <i>pro rata</i>



**7. Prior insurance and noncumulation of liability**

a) *A prior insurance condition in a policy reduces its limit of liability (and the total amount of coverage available for a loss) by the amount available to the insured under any applicable insurance in effect prior to the subject policy's inception date*

- Reduces the limits of liability available to pay a loss

It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the insured prior to the inception date hereof, the Company's limit of liability as stated in the Declarations shall be reduced by any amounts due to the insured on account of any such prior insurance.

b) *The following examples represent the possible effects of "prior insurance and noncumulation of liability" conditions on the exposure of two claims resulting from "continuous or repeated exposure to conditions" over three policy periods*

(1) These examples assumes that losses are assigned on the basis of the "exposure" theory of liability

(2) The theory holds that all insurers providing coverage for periods during which injurious exposure to conditions exist should share in the payment of loss

c) *The policies do not contain "prior insurance" conditions*

CLAIM A				CLAIM B		
1	2	3		1	2	3
5 Million	10 Million	10 Million	Coverage Years	10 Million	5 Million	5 Million
4 Million	7 Million	2 Million	Limits Purchased for Period	4 Million	4 Million	4 Million
4 Million	7 Million	2 Million	Portion of Loss Assigned	4 Million	4 Million	4 Million
0	0	0	Insurance Payments	0	0	0
0			Amounts Left Uninsured	0		
			TOTAL Uninsured			

d) *The policies contain "prior insurance" conditions similar to the following*

If any loss covered hereunder is covered in whole or in part under another policy issued to the insured prior to the inception of this policy, this policy's limit of liability shall be reduced by amounts due the insured under such prior insurance.

CLAIM A				CLAIM B		
1	2	3		1	2	3
5 Million	10 Million	10 Million	Coverage Years	10 Million	5 Million	5 Million
4 Million	7 Million	2 Million	Limits Purchased for Period	4 Million	4 Million	4 Million
4 Million	6 Million	0	Portion of Loss Assigned	4 Million	1 Million	0
0	1 Million	2 Million	Insurance Payments	0	3 Million	4 Million
3 Million			Amounts Left Uninsured	7 Million		
			TOTAL Uninsured			

## 8. Severability

- PERMITS CLAIMS/SUITS BY ONE INSURED AGAINST ANOTHER

This insurance afforded applies separately to each insured against whom claim is made or suit is brought, but the inclusion of more than one insured shall not operate to increase the limits of our liability.

a) *Caution, some insurers may attach a cross-liability exclusionary endorsement*

- ESPECIALLY UNDESIRABLE WHEN MULTIPLE ENTITIES INSURED WITH DIFFERENT OWNERSHIP

This policy does not apply as respects any suits brought against any insured under this policy by or on behalf of any other insured under this policy.

## 9. Subrogation

- WAIVER BEFORE LOSS PERMITTED

ORDER OF RECOVERY:

① INSURED

② UMBRELLA CARRIER

③ UNDERLYING CARRIER

**I. Transfer of Rights of Recovery Against Others to Us.**  
If any "insured" has rights to recover all or part of payment we have made under this policy, those rights are transferred to us. The "insured" must do nothing after loss to impair them. At our request, the "insured" will bring "suit" or transfer those rights to us and help us enforce them.

If there is any money recovered, we will disburse that money as follows:

- (1) First, we will repay any actual payment made by the insured that is in excess of the retained limit;
- (2) Second, we will be repaid to the extent of our actual payment;
- (3) Third, if any money remains, the insured or any underlying insurer will be repaid to the extent of their actual payment.

If any expenses are incurred to recover money, we will share the expenses with the insured or any underlying insurer in proportion to the amount that each is repaid.

If our recovery attempt is not successful, we will bear all of the recovery expenses.

## H. Exclusions

### 1. Underlying exclusions may be incorporated into the umbrella policy

In addition to the exclusions in the "underlying insurance", this insurance does not apply to:

**2. Exclusion may be conditional, applies only if no coverage is provided by the underlying policies**

Except insofar as coverage is available to the insured in the underlying insurance as set out in the attached Schedule, this policy shall not apply to:

**3. Exclusion may be absolute, the exclusion applies regardless of underlying provisions**

**4. Aircraft**

- OWNED excluded?
- NONOWNED excluded?
- COVERED if UNDERLYING EXISTS?
- CONTRACTUAL COVERED?

**Aircraft.** We won't cover bodily injury or property damage that results from the ownership, maintenance, use or operation, loading or unloading, or entrustment to others of:  
– any aircraft owned, operated, rented, or borrowed by any protected person; or  
– any other aircraft operated by anyone in the course of his or her employment by any protected person.  
  
But we won't apply this exclusion to bodily injury or property damage covered by your Basic Insurance.

**5. Asbestos**

- INTENDED TO EXCLUDE ALL EXPOSURES RESULTING FROM ASBESTOS
- A FEW UMBRELLAS HAVE TAKEN THIS CONCEPT FURTHER BY EXCLUDING COVERAGE FOR LIABILITY ARISING FROM OTHER LATENT-INJURY CAUSING PRODUCTS OR SUBSTANCES

This insurance does not apply to:  
"Bodily injury" "personal injury" or "property damage" arising out of the "asbestos hazard".  
  
We shall have no obligation under this policy:  
**(1)** To investigate, settle or defend any claim or suit against any insured alleging actual or threatened injury or damage of any nature or kind to persons or property which arises out of or would not have occurred but for the "asbestos hazard"; or  
**(2)** To pay, contribute to or indemnify another for any damages, judgments, settlements, loss, costs or expenses that may be awarded or incurred by reason of any such claim or suit or any injury or damage, or in complying with any action authorized by law and relating to such injury or damage.  
  
As used in this exclusion:  
"Asbestos hazard" means:  
**(1)** An actual exposure or threat of exposure to the harmful properties of "asbestos", or  
**(2)** The presence of "asbestos" in any place, whether or not within a building or structure.  
  
"Asbestos" means the mineral in any form, including but not limited to fibers or dust.

## 6. Care, custody or control

We won't cover property damage to the following property:  
– Property rented, leased, occupied, borrowed or used by, or in the care, custody or control of, any protected person. But we'll apply this exclusion part only to the extent that the protected person is required by contract to insure such property.

## 7. Director and officers

This policy does not apply under Coverage A or B:

To any wrongful act, error, omission or breach of duty by any insured in the performance of the office of director or officer of any organization.

- Reinforces intent of coverage not to provide coverage for “professional acts”
- Problem does not lie in intent but in the actual endorsement wording
- Even ordinary bodily injury and property damage involve errors, omissions and/or breach of duty

*a) Extreme care must be exercised if this exclusion is to be used*

- WRONGFUL ACT WOULD THEN BE DEFINED IN THE POLICY

This policy does not apply to any wrongful act of a professional nature committed or alleged to have been committed by or on behalf of any insured in the performance of the office of director or officer of any organization.

## 8. Discrimination

- RELATING TO EMPLOYMENT ONLY?
- POLICY SILENT?

(h) to any liability for **Personal Injury** arising out of discrimination including fines or penalties imposed by law, if (1) insurance coverage therefor is prohibited by law or statute, or (2) committed by or at **your** direction.

## 9. ERISA

- EXCLUDED OR POLICY SILENT?

2. Any obligation of the Insured under the Employee's Retirement Income Security Act (ERISA) of 1974 as now or hereafter amended.

## 10. Fellow employee

- Excluded?
- Policy silent?
  
- Usually applies only to EXTENT NOT COVERED by UNDERLYING INSURANCE

**Injury to fellow employees.** We won't protect your employees for bodily injury or personal injury to:

- you;
- any fellow employee; or
- the spouse or any child, parent, brother or sister of that fellow employee if such injury results from the bodily injury or personal injury to the fellow employee.

Nor will we protect an employee of yours for any obligation to share damages with or repay someone else who must pay damages because of bodily injury or personal injury to any fellow employee.

But we won't apply these exclusions if your Basic Insurance protects your employees for such bodily injury or personal injury.

## 11. Fire damage liability

This policy shall not apply to:

damage by fire to premises rented to you or premises temporarily occupied by you with permission of the owner.

- Clarifies umbrella does not apply to fire damage liability
- May be used when underlying policy exclusions are incorporated into the umbrella
- May be used to limit the extent of care, custody or control coverage provided when the care, custody or control exclusion only applies to specific types of property or only applies to liability assumed under contract

## 12. Intentional bodily injury

- COVERAGE FOR REASONABLE FORCE?
- PD included?

**Intentional bodily injury or property damage.** We won't cover bodily injury or property damage that's expected or intended by the protected person.

But we won't apply this exclusion to intentional bodily injury or property damage that results from the use of reasonable force to protect people or property.

### 13. Motor carrier act

- Will NOT provide the insured with coverage for specific statutory liability

The policy shall not apply to:

Any obligation to reimburse an insurer as provided by the terms of the “Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980” or under the terms of any similar endorsement required by Federal or State statute.

### 14. Pollution

- Pollution exclusion in most umbrellas has been broadened to remove all pollution liability coverage

This policy shall not apply to:

- (1) any claim for personal injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants anywhere in to world;
- (2) any loss, cost or expense arising out of any request, demand or order 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;
- (3) any loss, cost or expense arising out of any claim or suit by or on behalf of a governmental authority for damages, including but not limited to cost of investigation and attorney’s fees, 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.

Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

- CGL policy makes an exception for limited off-premises exposures, fuels and lubricants that are accidentally discharged from mobile equipment, the products-completed operations hazard AND heat, smoke or fumes from a hostile fire; endorsements under the CGL are available to broaden the coverage
- Employers liability coverage of the standard Workers Compensation and Employers Liability Insurance has no pollution exclusion
- The BAP has a pollution exclusion but excepts “non-cargo” exposure; and endorsement is available under the BAP to provide limited coverage for the cargo exposure
- Obtaining coverage for pollution in the umbrella that is as broad as the underlying should be the goal

## 15. Professional liability

The policy shall not apply to:

Injury arising out of the rendering or failure to render any professional services.

- Exclusion relating to professional liability exposures are somewhat redundant because commercial umbrella policies do not adequately address many of the exposures
- Standard, unendorsed CGL policy does not contain such an exclusion
- “Incidental medical malpractice” may be provided under the CGL of “bodily injury”
- Professional services is not a defined term
- Disputes can arise

## 16. Property damage to alienated premises, products, work or impaired property

a) *The alienated premises exclusion has not been a common exclusion found in umbrellas*

This policy shall not apply to:

Property damage to premises you sell, give away or abandon, if the property damage arises out of any part of those premises.

This exclusion does not apply if the premises are your work and were never occupied, rented or held for rental by you.

b) *Intent is to exclude insurance protection for property damage to premises conveyed by sale or transfer of title to another by the named insured*

c) *Exception for a speculative builder is in the CGL coverage form and may or may not be found in the umbrella policy*

d) *However, a speculative builder may still have an uninsured exposure*

This exclusion for property damage does not apply if the premises are “your work” and were not occupied, rented or held for rental by you for more than \_\_\_\_\_ days after completion.

e) *The exclusion for property damage to named insured's products should not apply to the completed operations exposure*

- THE EXCLUSION FOLLOWS THE CGL FORMAT

The policy shall not apply to:  
Property damage to your product arising out of it or any part of it.

f) *The exclusion for property damage to the named insured's work includes (by definition of your work) work or operations by the named insured or work or operations performed by others on behalf of the named insured AND materials, parts or equipment furnished in connection with such work or operations*

- MUST ENDORSE CGL TO PROVIDE APPROPRIATE COVERAGE USUALLY IN EXCESS OF A SUBSTANTIAL DEDUCTIBLE

The policy shall not apply to:  
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.

(1) Without the underlined portion, coverage for property damage to the named insured's work as well as property damage to the work of a subcontractor is excluded

(2) Even with the underlined wording, no insurance protection to the named insured's work resulting from the named insured's work

g) *Modified wording*

The 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.  
This exclusion does not apply if the damaged work and the work out of which the damage arises was performed by you and the loss is covered by valid and collectible insurance available as Underlying Insurance.



*h) The exclusion for property damage to impaired property encompasses such claims as diminution in value, loss of use and loss of profits which are unrelated to actual physical injury to property*

- PROVIDES COVERAGE FOR "ACTIVE MALFUNCTION" OF NAMED INSURED'S PRODUCT OR NAMED INSURED'S WORK

The policy shall not apply to:

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 its has been put to its intended use.

## 17. Punitive damages

This policy does not apply to:

Fines, penalties, punitive damages, exemplary damages, treble damages or any other damages resulting from the multiplication of compensatory damages.

- Some umbrella forms accomplish an exclusion of punitive damages through the insuring agreement or definition of ultimate net loss
- When the policy is silent with respect to insurance coverage for punitive damages, the policy is usually interpreted to provide for payment unless barred by state statute or court of law

## 18. Uninsured/underinsured motorists

- Excluded?
- Policy silent?
- Available for an additional premium?
- Included as low sub-limit?

**Uninsured motorists.** We won't cover any bodily injury or property damage that is subject to any automobile:

- uninsured motorists' law;
- underinsured motorists' law;
- no-fault or other first-party bodily injury or property damage law.

- Without a specific exclusion there is no intent to provide coverage for such loss; however, adverse judgments against insurers necessitate clarification
- Typically, UM, UIM, NO-FAULT benefits are first party benefits extended by underlying policies and do not involve an insured's legal liability to another

## 19. War

- Many umbrella policies contain a war exclusion

This policy shall not apply to:

Any liability incurred by an Insured directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under any government or public or local authority.

- Wording used by some insurers may encompass terrorism and military terrorism, terms which may be overly broad
- Alternatives include:
  - No war exclusion
  - War exclusion applies to contractual assumption of liability only
  - War exclusion excepts occurrences which take place in a defined coverage territory

## 20. Watercraft

- OWNED EXCLUDED?
- ALL NONOWNED EXCLUDED?
- NONOWNED OVER [XX] FEET EXCLUDED?
- CONTRACTUAL COVERED?

**Watercraft.** We won't cover bodily injury or property damage that results from the ownership, maintenance, use or operation, loading or unloading, or entrustment to others of any watercraft over 50 feet long unless:

- such bodily injury or property damage is covered by your Basic Insurance; or
- you notify us within 30 days after you acquire such a watercraft and we agree to provide coverage.

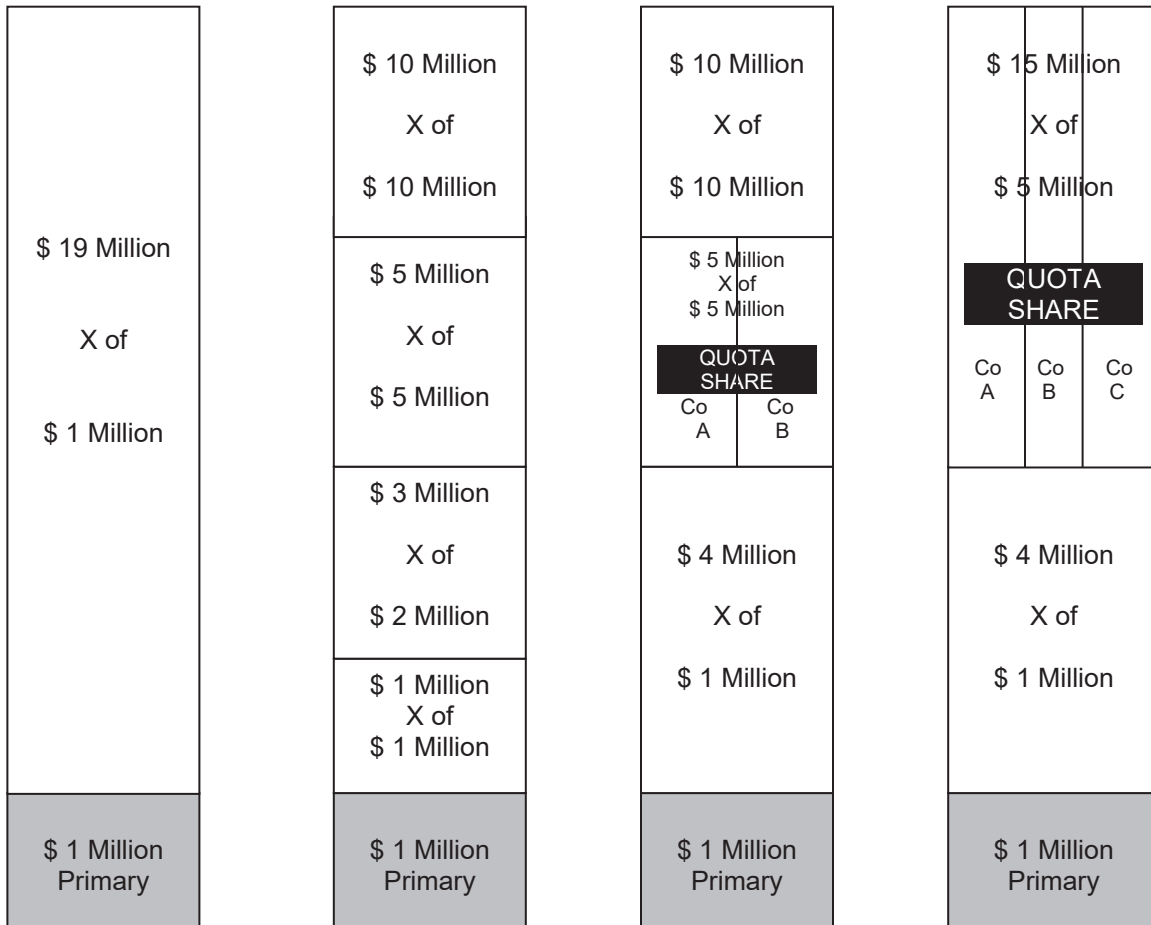
## 21. Others

- Caution should be exercised with regard to potential coverage gaps created*
- Recreational vehicles (snowmobiles, golf carts, etc.)*
- Employers liability as respects any occupational disease*
- Employment related practices*
- Insured versus insured*
- Arising out of particular products, i.e., aircraft, automobile, etc.*
- Lessor of premises used for selling or serving alcoholic beverages*
- Industry specific, i.e., contractors, financial institutions, etc.*

## UNDERLYING POLICY EXCLUSIONS

<b>2013 ISO CGL</b>	<b>2011 NCCI Employers Liability Coverage</b>	<b>2013 ISO Business Auto Coverage Form</b>	<b>2013 Auto Dealers Coverage Form</b>
a. Expected or Intended Injury	1. Contractual Liability	1. Expected or Intended Injury	1. Expected or Intended Injury
b. Contractual Liability	2. Punitive or Exemplary Damages	2. Contractual Liability	2. Contractual Liability
c. Liquor Liability	3. Employment in Violation of Law	3. Workers Compensation	3. Workers Compensation
d. Workers Compensation	4. Workers Compensation	4. Employee Indemnification and Employer's Liability Consequential Dual Capacity Action Over	4. Employee Indemnification and Employers Liability Consequential Dual Capacity Action Over
e. Employers Liability Dual Capacity Consequential Action Over	5. Intentional Bodily Injury		
f. Pollution	6. Territorial		
g. Aircraft, Auto, Watercraft	7. Discrimination		
h. Mobile Equipment Transportation	8. Federal compensation acts	5. Fellow Employee	5. Fellow Employee
i. War	9. Federal liability acts	6. Care, Custody or Control	6. Care, Custody or Control
j. Property Damage/Care, Custody, or Control	10. Master or members of crew	7. Handling of Property	7. Leased Autos
k. Damage to Product	11. Fines or penalties	8. Mechanical Device/Movement of Property	8. Pollution
l. Damage to Work	12. Migrant workers	9. Operations	9. Racing
m. Business Risk/Design Error		10. Completed Operations	10. Handling of Property
n. Products Recall/Sistership Liability		11. Pollution	11. Mechanical Device/Movement of Property
p. Electronic Data		12. War	12. Work You Performed
q. Recording or Distribution in Violation of Law		13. Racing	13. Loss of Use
2. Personal and Advertising Injury			14. Products Recall/Impaired Property
			15. War
			16. Acts, Errors or Omission

## V. Structuring an Umbrella Program



### A. Layering

### B. Quota Sharing

1. Two or more companies sharing a layer on some proportionate basis
2. Policies must be identical in "Who Is Covered," "What Is Covered," etc.

## C. Buffer layers

## D. Methods to provide coverage

### 1. Certificates of excess insurance

- FOLLOWS TERMS AND CONDITIONS OF LEAD UMBRELLA

Coverage shall follow all terms and conditions of policy number \_\_\_\_\_ (the lead umbrella), issued by \_\_\_\_\_ (the insurer), including all renewals and rewrites thereof.

### 2. Complete umbrella policy

- Alternative means of providing excess umbrella coverage involves a policy containing its own insuring agreements, conditions, definitions and exclusions*
- Desirable that the terms and conditions are identical*

- BROAD AS UNDERLYING ENDORSEMENT
- MAY NOT BE AVAILABLE FROM INSURER

In the event the insured suffers a loss which is covered by the underlying insurance set out in the schedule attached to this policy, the excess of which would be payable under this policy except for the terms and conditions of this policy which are not consistent with the underlying insurance, then in spite of anything in this policy to the contrary, this policy is amended to follow and be subject to the terms and conditions of such underlying insurance, including any endorsements thereto, in respect to such loss.

## E. Potential gaps in a layered program

### 1. Persons insured

- The scope of “persons insured” is critical*
- For example, the lead umbrella and some excess layers define the “named insured” as the parent corporation and all of its subsidiaries; however, one of the intermediate layers of coverage defines “named insured” as the parent corporation and omits one or more of its subsidiaries*

## 2. Coverage

### a) *Definition of occurrence*

- (1) The definition of occurrence should be consistent through all layers; if multiple claims arising out of one occurrence (e.g., the same general conditions at one premises or one batch of products), then more than one retention may apply in some layers but not in others; and coverage gaps exist
- (2) For example, consider a \$20 million umbrella liability program that is structured as follows:

\$10 million second excess umbrella – “one occurrence”  
\$5 million first excess umbrella – “multiple occurrences”  
\$4 million umbrella – “one occurrence”  
\$1 million primary – “one occurrence”

Assume products liability claims totaling \$8 million result from a defective batch of products. The primary products aggregate is exhausted by claims from this occurrence. The primary umbrella attaches to provide coverage, and it too is exhausted by claims from this occurrence. The first excess umbrella should attach at this time; however, its policy treats each claim as a separate occurrence. In the layers up to \$5 million, these claims have been treated as one occurrence, subject to only one retained amount. This layer, however, treats each claim as a separate occurrence and requires retentions for each of these occurrences. Consequently, the layer excess of \$5 million is impaired since it will respond only to those individual claims that exceed \$5 million rather than when the sum total of all these claims exceeds \$5 million.

### b) *Notice of occurrence requirements may vary*

- (1) Insured must be aware of notice requirements so as not to breach this condition and possibly make coverage voidable

### c) *Policy exclusions can differ*

- (1) Variances must be recognized and reconciled
- (2) Most restrictive policies should be in the uppermost layers

### 3. Defense

a) *Varying treatment of defense costs in the excess layers may lead to gaps in coverage; the most likely deficiency results from policies that provide defense within policy limits and that consider only indemnity payments to meet the retained amounts*

b) *For example, consider the following \$20 million excess liability program:*

- \$ 10 million second excess – defense within limits
- \$ 5 million first excess – defense within limits
- \$ 4 million umbrella – defense within limits
- \$1 million primary – defense in addition to limits

Claims are paid during the year as follows:

Indemnity Payment	Defense Costs	Total Claim	Paid by Layers	Paid by Insured
1.0 million	200,000	1.2 million	1.2 million - Primary	0
3.5 million	1.5 million	5.0 million	4.0 million - Umbrella	1.0 million
3.0 million	2.5 million	5.5 million	5.0 million – 1 <sup>st</sup> Excess	500,000
1.0 million	400,000	1.4 million	0	1.4 million
8.5 million	4.6 million	13.1 million	10.2 million	2.9 million

- To summarize, even though there are policy limits available, the insured has to pay those portions of claims indicated above (indemnity payments as well as defense costs) until the attachment point of a particular layer is reached by indemnity payments

### 4. Limits of liability

a) *Limits of liability provisions have a major impact on the continuity of coverage between layers*

b) *Aggregate limits complicate the process and may cause impairment of coverage within a given layer, particularly when the umbrella policy requires a specific pattern of underlying aggregate limits*

Liability shall attach to the insurer only after the Underlying umbrella Insurers have paid . . . the full amount of their "Ultimate Net Loss" Liability as follows:

\$ \_\_\_\_ "Ultimate Net Loss" in respect of each occurrence but

\$ \_\_\_\_ in the aggregate for each annual period . . . separately in respect of all damages with regard to damages as a result of "Personal Injury" or "Property Damage" and included in the "Products-completed Operations Hazard" and separately in respect of all damages as a result of "Personal Injury" or "Property Damage" other than those included in the "Products-completed Operations Hazard"



## NONCONCURRENCY OF LIMITS OF LIABILITY PROVISIONS

<b>* \$5 MM 1<sup>st</sup> EXCESS</b>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Aggregate</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> </table>	General Aggregate	P/CO Aggregate	Auto Liability (no aggregate)
General Aggregate	P/CO Aggregate	Auto Liability (no aggregate)		
<b>\$4 MM UMBRELLA</b>	Combined Single Limit Aggregate			
<b>\$1 MM PRIMARY</b>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Policy Aggregate</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> </table>	General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)
General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)		

First claim  
\$7 MM  
P/CO  
Claim

<b>* \$5 MM 1<sup>st</sup> EXCESS</b>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Aggregate</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> <tr> <td style="text-align: center;">Pays \$0</td> <td style="text-align: center;">Pays \$2 MM \$3 MM Remains</td> <td style="text-align: center;">\$3 MM Remains</td> </tr> </table>	General Aggregate	P/CO Aggregate	Auto Liability (no aggregate)	Pays \$0	Pays \$2 MM \$3 MM Remains	\$3 MM Remains
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General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)					
Pays \$1 MM Exhausted	Pays \$1 MM Exhausted	Pays \$1 MM Exhausted					

Subsequent claim  
\$2 MM  
Premises/  
Operations  
Claim

<b>* \$5 MM 1<sup>st</sup> EXCESS</b>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Aggregate</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> <tr> <td style="text-align: center;">Pays \$0</td> <td style="text-align: center;">Pays \$3 MM Remains</td> <td style="text-align: center;">\$3 MM Remains</td> </tr> </table>	General Aggregate	P/CO Aggregate	Auto Liability (no aggregate)	Pays \$0	Pays \$3 MM Remains	\$3 MM Remains
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General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)					
Pays \$1 MM Exhausted	Pays \$1 MM Exhausted	Pays \$1 MM Exhausted					

Pays \$0  
Already Exhausted

\* Attachment /drop down provision only applies when retention has been met by claims which affect that particular aggregate.

## NONCONCURRENCY OF LIMITS OF LIABILITY PROVISIONS

<p><b>* \$5 MM 1<sup>st</sup> EXCESS</b></p> <p>Combined Single Limit Aggregate</p>	<p><b>\$4 MM UMBRELLA</b></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Aggregate except P/CO and Auto</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> </table>	General Aggregate except P/CO and Auto	P/CO Aggregate	Auto Liability (no aggregate)	
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<p>First claim \$10 MM P/CO Claim</p>					
<p><b>\$1 MM PRIMARY</b></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Policy Aggregate</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> </table>	General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)		
General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)			

<p><b>* \$5 MM 1<sup>st</sup> EXCESS</b></p> <p>Combined Single Limit Aggregate</p> <p>Pays \$5 MM</p>	<p><b>\$4 MM UMBRELLA</b></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Aggregate</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Pays \$4 MM</td> </tr> </table>	General Aggregate	P/CO Aggregate	Auto Liability (no aggregate)			Pays \$4 MM	
General Aggregate	P/CO Aggregate	Auto Liability (no aggregate)						
		Pays \$4 MM						
<p>Subsequent claim \$6 MM Premises/Operations Claim</p>								
<p><b>\$1 MM PRIMARY</b></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Policy Aggregate</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Pays \$1 MM</td> </tr> </table>	General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)			Pays \$1 MM		
General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)						
		Pays \$1 MM						

<p><b>* \$5 MM 1<sup>st</sup> EXCESS</b></p> <p>Combined Single Limit Aggregate</p> <p>Pays \$0 Already Exhausted</p>	<p><b>\$4 MM UMBRELLA</b></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Aggregate</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Pays \$4 MM Exhausted</td> </tr> </table>	General Aggregate	P/CO Aggregate	Auto Liability (no aggregate)			Pays \$4 MM Exhausted	
General Aggregate	P/CO Aggregate	Auto Liability (no aggregate)						
		Pays \$4 MM Exhausted						
<p>Subsequent claim \$6 MM Premises/Operations Claim</p>								
<p><b>\$1 MM PRIMARY</b></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">General Policy Aggregate</td> <td style="width: 33%;">P/CO Aggregate</td> <td style="width: 33%;">Auto Liability (no aggregate)</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Pays \$1 MM Exhausted</td> </tr> </table>	General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)			Pays \$1 MM Exhausted		
General Policy Aggregate	P/CO Aggregate	Auto Liability (no aggregate)						
		Pays \$1 MM Exhausted						

\* Does not follow underlying aggregates; CSL aggregate limit only

## **VI. Coordinating a "Mixed" Program**

### **A. Problems**

- 1. Occurrence over claims made**
- 2. Claims made over occurrence**

### **B. Solutions**

- 1. Avoid**
- 2. If can not be avoided:**
  - a) Try to confine "claims made" policies to the upper layers*
  - b) If the umbrella is "claims made," buy the highest limits you can in the underlying*
  - c) Keep all policies in a layer identical when a quota share arrangement exists*
  - d) Try to keep retro dates consistent through all layers*
  - e) Try to negotiate the guaranteed availability of a "Supplemental Extended Reporting Period" in the event of nonrenewal*
  - f) Put in writing for all parties*

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

## **UNDERLYING CLAIMS MADE COVERAGE**

This endorsement modifies insurance provided under the following:

### COMMERCIAL LIABILITY UMBRELLA COVERAGE PART

If any “underlying insurance” is written on a claims-made basis, the following applies to the insurance provided by this policy which is excess over that other underlying insurance:

**A. Paragraphs 1.c.(2), 1.c.(3), 1.d, 1.e. and 1.f. of Section I – Coverage A – Bodily Injury And Property Damage Liability are replaced by the following:**

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

- c.** This insurance applies to “bodily injury” and “property damage” only if:
  - (2)** The “bodily injury” or “property damage” did not occur before the Retroactive Date, if any, shown in the Declarations of the “underlying insurance” 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 **d.** below, during the policy period or any Extended Reporting Period we provide under Extended Reporting Periods.
- d.** A claim by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:
  - (1)** When notice of such claim is received and recorded by any insured or by the “underlying insurer” or us if the limits of the “underlying insurance” have been used up, whichever comes first; or
  - (2)** When we make settlement in accordance with Paragraph **1.a.** above, or settlement is made by the “underlying insurer” with our agreement.
- e.** 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.

**f.** 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.

**B. Paragraph 1.c. of Section I – Coverage B – Personal And Advertising Injury Liability is replaced by the following:**

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

- c.** This insurance applies to “personal and advertising injury” caused by an offense arising out of your business, but only if:
  - (1)** The offense was committed in the “coverage territory”;
  - (2)** The offense was not committed before the Retroactive Date, if any, shown in the Declarations of the “underlying insurance” or after the end of the policy period; and
  - (3)** A claim for damages because of the “personal and advertising injury” is first made against any insured, in accordance with Paragraph **d.** below, during the policy period or any Extended Reporting Period we provide under Extended Reporting Periods.

**C. The following is added to Paragraph 1. of Section I – Coverage B – Personal and Advertising Injury Liability:**

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

- d.** A claim made by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:
  - (1)** When notice of such claim is received and recorded by any insured or by the “underlying insurer” or us if the limits of the “underlying insurance” have been used up, whichever comes first; or

- (2) When we make settlement in accordance with Paragraph 1.a. above or settlement is made by the “underlying insurer” with our agreement.

All claims for damages because of “personal and advertising injury” to the same person or organization as a result of an offense will be deemed to have been made at the time the first of those claims is made against any insured.

**D. Exclusion 2.a.(3) Material Published Prior To Policy Period, of Section I – Coverage B – Personal And Advertising Injury Liability is replaced by the following:**

**b. Material Published Prior To The Policy Period**

“Personal and advertising injury” arising out of oral or written publication, in any manner, of material whose first publication took place before the Retroactive Date, if any, shown in the Declarations.

**E. The following section is added:**

**Extended Reporting Periods**

1. With respect to any “underlying insurance” written on a claims-made basis, we will provide one or more Extended Reporting Periods, as described below, if:

- a. This Coverage Part is cancelled or not renewed; or
- b. “Underlying insurance” written on a claims-made basis is renewed or replaced with insurance that:
  - (1) Has a Retroactive Date later than the date shown in the Declarations of the “underlying insurance”; or
  - (2) Does not apply to “bodily injury”, “property damage” or “personal and advertising injury” on a claims-made basis.

2. Extended Reporting Periods do not extend the policy period or change the scope of coverage provided. They apply to claims for:

- a. “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 of the “underlying insurance; or

- b. “Personal and advertising injury” caused by an offense committed before the end of the policy period but not before the Retroactive Date, if any, shown in the Declarations of the “underlying insurance”.

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

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 the Duties In The Event Of Occurrence, Offense, Claim Or Suit Condition;
- b. Five years with respect to claims because of “personal and advertising injury” arising out of an offense reported to us, not later than 60 days after the end of the policy period, in accordance with the Duties In The Event Of Occurrence, Offense, Claim Or Suit Condition; and
- c. 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.

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 on a claims-made basis;
- 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.

This endorsement shall set forth the terms, not inconsistent with this Section, applicable to the Supplemental Extended Reporting Period.

6. If the Supplemental Extended Reporting Period is in effect, we will provide a supplemental aggregate limit of insurance equal to the dollar amount of the Aggregate Limit shown in the Declarations in effect at the end of the policy period, but only for claims first received and recorded during the Supplemental Extended Reporting Period.

Limits of Insurance will be amended accordingly. The Personal And Advertising Injury Limit and the Each Occurrence Limit shown in the Declarations will then continue to apply.

SAMPLE



## James K. Ruble Seminar

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

### Section 3

# **Proceed With Caution...Your Client Purchased a Condominium**





**PROCEED WITH CAUTION...**  
**Your Client Purchased a  
Condominium**



1

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**LYON CONSULTING  
SERVICES, LLC**



**Steven D. Lyon**  
**CPCU, CRM, CIC, AAI, ARM, AIS, CRIS,**  
**MLIS, AFIS, TRIP**

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# DISCLAIMER

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

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

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

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High-rise condominiums along Collins Avenue, near the site of the Champlain South Towers collapse in Surfside, Fla. Scott McIntyre for The New York Times

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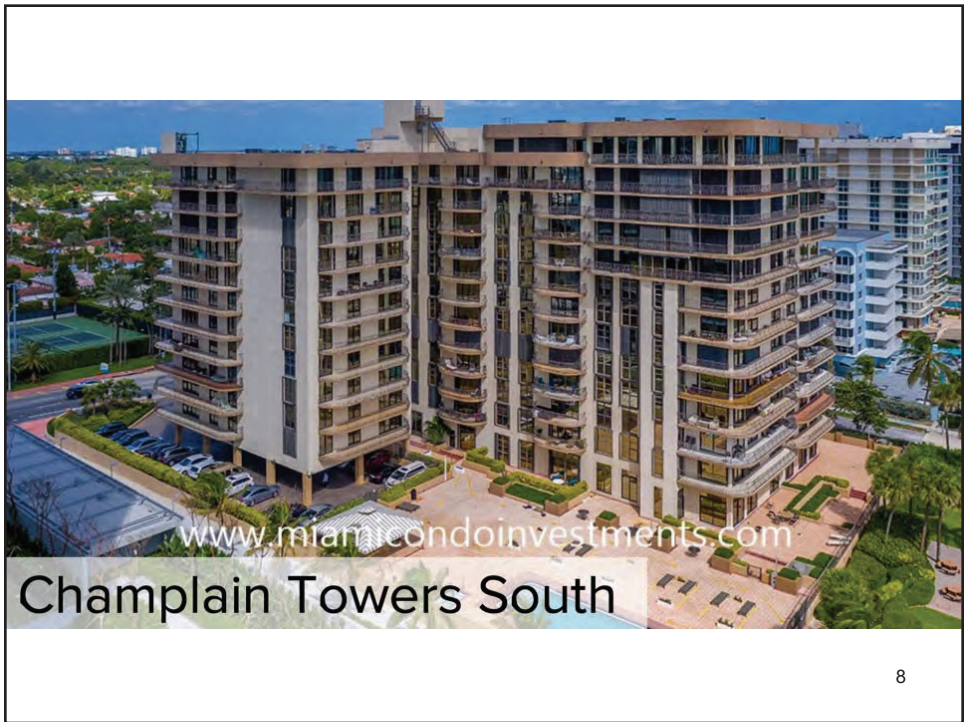
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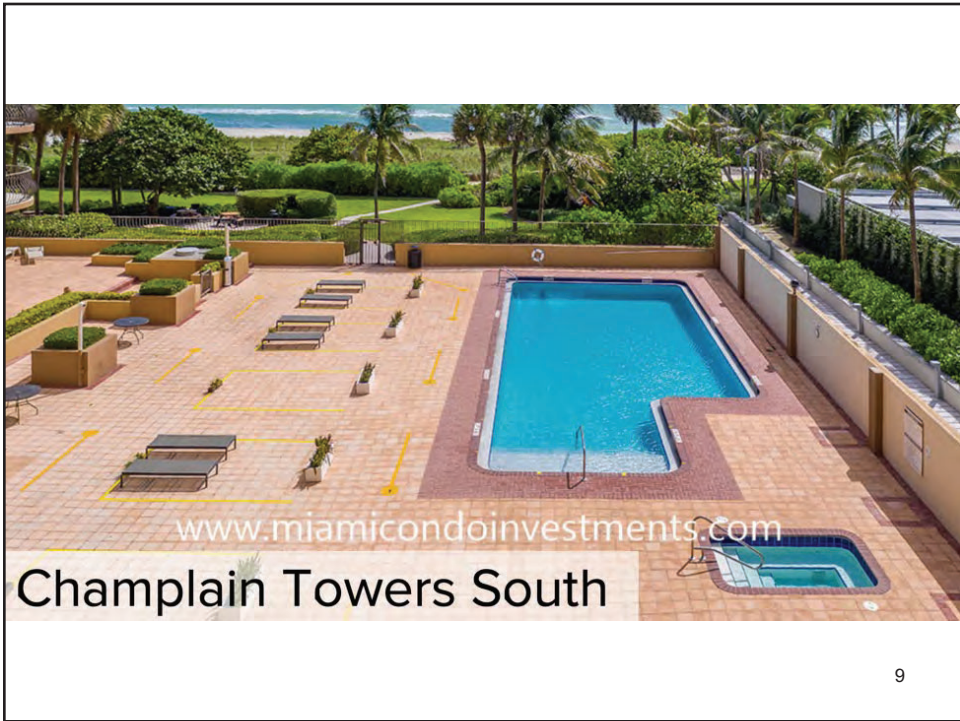
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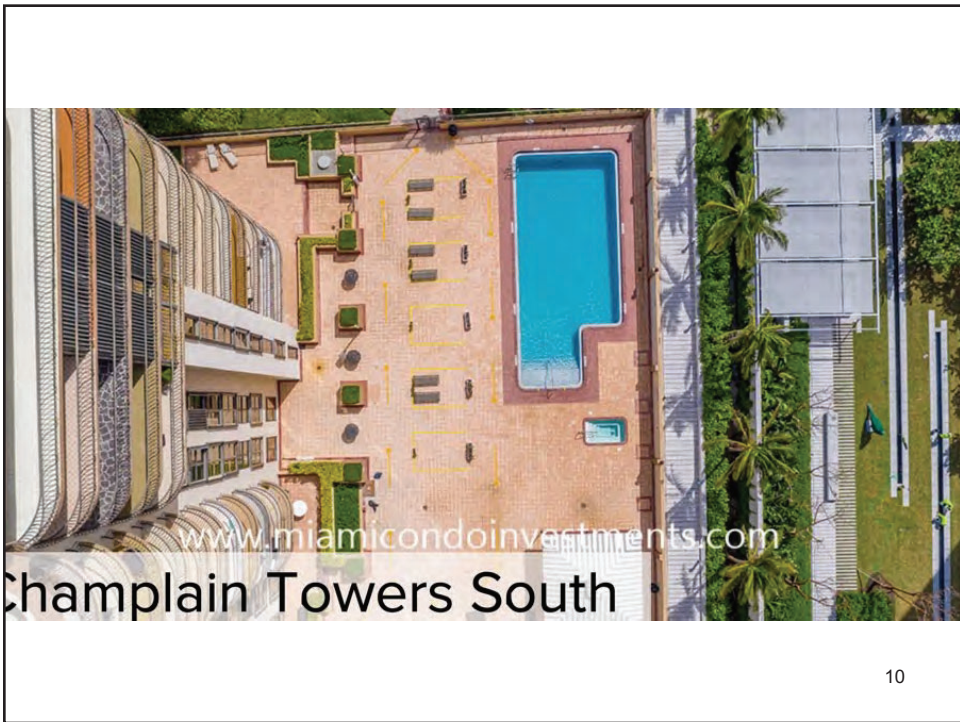
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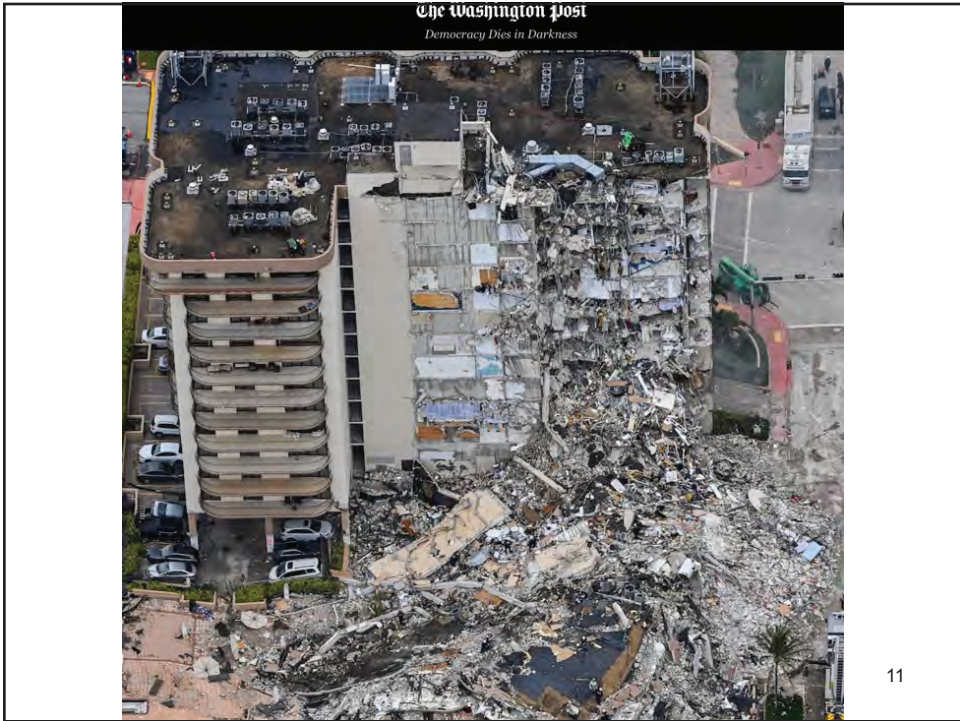
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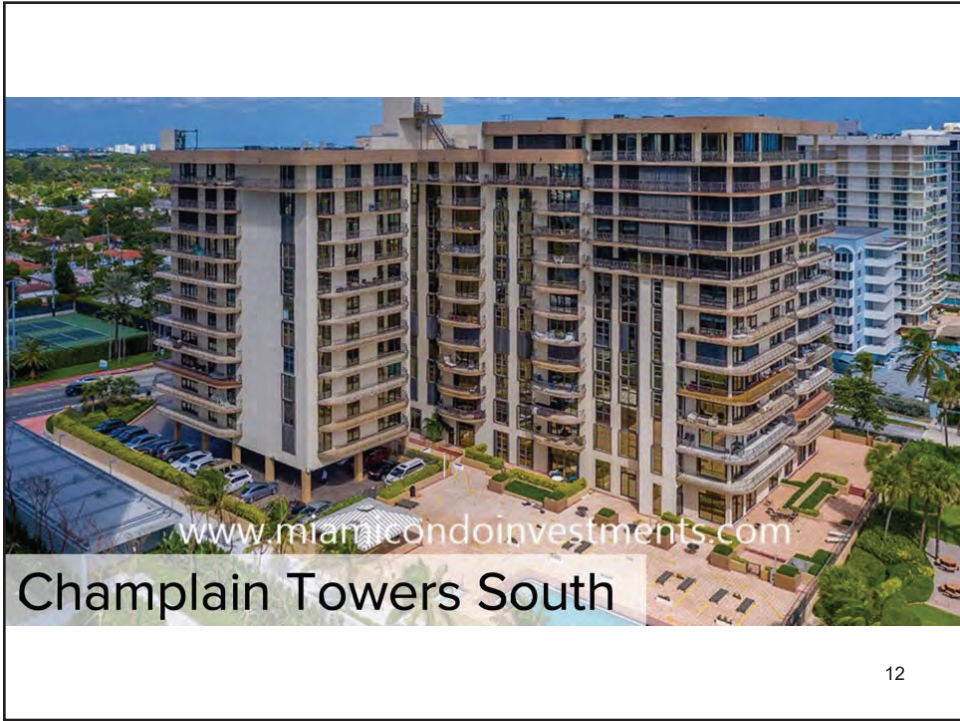
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[www.miamicondoinvestments.com](http://www.miamicondoinvestments.com)

**Champlain Towers South**

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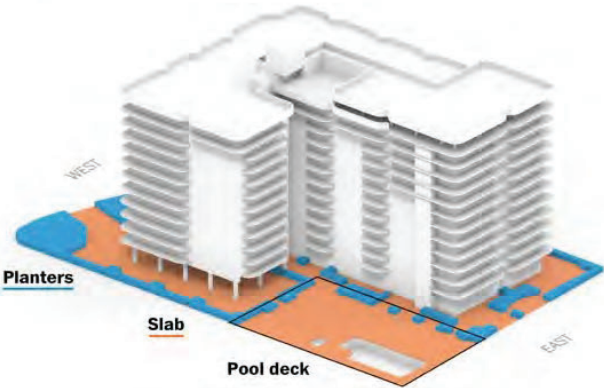
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### The troubled slab

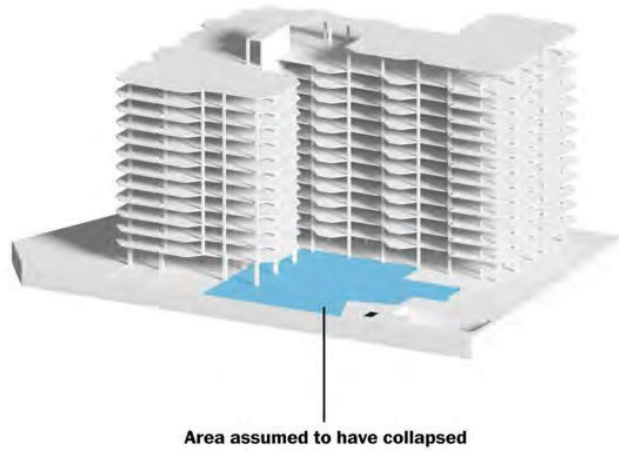
Champlain Towers South, which contained 136 apartments, was built on a concrete slab about 9½-inches thick that spanned about 55,000 square feet. A grid of steel reinforcing bars, known as rebar, ran through the slab to boost its strength and stability.



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## The simulation

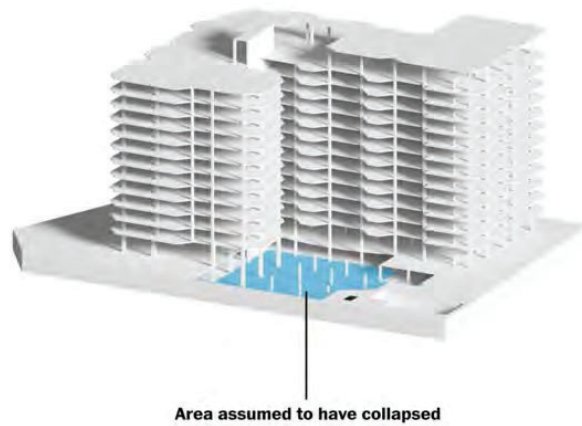


Area assumed to have collapsed

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## The simulation

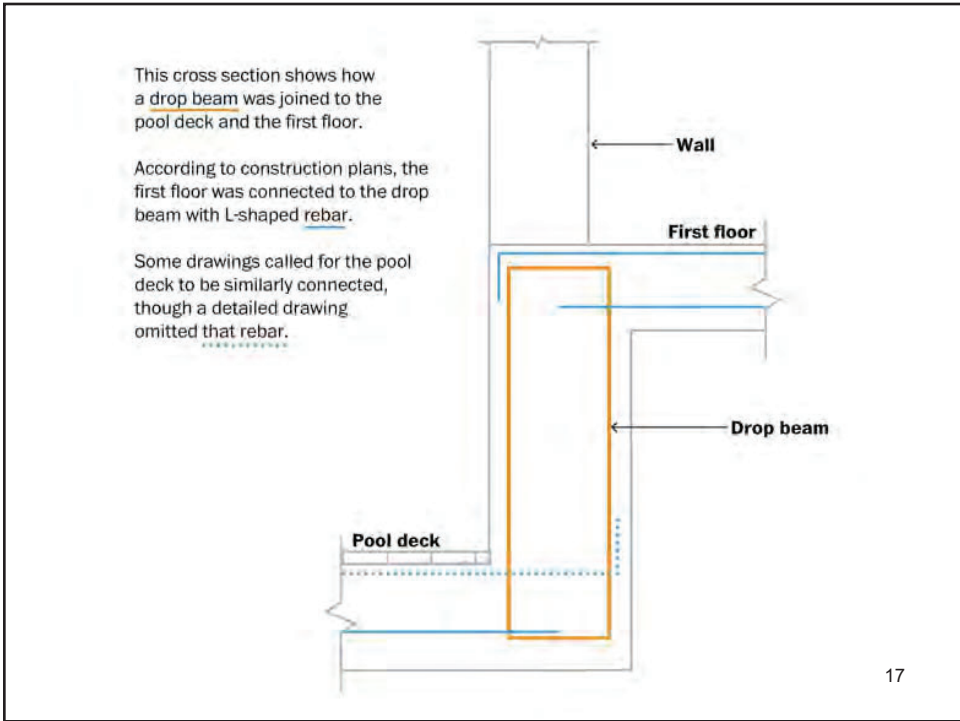


Area assumed to have collapsed

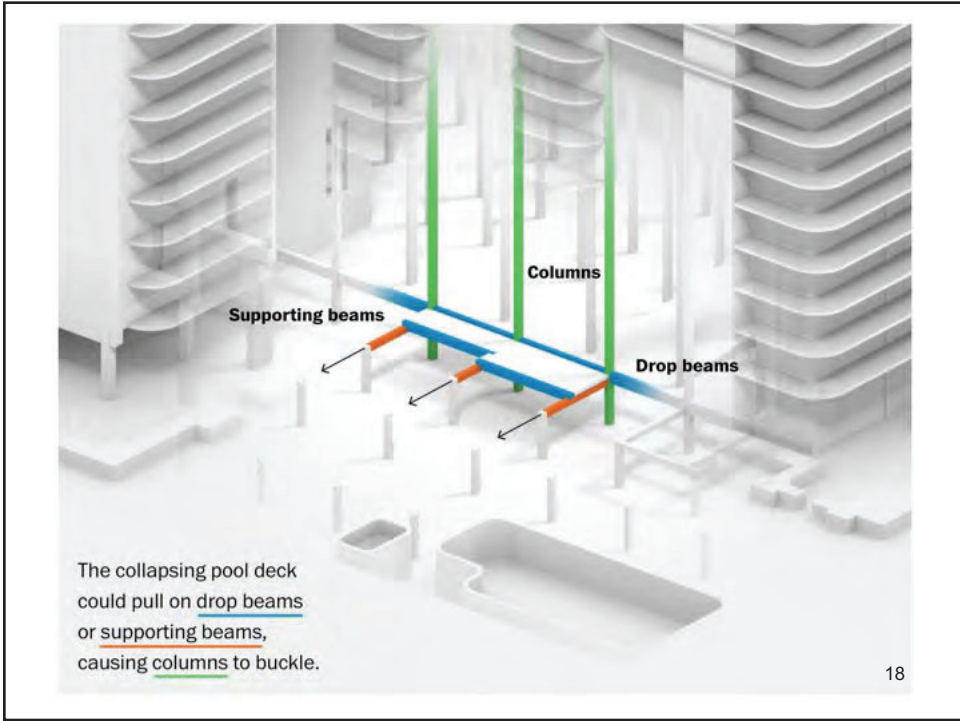
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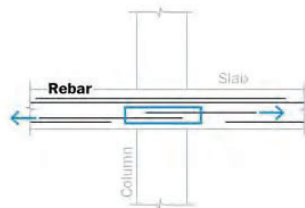
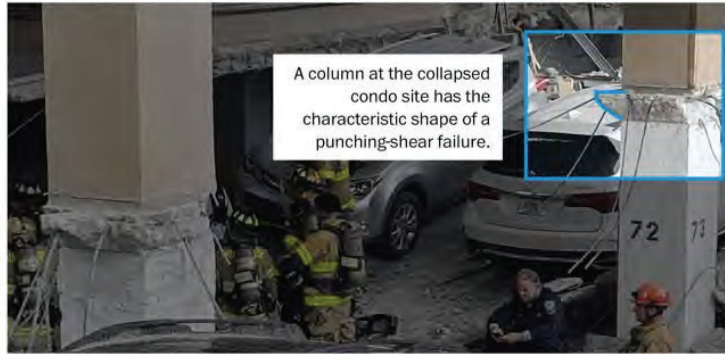


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### Punching-shear failure at site of condo collapse



Structural drawings show lack of continuous rebar along the bottom in slab and column connections.

According to experts, rebar could have slid out of the column in the event of a punching-shear failure.

Source: Adapted from a figure published in IBRACON Structures and Materials Journal, in an article by Paulo Sacramento, Mauricio Ferreira, D.R.C. Oliveira and Guilherme S. Melo.

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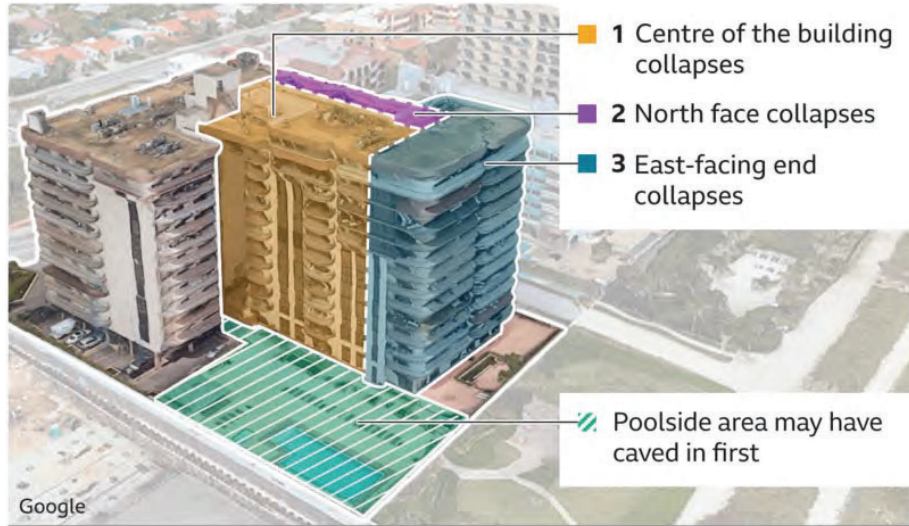
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## The building collapsed in stages



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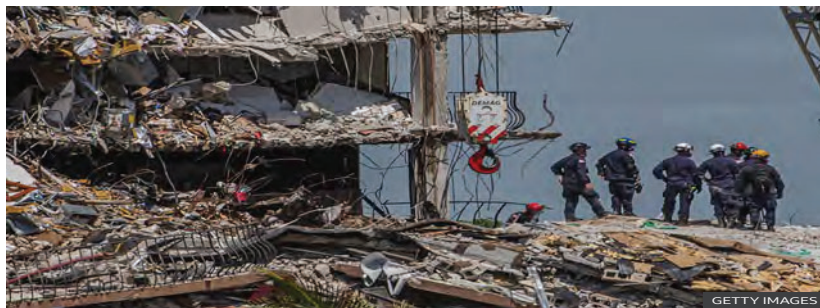
## Miami building collapse: What could have caused it?

By The Visual Journalism Team  
BBC News

© 1 July



Miami building collapse



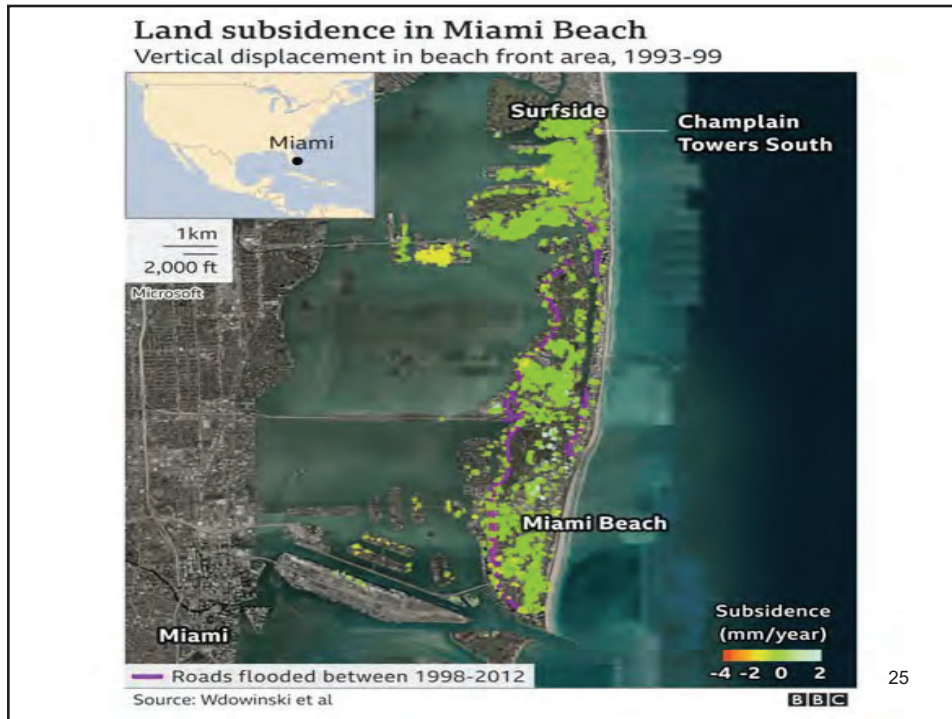
Questions are being raised about what caused a 12-storey apartment complex to collapse in Surfside, near Miami in Florida.

Experts gathering information at the scene will have to consider a range of possible causes - from structural defects to environmental influences - and whether a combination of factors may have triggered the sudden collapse of

<https://www.bbc.com/news/world-us-canada-57651025>

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## Did land movement contribute?

A study from researchers at Florida International University published last year found that the building was sinking at a rate of about two millimetres per year in the 1990s.

Such movement can cause cracking and contribute to structural problems.

Professor Shimon Wdowinski said the study did not focus on Champlain Towers South in particular, but the building stood out as one of the places that showed the most subsidence.

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It had not sunk much, he said, but as the study was more than 20 years ago it was not known whether the building had sunk further and whether this had affected its foundations.

"Maybe a point was reached where the structure couldn't hold the load and collapsed. But this is a structural problem. They are not things that I study," he told BBC Mundo, the BBC's Spanish language news service.

"What we do know is that the building that collapsed in Miami has been sinking for decades, but that alone does not explain the collapse."

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### Could new building work be a factor?

Some people believe it is possible that vibrations from the recent construction of the adjacent 18-storey tower block - Eighty Seven Park - may have caused some ground movement.

Champlain Towers South residents raised concerns in 2019 that they had felt movement and shaking during the construction work, but were told to monitor the situation.

### Are other buildings at risk of collapse?

Champlain Towers South was built on reclaimed wetland in 1981.

Most blocks along the coast, and high-rise buildings elsewhere, are built on pile foundations, using columns of concrete and steel to transfer the load of the building into the ground.

A short distance away is Champlain Towers North, built to an almost identical design.



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## Demolition ? Debris Removal?



The lot where the Champlain Towers South once was (Getty)

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## Federal Government to pay for Demo and Debris Removal

President Joe Biden, following his visit to Surfside yesterday, formally authorized the federal government on Friday to cover 100% of the cost of debris removal and emergency protective measures at the collapse site under the Public Assistance program for 30 days, beginning June 24.

Florida Division of Emergency Management Director Kevin Guthrie thanked the federal government and private-sector vendors for their support.

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## BUSINESS INSURANCE.

### Coverage 'inadequate' in Florida condo collapse: Judge

Posted On: Jul. 2, 2021 11:29 AM CST

#### Claire Wilkinson

The Surfside, Florida, condominium building that collapsed last week had \$48 million in total property and liability coverage, which will be "inadequate" to compensate everyone fully, a Miami-Dade circuit judge has said.

In an online meeting Thursday, Judge Michael Hanzman was told by attorneys for the Champlain Towers South condo association that they were aware of only \$30 million in property insurance and \$18 million in liability coverage, according to a segment posted online by the Miami Herald.

Great American Insurance Co. is the property insurer for the building.

"It looks like for the property damage claims and the injury and death claims there's going to be a total of \$48 million which will obviously be inadequate to compensate everyone fully to the extent of their harm," Judge Hanzman said.

"I don't know if there are any third-party claims. Maybe there are, maybe there aren't, but we are dealing with certainly a limited pot as far as insurers go," he said.



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## VALUATION

- **Guaranteed Replacement Cost**
  - The carrier will rebuild all common buildings and structures—guaranteed, even if materials and/or the cost of labor unexpectedly increases for whatever reason. The Board has to agree to use the RC figures provided by the carrier and any increases at renewal.
- **Extended Replacement Cost**
  - The carrier will increase the building/structure limits by up to 25% above those stated in the policy; as long as the Board agrees to use the RC figures provided by and carrier and any increases

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## Actual Claim

- During the Northern California fires in Sonoma, an entire 46 unit HOA was destroyed.
- The Board purchased GRC and also selected “Walls In including Upgrades”.
- The carrier rebuilt the entire HOA and improvements without limit !

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## Get More Building Code Coverage

One other lesson learned after the California Fires by board members who lost their homes is that it is smart financial protection to have plenty of Building Code Coverage in your insurance policy. The older the HOA the more building code coverage needed. One General Contractor I know who has over 20 years of building experience advised me that if your buildings are over 25 years of age, get about 20% of the replacement cost figure for additional monies to bring buildings up to current codes post major fire loss. So if your replacement cost number is \$3,000,000, then get \$600,000. ( $\$3,000,000 \times 20\% = \$600,000$ ). When I review and bid on HOA's I often discover this important coverage is far too low for an HOA that is over 25 years of age.

34

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## BUSINESS INSURANCE.

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## Champlain Towers South Site Approved for Estimated \$100M Sale

BY CHAVA GOURARIE JULY 15, 2021 5:57 PM

REPRINTS



SITE OF THE CHAMPLAIN TOWERS SOUTH, WHICH COLLAPSED JUNE 24, 2021.

36

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Miami-Dade Circuit Judge **Michael Hanzman**, who is overseeing the legal cases related to the building's collapse, said Wednesday that the sale should begin immediately, the *Miami Herald* [reported](#). Hanzman vetoed a suggestion to turn the site into a memorial, since that would not generate compensation for the victims.

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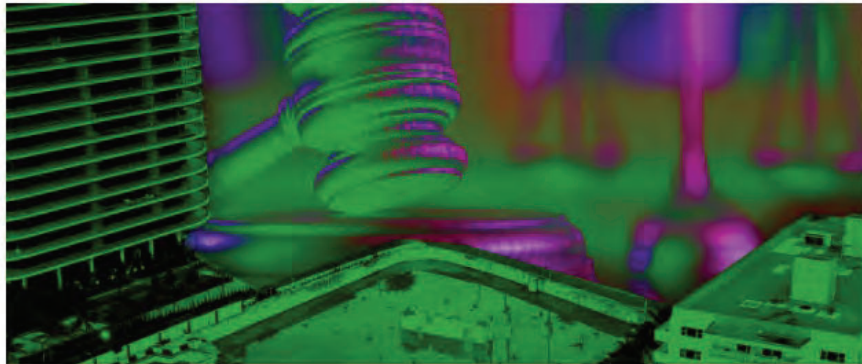
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## Dubai developer's \$120M contract for Surfside site approved, appraisal for unit owners totals \$96M

*Appraisal estimates the market value as of the day before deadly collapse*

[Miami](#) / By Lidia Dinkova and Katherine Kallergis

September 30,  
2021 03:35 PM



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The screenshot shows the ABC News website interface. At the top, there is a navigation bar with the ABC NEWS logo and links for VIDEO, LIVE, SHOWS, CORONAVIRUS, and OLYMPICS. Below the navigation bar, the main headline reads "Judge: \$150M initially for victims in Florida condo collapse". A sub-headline states, "A judge says victims and families who suffered losses in the collapse of a 12-story oceanfront Florida condominium will get a minimum of \$150 million in compensation initially". The byline identifies the authors as "By CURT ANDERSON and KELLI KENNEDY Associated Press" and includes the date "July 22, 2021, 2:29 AM" and a "5 min read" indicator. Social media sharing icons for Facebook, Twitter, and Email are visible on the right side of the article snippet.

**COMMERCIAL PROPERTY**  
CP 10 30 09 17

### CAUSES OF LOSS – SPECIAL FORM

Words and phrases that appear in quotation marks have special meaning. Refer to Section G. Definitions.

**A. Covered Causes Of Loss**  
When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

**B. Exclusions**

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
  - a. **Ordinance Or Law**  
The enforcement of or compliance with any ordinance or law:
    - (1) Regulating the construction, use or repair of any property; or
    - (2) Requiring the tearing down of any property, including the cost of removing its debris.
 This exclusion, Ordinance Or Law, applies whether the loss results from:
    - (a) An ordinance or law that is enforced even if the property has not been damaged; or
    - (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.
  - (4) Earth sinking (other than sinkhole collapse), 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.  
But if Earth Movement, as described in b.(1) through (4) above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.
  - (5) Volcanic eruption, explosion or effusion. But if volcanic eruption, explosion or effusion results in fire, building glass breakage or Volcanic Action, we will pay for the loss or damage caused by that fire, building glass breakage or Volcanic Action.  
Volcanic Action means direct loss or damage resulting from the eruption of a volcano when the loss or damage is caused by:
    - (a) Airborne volcanic blast or airborne shock waves;
    - (b) Ash, dust or particulate matter; or
    - (c) Lava flow.
 With respect to coverage for Volcanic Action as set forth in (5)(a), (5)(b) and (5)(c), all volcanic eruptions that occur

## Exclusions

**k.** Collapse, including any of the following conditions of property or any part of the property:

- (1)** An abrupt falling down or caving in;
- (2)** Loss of structural integrity, including separation of parts of the property or property in danger of falling down or caving in; or
- (3)** Any cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion as such condition relates to **(1)** or **(2)** above.

But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or damage caused by that Covered Cause of Loss.

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This exclusion, **k.**, does not apply:

- **(a)** To the extent that coverage is provided under the Additional Coverage, Collapse; or
- (b)** To collapse caused by one or more of the following:
  - **(i)** The "specified causes of loss";
  - (ii)** Breakage of building glass;
  - (iii)** Weight of rain that collects on a roof; or
  - (iv)** Weight of people or personal property.

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## “Specified Cause of Loss”

“Specified causes of loss” means fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, vandalism, leakage from fire-extinguishing equipment, sinkhole collapse, volcanic action, falling objects, weight of snow, ice or sleet, and water damage.

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- (2) To Business Income Coverage or to Extra Expense Coverage.
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.
  - b. \$2,500 for jewelry, watches, watch movements, jewels, pearls, precious and semiprecious stones, bullion, gold, silver, platinum and other precious alloys or metals. This limit does not apply to jewelry and watches worth \$100 or less per item.
  - c. \$2,500 for patterns, dies, molds and forms.
  - d. \$250 for stamps, tickets, including lottery tickets held for sale, and letters of credit.
- These special limits are part of, not in addition to, the Limit of Insurance applicable to the Covered Property.
- This limitation, C.3., does not apply to Business Income Coverage or to Extra Expense Coverage.
4. We will not pay the cost to repair any defect to a system or appliance from which water, other liquid, powder or molten material escapes. But we will pay the cost to repair or replace damaged parts of fire-extinguishing equipment if the damage:
- a. Results in discharge of any substance from an automatic fire protection system; or
  - b. Is directly caused by freezing.
- However, this limitation does not apply to Business Income Coverage or to Extra Expense Coverage.

### D. Additional Coverage – Collapse

The coverage provided under this Additional Coverage, Collapse, applies only to an abrupt collapse as described and limited in D.1. through D.7.

1. For the purpose of this Additional Coverage, Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.

2. We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:
- a. Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;
  - b. Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;
  - c. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs during the course of the construction, remodeling or renovation.
  - d. Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs after the construction, remodeling or renovation is complete, but only if the collapse is caused in part by:
    - (1) A cause of loss listed in 2.a. or 2.b.;
    - (2) One or more of the “specified causes of loss”;
    - (3) Breakage of building glass;
    - (4) Weight of people or personal property; or
    - (5) Weight of rain that collects on a roof.
3. This **Additional Coverage – Collapse** does not apply to:
- a. A building or any part of a building that is in danger of falling down or caving in;
  - b. A part of a building that is standing, even if it has separated from another part of the building; or
  - c. A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.
4. With respect to the following property:
- a. Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;

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#### **D. Additional Coverage – Collapse**

The coverage provided under this Additional Coverage, Collapse, applies only to an abrupt collapse as described and limited in **D.1.** through **D.7.**

- 1. For the purpose of this Additional Coverage, Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.

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- 2. We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:

- a. Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;

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### Months before the building's collapse, a condo official warned that damage had 'gotten significantly worse' in recent years.

Less than three months before the collapse of the Champlain Towers South condo in Surfside, Fla., the president of the condominium association warned in a letter that the damage in the building had "gotten significantly worse" since it was highlighted in a 2018 inspection.

The letter was written to residents by Jean Wodnicki, president of the association's board of directors, explaining why a list of extensive construction projects were worth a \$15 million special assessment that residents were being asked to pay.

Along with the 2018 inspection, which warned of "major structural damage," the letter, a copy of which The New York Times obtained, adds to a growing body of evidence that engineers had raised alarms about serious flaws in the building months and even years before the catastrophic building failure, which killed 12 people and left 149 unaccounted for.

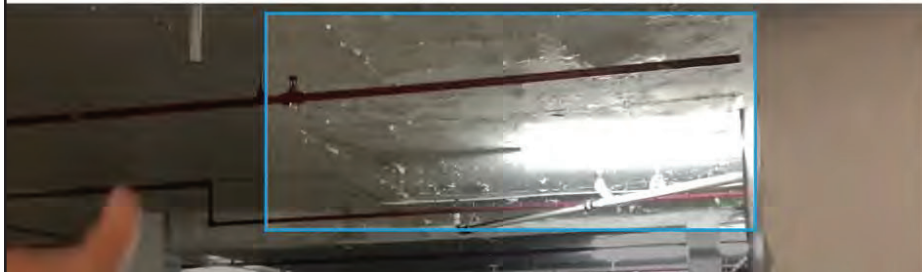
Ms. Wodnicki could not immediately be reached for comment.

That 2018 inspection warned that concrete damage would "multiply exponentially" in the coming years, Ms. Wodnicki wrote in the letter, which was earlier reported by USA Today and The Wall Street Journal. The engineer who prepared that initial report, Frank Morabito, carried out "a much more detailed survey of the property" and found signs that this acceleration was indeed already happening. "When you can visually see the concrete spalling (cracking), that means that the rebar holding it together is rusting and deteriorating beneath the surface," Ms. Wodnicki wrote.

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Water damage was visible on the garage ceiling close to where the concrete planters sat on the deck above, video recorded last summer shows. The condo association's board warned residents in October that a lack of waterproofing on large sections of the slab had "exposed the garage to water intrusion for 40 years," and said significant work was needed. "Where there is waterproofing, it has failed," residents were told. "Water has gotten underneath and caused additional damage to the concrete."



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# Condo owners in Surfside building were facing assessments for \$15 million worth of repairs



By Casey Tolan, CNN

Updated 6:56 PM ET, Tue June 29, 2021



### More from CNN



Roger Federer bit lucky survives.



She sued Why her worried.

This ad is good night's

Because it has fraud pro

Rest easy with Amex

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**(CNN)** — Condo owners in the South Florida tower that collapsed last week were facing assessments for millions of dollars worth of repairs -- with payments set to begin a week after the building's deadly fall.

The Champlain Towers South condo association approved a \$15 million assessment in April to complete repairs required under the county's 40-year recertification process, according to documents obtained by CNN.

The documents show that more than two years after association members received a report about "major structural damage" in the building, they began the assessment process to pay for necessary repairs.

Owners would have to pay assessments ranging from \$80,190 for one-bedroom units to \$336,135 for the owner of the building's four-bedroom penthouse, a document sent to the building's residents said. The deadline to pay upfront or choose paying a monthly fee lasting 15 years was July 1.

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**2.** We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:

**a.** Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;

**b.** Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;

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**2.** We will pay for direct physical loss or damage to Covered Property, caused by abrupt collapse of a building or any part of a building that is insured under this Coverage Form or that contains Covered Property insured under this Coverage Form, if such collapse is caused by one or more of the following:

**a.** Building decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;

**b.** Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an insured prior to collapse;

**c.** Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs during the course of the construction, remodeling or renovation.

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- **d.** Use of defective material or methods in construction, remodeling or renovation if the abrupt collapse occurs after the construction, remodeling or renovation is complete, but only if the collapse is caused in part by:
- (1) A cause of loss listed in **2.a.** or **2.b.**;
  - (2) One or more of the "specified causes of loss";
  - (3) Breakage of building glass;
  - (4) Weight of people or personal property;  
or
  - (5) Weight of rain that collects on a roof.

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- **3.** This **Additional Coverage – Collapse** does **not** apply to:
- a. A building or any part of a building that is in danger of falling down or caving in;
  - b. A part of a building that is standing, even if it has separated from another part of the building; or
  - c. A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

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4. With respect to the following property:
- a. Outdoor radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers;
  - b. Awnings, gutters and downspouts;
  - c. Yard fixtures;
  - d. Outdoor swimming pools;
  - e. Fences;
  - f. Piers, wharves and docks;
  - g. Beach or diving platforms or appurtenances;
  - h. Retaining walls; and
  - i. Walks, roadways and other paved surfaces;
- if an abrupt collapse is caused by a cause of loss listed in 2.a. through 2.d., we will pay for loss or damage to that property only if:
- (1) Such loss or damage is a direct result of the abrupt collapse of a building insured under this Coverage Form; and
  - (2) The property is Covered Property under this Coverage Form.

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5. If personal property abruptly falls down or caves in and such collapse is **not** the result of abrupt collapse of a building, we will pay for loss or damage to Covered Property caused by such collapse of personal property only if:

- a. The collapse of personal property was caused by a cause of loss listed in **2.a.** through **2.d.**;
- b. The personal property which collapses is inside a building; and
- c. The property which collapses is not of a kind listed in **4.**, regardless of whether that kind of property is considered to be personal property or real property.

The coverage stated in this Paragraph **5.** does not apply to personal property if marring and/or scratching is the only damage to that personal property caused by the collapse.

- 6. This Additional Coverage, Collapse, does not apply to personal property that has not abruptly fallen down or caved in, even if the personal property shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.
- 7. This Additional Coverage, Collapse, will not increase the Limits of Insurance provided in this Coverage Part.
- 8. The term Covered Cause of Loss includes the Additional Coverage, Collapse, as described and limited in **D.1.** through **D.7.**

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## Exclusions

### **b. Earth Movement**

- (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;

→ (4) Earth sinking (other than sinkhole collapse), 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.

But if Earth Movement, as described in **b.(1)** through **(4)** above, results in fire or explosion, we will pay for the loss or damage caused by that fire or explosion.

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## Definition

- a.** Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite. This cause of loss does not include:
- (1)** The cost of filling sinkholes; or
  - (2)** Sinking or collapse of land into man-made underground cavities.

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**3.** We will not pay for loss or damage caused by or resulting from any of the following, **3.a.** through **3.c.** But if an excluded cause of loss that is listed in **3.a.** through **3.c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

**a.** Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in Paragraph 1. above to produce the loss or damage.

→ **b.** Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

→ **c.** Faulty, inadequate or defective:

- (1)** Planning, zoning, development, surveying, siting;
- (2)** Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- (3)** Materials used in repair, construction, renovation or remodeling; or
- (4)** Maintenance;

of part or all of any property on or off the described premises.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

### FLORIDA CHANGES

This endorsement modifies insurance provided under the following:

#### COMMERCIAL PROPERTY COVERAGE PART

- A.** When this endorsement is attached to Standard Property Policy CP 00 99, the term Coverage Part in this endorsement is replaced by the term Policy.
- B.** The following provision applies when a Coinsurance percentage is shown in the Declarations:

Florida law states as follows:

Coinsurance contract: The rate charged in this policy is based upon the use of the coinsurance clause attached to this policy, with the consent of the insured.

- C.** The following is added:

If windstorm is a Covered Cause of Loss and loss or damage to Covered Property is caused by or results from windstorm, the following exclusion applies in:

1. Broward County;
2. Dade County;
3. Martin County;
4. Monroe County;
5. Palm Beach County; and
6. All the areas east of the west bank of the Intracoastal Waterway in the counties of:
  - a. Indian River; and
  - b. St. Lucie.

#### Windstorm Exterior Paint And Waterproofing Exclusion

We will not pay for loss or damage caused by windstorm to:

1. Paint; or
  2. Waterproofing material;
- applied to the exterior of buildings unless the building to which such loss or damage occurs also sustains other loss or damage by windstorm in the course of the same storm event. But such coverage applies only if windstorm is a Covered Cause of Loss.

When loss or damage to exterior paint or waterproofing material is excluded, we will not include the value of paint or waterproofing material to determine:

- a. The amount of the Windstorm or Hall Deductible; or
  - b. The value of Covered Property when applying the Coinsurance Condition.
- D.** The Loss Payment Condition dealing with the number of days within which we must pay for covered loss or damage is replaced by the following:

Provided you have complied with all the terms of this Coverage Part, we will pay for covered loss or damage upon the earliest of the following:

- (1) Within 20 days after we receive the sworn proof of loss and reach written agreement with you;
  - (2) Within 30 days after we receive the sworn proof of loss and:
    - (a) There is an entry of a final judgment; or
    - (b) There is a filing of an appraisal award with us; or
  - (3) Within 90 days of receiving notice of an initial, reopened or supplemental claim, unless we deny the claim during that time or factors beyond our control reasonably prevent such payment. If a portion of the claim is denied, then the 90-day time period for payment of claim relates to the portion of the claim that is not denied.
- Paragraph (3) applies only to the following:
- (a) A claim under a policy covering residential property;
  - (b) A claim for building or contents coverage if the insured structure is 10,000 square feet or less and the policy covers only locations in Florida; or

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### Catastrophic Ground Cover Collapse

We will pay for direct physical loss or damage to Covered Property caused by or resulting from catastrophic ground cover collapse, meaning geological activity that results in all of the following:

1. The abrupt collapse of the ground cover;
2. A depression in the ground cover clearly visible to the naked eye;
3. "Structural damage" to the building, including the foundation; and
4. The insured structure being condemned and ordered to be vacated by the governmental agency authorized by law to issue such an order for that structure.

However, damage consisting merely of the settling or cracking of a foundation, structure or building does not constitute loss or damage resulting from a catastrophic ground cover collapse.

The Earth Movement Exclusion and the Collapse Exclusion do not apply to coverage for Catastrophic Ground Cover Collapse.

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**B. Exclusions**

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

**a. Ordinance Or Law**

The enforcement of or compliance with any ordinance or law:

- (1) Regulating the construction, use or repair of any property; or
- (2) Requiring the tearing down of any property, including the cost of removing its debris.

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

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

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POLICY NUMBER: \_\_\_\_\_ COMMERCIAL PROPERTY  
CP 04 05 09 17

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

**ORDINANCE OR LAW COVERAGE**

This endorsement modifies insurance provided under the following:  
BUILDING AND PERSONAL PROPERTY COVERAGE FORM  
CONDOMINIUM ASSOCIATION COVERAGE FORM  
STANDARD PROPERTY POLICY

**SCHEDULE**

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

Post-Loss Ordinance Or Law Option: Yes  No

\*Do not enter a Combined Limit of Insurance if individual Limits of Insurance are selected for Coverages B and C, or if one of these Coverages is not applicable.  
Information required to complete this Schedule, if not shown above, will be shown in the Declarations. 65

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## Ordinance & Law Issues

- What percentage of the structure must be damaged ?
  - 41% - 51%
  - Discretion of Town Fathers
- What valuation method is used to determine the percentage?
  - Property Value ?
  - Replacement Cost ?
  - Tax Assessed Value ?
    - The City of Tallahassee says 50% of Property Value
    - Leon County 50% of the Assessed Value
    - Both ordinances say if Fire Marshall deems building <sup>66</sup> unsafe, then it must be torn down

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## **Miami orders residents to evacuate 8-story condo building six weeks after collapse of Champlain Towers**

By The Associated Press Updated August 10, 2021, 8:45 a.m.

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Residents of an eight-story condo building in Miami were ordered to evacuate after the building was deemed “unsafe” by city officials.

On Monday night, some six weeks after 98 people died in the collapse of the Champlain Towers South in nearby Surfside, residents of the 138-unit building lugged belongings to their vehicles, news outlets reported. They were ordered to be out by Tuesday morning.

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## 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.

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## C. Coverage D – Loss Of Use

The limit of liability for Coverage D is the total limit for the coverages in 1. Additional Living Expense, 2. Fair Rental Value and 3. Civil Authority Prohibits Use below.

### 1. Additional Living Expense

If a loss by a Peril Insured Against under this policy to covered property or the building containing the property makes the "residence premises" not fit to live in, we cover any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living.

Payment will be for the shortest time required to repair or replace the damage or, if you permanently relocate, the shortest time required for your household to settle elsewhere.

### 2. Fair Rental Value

If a loss covered under Section I makes that part of the "residence premises" rented to others or held for rental by you not fit to live in, we cover the fair rental value of such premises less any expenses that do not continue while it is not fit to live in.

Payment will be for the shortest time required to repair or replace such premises.

### 3. Civil Authority Prohibits Use

If a civil authority prohibits you from use of the "residence premises" as a result of direct damage to neighboring premises by a Peril Insured Against, we cover the loss as provided in 1. Additional Living Expense and 2. Fair Rental Value above for no more than two weeks.

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Policy No. MAC E658359 00 00  
 Renewal Of

**POLICY COMMON DECLARATIONS**

**NAMED INSURED** Champlain Towers South Condominium Association, Inc.  
**AND ADDRESS:** 8777 Collins Ave  
 Surfside, FL 33154

**IN RETURN FOR PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.**

**AGENT'S NAME AND ADDRESS:**  
 Amvins Brokerage of Florida  
 1227 S Patrick Dr  
 Ste 101  
 Satellite Beach, FL 32937

Insurance is afforded by the Company named below, a Capital Stock Corporation:  
 Great American Insurance Company

**POLICY PERIOD:** From 12/28/2020 To 12/28/2021  
 12:01 A.M. Standard Time at the address of the Named Insured

This policy consists of the following Coverage Parts for which a premium is indicated. This premium may be subject to adjustment.

	Premium
Commercial Property	\$ 33,003.00
Commercial General Liability	
Commercial Crime and Fidelity	
Commercial Inland Marine	
Commercial Equipment Breakdown	\$ 1,414.00
Commercial Auto	
Commercial Umbrella	
Florida Commercial Property Fire Assessment	\$ 33.00
Florida Property Trust Fund - Commercial	\$ 4.00
<b>Total</b>	<b>\$ 34,454.00</b>

**FORMS AND ENDORSEMENTS** applicable to all Coverage Parts and made part of this Policy at time of issue are listed on the attached Forms and Endorsements Schedule IL 88 01 (11/85).

**POLICY ALTERNATE MAILING ADDRESS:**

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**SELECT BUSINESS POLICY PLUS**

**NAMED INSURED:** Champlain Towers South Condominium Association, Inc.  
**POLICY PERIOD:** 12/28/2020 to 12/28/2021

**TOTAL PROPERTY PREMIUM:** \$ 33,003.00

**DEDUCTIBLE AMOUNTS:**

\$ 2,500 EDP Mechanical breakdown \$ 2,500 In transit  
 \$ 2,500 All other

**NOT AT A DESCRIBED PREMISES:**

Insurance is provided only for those coverages for which a Limit of Insurance has been inserted:

	Newly Acquired or Constructed Locations	At any other location	In transit, in or on any one conveyance unit
Building	\$ 500,000	\$ 50,000	\$ NOT COVERED
Business Personal Property	\$ 250,000	\$ 50,000	\$ 5,000
Business Income	\$ NOT COVERED	\$ NOT COVERED	\$ NOT COVERED
Extra Expense	\$ 10,000	\$ 10,000	\$ NOT COVERED

**DESCRIBED PREMISES:**

At the locations specified below, insurance is provided for those coverages for which a Limit of Insurance has been inserted:

Location: Building: **See SB8118** Address:

**BUILDING:** Limit \$ Valuation

**BUSINESS PERSONAL PROPERTY:** Limit \$ Valuation

**BUSINESS INCOME INCLUDING EXTRA EXPENSE:** Limit \$

**MORTGAGEHOLDER:**

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**SELECT BUSINESS POLICY  
SCHEDULE OF ADDITIONAL PROPERTY LOCATIONS**

**Described Locations:** At the locations specified below, insurance is provided only for those coverages for which a Limit of Insurance has been inserted.

Schedule of Locations						
Loc No.	Bldg. No.	Address	C	V	Coin/BI Opt	Limit of Insurance
1	1	8777 Collins Ave, Surfside, FL 33154 Condo	BLDG	RC	NONE	\$ 30,172,900
			BPP	RC	NONE	\$ 160,000
2		8777 Collins Ave, Surfside, FL 33154 Pool	BLDG	RC	NONE	\$ 85,000
3		8777 Collins Ave, Surfside, FL 33154 Whirlpool	BLDG	RC	NONE	\$ 20,000
4		8777 Collins Ave, Surfside, FL 33154 Pool Awning	BLDG	RC	NONE	\$ 8,000
5		8777 Collins Ave, Surfside, FL 33154 Pool Fence	BLDG	RC	NONE	\$ 25,000
6		8777 Collins Ave, Surfside, FL 33154 Deck Pavers	BLDG	RC	NONE	\$ 65,000
7		8777 Collins Ave, Surfside, FL 33154 Exterior Walls	BLDG	RC	NONE	\$ 150,000
8		8777 Collins Ave, Surfside, FL 33154 St Lighting	BLDG	RC	NONE	\$ 9,000
9		8777 Collins Ave, Surfside, FL 33154 Barbeques	BLDG	RC	NONE	\$ 2,000
10		8777 Collins Ave, Surfside, FL 33154 Monument	BLDG	RC	NONE	\$ 8,000

For additional locations, if any, see the Select Business Policy Schedule of Additional Property Locations attached to this Coverage Form.

All other terms and conditions of this Policy remain unchanged.

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SB 81 18 (Ed. 05/16) (Page 1 of 1)

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**CHAMPLAIN TOWERS SOUTH**

A Development Of  
Toronto Enterprises

8777 Collins Avenue  
Surfside, Florida

135 UNIT CONDOMINIUM			
UNIT	Number	sq ft	Type
A	12	2242	3-2
B	12	1794	2-2
C	23	1673	2-2
D	11	1748	2-2
E	11	1990	2-2
F	11	1728	2-2
G	22	1200	1-2
H	22	1425	1-2
I	11	1728	2-2

*Plumber's D.T. 13  
A-20-30*

TOURTOUR SURFSIDE  
 Approved  
 Approved as noted  
 Disapproved

Approximately 220,000 sq ft

74

74



## Commercial cost per square foot in the Eastern US

Using figures from **New York City, Boston, Washington DC, Philadelphia, and the Raleigh-Durham area**, we've come up with the average cost per square foot for commercial projects in the East.

On average, the cost to build a **single-story commercial office building** on the high end is \$361 per square foot. On the low end, the average cost is \$301 per square foot. For a **mid-rise building**, the numbers jump to \$719 and \$599, respectively. **High rise buildings** jump a bit more, with a high average of \$827 and a low average of \$688 per square foot.

A standard **neighborhood strip mall's** cost per square foot averages at \$371 per square foot on the high end and \$309 on the low end. A **regional mall's** top-end average is \$554 per square foot and \$461 for a bottom average.

For a **three-star hotel**, your high and low average costs per square foot are \$604 and \$489, respectively. Bump that up to a **five-star hotel**, and you're looking at \$871 per square foot on the high side and \$677 on the lower end.

When it comes to elementary, middle, and high **school construction**, the average cost per square foot on the high end is \$381, while the low end comes in at \$317.

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2021 Q2: U.S. Costs per Square Foot of Gross Floor Area 2021 - Infogram 2/28/22, 8:26 AM

U.S. Costs per Square Foot of Gross Floor Area 2021

**CUMMING**  
By Metro Voice Investor - LinkedIn

	West		Midwest		South		East	
	Atlanta	Dallas	Miami	Orlando				
<b>RESIDENTIAL</b>								
Single Family Detached-Medium Quality	\$254	\$195	\$228	\$190	\$225	\$187	\$221	\$184
Apartment/Condominium-Mid Rise	\$802	\$603	\$603	\$603	\$579	\$230	\$372	\$190
<b>COMMERCIAL / OFFICE</b>								
Single Story	\$294	\$245	\$287	\$239	\$283	\$235	\$278	\$231
Mid-Rise	\$586	\$489	\$571	\$476	\$564	\$470	\$554	\$462
High Rise	\$674	\$561	\$657	\$547	\$648	\$540	\$637	\$530
<b>RETAIL</b>								
Neighborhood Strip Center	\$305	\$255	\$295	\$246	\$291	\$242	\$286	\$238
Regional Mall	\$452	\$377	\$440	\$367	\$455	\$362	\$427	\$356
<b>HOSPITALITY / LODGING</b>								
Three-Star Hotel	\$493	\$353	\$480	\$336	\$473	\$351	\$465	\$345
Five-Star Hotel	\$708	\$480	\$685	\$464	\$676	\$455	\$664	\$447
<b>WAREHOUSE / MANUFACTURING</b>								
Warehouse-Regional Distribution	\$212	\$152	\$207	\$148	\$204	\$146	\$200	\$143
Warehouse-Light Industrial	\$236	\$168	\$230	\$164	\$227	\$162	\$223	\$159
Manufacturing-Tech Laboratory	\$589	\$491	\$575	\$478	\$566	\$472	\$556	\$464
<b>HEALTHCARE</b>								
Acute Care Facility	\$821	\$616	\$799	\$600	\$789	\$591	\$775	\$581
Medical Office Building	\$421	\$351	\$410	\$341	\$475	\$350	\$485	\$360
Specialty Clinic	\$526	\$438	\$512	\$427	\$505	\$421	\$496	\$414
<b>PRIMARY &amp; SECONDARY EDUCATION</b>								
Elementary School	\$244	\$205	\$238	\$198	\$234	\$195	\$230	\$192
Middle School	\$267	\$225	\$260	\$217	\$257	\$214	\$252	\$210
High School	\$294	\$245	\$286	\$238	\$282	\$235	\$277	\$231
<b>HIGHER EDUCATION</b>								
Academic/Classroom	\$518	\$452	\$505	\$421	\$498	\$415	\$489	\$408
Laboratory	\$716	\$597	\$698	\$581	\$688	\$573	\$676	\$563
Administration	\$536	\$447	\$522	\$435	\$515	\$430	\$506	\$423
Dormitory	\$286	\$232	\$278	\$226	\$275	\$223	\$270	\$219
<b>PUBLIC / COMMUNITY FACILITIES</b>								
Gov't Administrative Buildings	\$565	\$467	\$551	\$455	\$544	\$449	\$534	\$441
Museum/Performing Arts	\$857	\$686	\$835	\$668	\$824	\$659	\$809	\$647
Recreation/Gymnasium	\$368	\$307	\$358	\$299	\$353	\$294	\$347	\$289
Police Stations	\$535	\$446	\$521	\$434	\$514	\$429	\$505	\$421
<b>PARKING STRUCTURES</b>								
Below Grade-Multi-Level	\$339	\$314	\$335	\$311	\$335	\$309	\$331	\$307

[https://www.infogram.com/b9e5ce0c-f127-4d92-b7bf-3f108f39d265?pare...rpsights.com%2Fcosts-per-square-foot%2F&src=embed#async\\_embed](https://www.infogram.com/b9e5ce0c-f127-4d92-b7bf-3f108f39d265?pare...rpsights.com%2Fcosts-per-square-foot%2F&src=embed#async_embed) Page 1 of 2

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**HARP INC.**  
**HARP, INC - Risk Purchasing Group**

**CERTIFICATE OF COVERAGE**  
**UMBRELLA AND EXCESS LIABILITY INSURANCE**

9954-7

HARP Inc, Risk Purchasing Group Member (Certificate Holder) and Mailing Address:  
Champlain Towers South Condominium Association, Inc.  
8777 Collins Avenue MIAMI BEACH, FL 33154

Designated Location(s) and other Named Insured(s): See Schedule of Locations Form  
8777 Collins Avenue  
MIAMI BEACH, FL 33154

Coverage Period: 12/28/2020 to 12/28/2021  
12:01 a.m. Standard Time at the Mailing Address of Purchasing Group Member as stated herein.

**APPLICABLE LIMITS OF INSURANCE AND PARTICIPATING INSURERS:**

**COMBINED LIMIT OF LIABILITY:** \$15,000,000 EACH OCCURRENCE AND AGGREGATE AS APPLICABLE

**PARTICIPATING INSURANCE COMPANIES AND LIMITS:**

LEAD INSURANCE	Policy#	Limit of Insurance
Fireman's Fund Insurance	USL00656920U	\$10,000,000 Each Occurrence \$10,000,000 General Aggregate (where applicable) \$10,000,000 Products/Completed Operations
<b>EXCESS UMBRELLA INSURANCE</b>		
DBE Insurance	HRP2620	\$5,000,000 Each Occurrence and Aggregate Excess of \$10,000,000
		Each Occurrence and Aggregate Excess of

Harp, Inc. (Harp) a Purchasing Group formed in Delaware pursuant to the Liability Risk Retention of 1966 (as amended) (15 U.S.C. 3910 et. seq.) and Delaware Law, in connection with its risk purchasing group activities, Harp has appointed PG Administrators LLC (PG) to administer certain risk purchasing group operations of Harp and PG has paid an administration fee by for such services. Trivedi - Capacity Associates LLC (Trivedi) is the insurance agent through which PG currently purchases the insurance coverage for Harp's members and is an affiliate of PG.

ISSUE DATE: 12/28/2020      AUTHORIZED SIGNATURE: 

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**Schedule Of Underlying Insurance**

For the insured shown above, and subject to all the terms and conditions of Coverage-Excess Follow-Form Coverage A, this insurance follows form on to those coverages:

- which are indicated below by an X and
- for which policies of underlying insurance in at least the limits shown have been issued to and remain in force for each insured.

**Commercial General Liability:**  
\$1,000,000 Per Occurrence  
\$2,000,000 General Aggregate (per location if more than one location)  
\$1,000,000 Products/Completed Operations Aggregate  
\$1,000,000 Personal & Advertising Injury

Carrier: James River Insurance Company  
Policy No: As Assigned by Carrier  
Policy Period: 12/28/2020 to 12/28/2021

**Employee Benefits Liability:**      Claims Made  
\$1,000,000 Per Claim      Retrospective Date:  
\$1,000,000 Aggregate      \*Note retrospective date is the same as the policy inception date.

Carrier:  
Policy No: Occurrence  
Policy Period:

**Liquor Liability:**  
\$1,000,000 Each Common Cause  
\$1,000,000 Aggregate

Carrier:  
Policy No:

**Commercial Automobile Liability:**  
\$1,000,000 Combined Single Limit

Carrier: James River Insurance Company  
Policy No: As Assigned by Carrier  
Policy Period: 12/28/2020 To 12/28/2021

**Employers Liability:**  
\$200,000 Each Accident  
\$500,000 Disease Policy Limit  
\$500,000 Disease Each Employee

Carrier: CNA  
Policy No: As Assigned by Carrier

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Garage Keeper Legal Liability  
\$1,000,000 Each Occurrence  
\$1,000,000 Aggregate

Carrier:  
Policy No:

Directors & Officers (Condo/Co-Op)  
\$1,000,000 Each Claim  
\$1,000,000 Aggregate Per Association (Defense in addition to the limit)

Carrier: Philadelphia  
Policy No: As Assigned by Carrier

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CHAMTOZ      DP-10: MS  
DATE REVISED: 01/04/2021

### ACORD CERTIFICATE OF LIABILITY INSURANCE

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURERS, AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

**IMPORTANT:** If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

<b>PRODUCER</b> Champlain Towers South 2900 RW 148th Avenue Miramar, FL 33027-6602 Peter C. Catala	<b>AGENT</b> Peter C. Catala Phone: 954-883-2900      Fax: 954-517-7400 Email: <a href="mailto:pcatala@champlaintowersouth.com">pcatala@champlaintowersouth.com</a> Address:
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<b>INSURED</b> Champlain Towers South (Condominium Association, Inc.) Surfside, FL 33154	<b>INSURERS</b> INSURER A: James River Ins. Company      NAIC # 12283 INSURER B: Philadelphia Indemnity Ins. Co.      18058 INSURER C: INSURER D: INSURER E:
--	---

**COVERAGES**      **CERTIFICATE NUMBER:**      **REVISION NUMBER:**

TYPE OF INSURANCE	INSURED	POLICY NUMBER	ISSUANCE DATE	EXPIRATION DATE	COVERAGE	AMOUNT
A Commercial General Liability	Champlain Towers South	000885321	12/28/2020	12/28/2021	Auto Damage	1,000,000
					Other	190,000
B Directors & Officers	Champlain Towers South	PCAP190330201	12/28/2020	12/28/2021	Directors & Officers	1,000,000
					Errors & Omissions	2,000,000
					Products - Completed Operations	2,000,000
					Professional Services	2,000,000

**DEFINITIONS OF OPERATIONS (LOCATIONS, VEHICLES, FACILITIES):** (Additional Branches & Facilities may be added if there is space in column)

136 Unit Condominium Association

<b>CERTIFICATE HOLDER:</b> Champlain Towers South Proof of Insurance Only 2777 Collins Avenue Surfside, FL 33154	<b>PROOF#1</b> SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS. AUTHORIZED REPRESENTATIVE: 
--	--

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## Property Insurance Coverage LAW BLOG

THE POLICYHOLDER'S ADVOCATE®

### Great American Agrees to Pay Champlain Towers South Property Insurance Claim

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By Chip Merlin on July 20, 2021

Great American Insurance Company attorney **Bill Wilson** of the Mound Cotton law firm announced at a hearing in the Champlain Towers South Case that the insurer would

<https://www.propertyinsurancecoveragelaw.com/2021/07/articles/insurance-claim-and-more-to-be-discussed-on-tuesday-2-with-chip-merlin/> Page 2 of 7

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Great American Agrees to Pay Champlain Towers South Property Insur... Merlin - Property Insurance Coverage Law Blog - Merlin Law Group 10/6/21, 10:50 AM

tender its full policy limits and pay additional coverages totaling more than 30 million dollars. The catastrophe was on June 24 and the claims decision was announced only 22 days after the occurrence. While I have often criticized insurance claims executives for taking too long to investigate and come to a claims determination, Great American deserves a *Bravo* and resounding accolades for putting this claims determination to rest.

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# U.S. Treasury Department set to reimburse Surfside residents for \$750,000 cash found in collapse

WLRN 91.3 FM | By Jay Weaver  
Published December 2, 2021 at 12:03 PM EST



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An estimated \$750,000 in randomly scattered cash that was recovered in the rubble of the Surfside condo collapse will soon be driven in an armored truck to Washington, D.C., and converted into a lump-sum payment – courtesy of the Treasury Department for the benefit of residents who lost the money in the summer tragedy.

That promising news was delivered Wednesday by the receiver for the Champlain Towers South condo association to a Miami-Dade Circuit judge who is overseeing legal matters, including a class-action lawsuit, in the aftermath of the 136-unit building collapse in which nearly 100 people died.

Receiver Michael Goldberg said he was coordinating a plan with the Secret Service to haul the badly damaged currency to the nation's capital. The Treasury Department has agreed to clean up the cash, count it and then wire the reimbursement check to him, so he can distribute the money to the Champlain condo residents.

*Read more at our news partner [the Miami Herald](#).*

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## Serving on a Condo Board

- Evaluate the Board before agreeing to be a member
- Make sure they carry adequate D&O cover, and suggest stand alone Side A cover for board members added protection
- Obtain current appraisals
- Recommend CGL and Umbrella/Excess liability. Always show additional limits are available
- Evaluate the Association's financial condition, repair records, and escrow funding

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## Lawsuits Filed Within Days of Collapse

 Several lawsuits have been filed against the association naming the board and individual board members as defendants. The first lawsuit, a class action suit filed by Manuel Drezner, alleges that the condo association "disregarded the rights of Plaintiff and Class members by intentionally, willfully, recklessly, or negligently doing the following: failing to take adequate and reasonable measures to ensure the safety and protection of its residents and their property, failing to disclose to its residents and visitors that it did not have adequate safety measures in place to safeguard occupants of Champlain Towers South, failing to take available steps to prevent the catastrophic collapse of the building, and failing to monitor the building and activities that led to the collapse of the building, among other things."

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IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND  
FOR MIAMI-DADE COUNTY, FLORIDA

ROSA ANA QUESADA,

Plaintiff,

CASE NO.

LIMITED FUND CLASS ACTION  
COMPLAINT

v.

CHAMPLAIN TOWERS SOUTH  
CONDOMINIUM ASSOCIATION, INC.,  
GREAT AMERICAN INSURANCE  
COMPANY, JAMES RIVER INSURANCE  
COMPANY, PHILADELPHIA INDEMNITY  
INSURANCE COMPANY, FIREMAN'S FUND  
INSURANCE COMPANY, and QBE  
INSURANCE CORPORATION,

Defendants.

**LIMITED FUND CLASS ACTION COMPLAINT**

Plaintiff, ROSA ANA QUESADA ("Plaintiff"), sues Defendants, CHAMPLAIN TOWERS SOUTH CONDOMINIUM ASSOCIATION, INC. (the "Association"), GREAT AMERICAN INSURANCE COMPANY ("GAIC"), JAMES RIVER INSURANCE COMPANY ("JRJC"), PHILADELPHIA INDEMNITY INSURANCE COMPANY ("PIC"), and FIREMAN'S FUND INSURANCE COMPANY ("FFIC") (collectively, "Defendants"), and states as follows:

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**HOA Breach of Fiduciary Duty**

The HOA also has a duty to act in the best interests of their residents. Such obligation is called fiduciary liability. The fiduciary duties of HOA Board members are defined by individual state corporation law. This fiduciary duty applies to HOAs even though they are typically nonprofit corporations and HOA Board members serve as volunteers. In addition to the duty of care discussed above HOA Board members owe the duty of loyalty and the duty to act within the scope of their authority.

**Duty of Care** – Board members have an obligation to make informed decisions. Depending on the matter before the Board, members may be required to do extensive research or to consult with lawyers, engineers, architects, geologists, or other experts and consultants. Board members also must generally be familiar with the HOA By-laws, CC&Rs and applicable state statutes. Board members always must act in a prudent and reasonable manner, use sound business judgment and avoid uninformed or impulsive decisions.

**Duty of Loyalty** – Board members must act in good faith, fairly and for the benefit of the HOA as a whole. Board members must not make decisions based on personal interest or potential for gain. Board members should also avoid any actual or perceived conflict of interest.

**Duty to Act** – Although Board members must perform all obligated duties, they must be careful not to make decisions or act on matters where the authority to do so does not exist. The authority of the Board comes solely from its obligations under state laws, and any authority granted to it in the Association's governing documents.

→ The Champlain Towers South Condominium Association was the first to be named in a lawsuit over the collapse. Filed less than 24 hours after it occurred, the \$5 million class-action suit claims the HOA failed to "properly protect the lives and property" of residents by not implementing needed repairs. It has since been revealed that in an independent budget review prepared for the association in 2020, the HOA was considered critically underfunded for necessary structural repairs and had just 6.9% of the funds recommended to make repairs and stay financially secure. This underfunding of reserves most commonly occurs when the needed repairs are so costly that even a special assessment cannot be imposed on the HOA members because it is deemed to be unaffordable. 88

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What are the lessons to be learned from the Champlain Towers collapse and how can the HOA's Board of Directors minimize the risk building damage, loss of life and of lawsuits?

### **Inspections**

Inspections by qualified engineers can investigate hidden portions of a building to identify hidden damage in several ways. "Non-destructive" testing (NDT) can be used to determine the location and extent of damage—particularly rot or corrosion. Infrared cameras can be used to determine the extent of moisture intrusion in certain types of buildings. Another method involves use of a borescope – a small camera inserted through a hole in the outer skin. For concrete and steel buildings which often require more sophisticated methods of detecting internal damage, ground penetrating radar can assess corrosion in rebar or beams covered in concrete.

"Destructive" testing, where portions of the building are removed or opened, can be used to obtain a direct view of framing, shear walls, and waterproofing. Other hidden decay, such as corrosion of metal components may also become apparent during routine repair of other elements. Concrete can be cored to reach decay or corrosion.

To maximize effectiveness, inspections must start early following building construction when water intrusion leading to deterioration can be identified and repaired economically. However, inspections can be lifesaving even several years later.

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### **Structural Study**

When there is concern about the structural integrity of the building, a structural study, conducted by a licensed engineer, can identify any immediate and potential future problems. In some areas of the country, periodic building recertification is required by state or local government. For maximum effectiveness, the recertification process should be started as soon as there is a concern, rather than waiting until the recertification deadline.

### **Maintenance**

Maintenance or repair recommendations, even if relatively minor, should be addressed as soon as they are presented. As evident with the Champlain Towers, putting off repairs until they are "convenient" or even "affordable" can lead to serious trouble. Building maintenance should be scheduled and ongoing – not performed occasionally when a problem is brought to the Board's attention.

### **Insurance**

The Board should make sure the adequate property and liability insurance limits, as required by the Association's governing documents, is maintained. In many cases, the documents only specify minimum insurance requirements. If those limits are unrealistic, additional coverage should be purchased in order to avoid the potential

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for lawsuits. If the Board feels that the D&O policy limits are insufficient protection from lawsuits, consideration should be given to buying higher limits, or paying for additional "Side A" coverage for the directors.

**Claim Against the Architect or Builder**

Where inspections or structural studies disclose a major problem with design or construction of the building, a claim should be made against the architect or the builder as soon as the problem is identified. Waiting to do this may impair the Board's ability to pursue the claim.

**Communicate**

Even if the Board is convinced to periodically inspect and perform necessary repairs, the effort may fail without support of the Association members, particularly where the cost of repairs is substantial and exceeds reserves. Accordingly, members have to be informed of inspection plans and their cost. But more important, members have to understand that with hidden damage, disaster may be lurking. Having meetings where the experts who do the inspections explain the process and their findings opens up lines of communication and instills confidence, particularly where the inspections are conducted to comply with statutes or good industry practice. If the cost of needed repairs requires a special assessment, it is essential to make the members understand that the assessment is necessary to avoid compromising the safety of the residents.

When a special assessment is not possible or affordable for the member, a bank loan may be the answer. The ability to get a loan, however, is of course dependent on the creditworthiness of the HOA. While the present owners may only have a short-term interest in the condition of the building, the Association has a long-term interest and must maintain the structure properly according to law and most governing documents. Because these two interests conflict, the Board of Directors may be tempted to keep expenses low and defer inspections and maintenance. However, a Board should not sacrifice the interests of owners who will come later to the interests of current members.

**Conclusion**

Like a scientist that studies creatures that swarm and multiply in a drop of water, the horrific Champlain Towers disaster has focused a microscope on the acts and omission of HOA board members both past and present. While it may be appropriate to hold such positions accountable for decades of deferred maintenance, kicking the can down the road for future boards to solve is not the solution. It is the homeowners that are collectively and ultimately responsible for the HOA board's performance.

As such a much more vocal and active association body is needed to ensure that the board is following at minimum the suggestion offered in this paper. In addition, legislative reforms regarding periodic safety inspections, reserve funding

requirements and local ordinances may be needed to ensure that the board and association members are held to a higher degree of care regarding the collective interests of all owners.

Gary W. Griffin, ARM is President of Griffin Communications, Inc. and G2 Risk Consulting, publishers of risk and insurance reference materials and independent risk management consultants located in Southern California. Gary may be reached at 949.331.7522 or Gary@G2risk.com.

Alan P. Schreiber, ARM is a principal consultant with Integrated Risk Management, a Culver City-based risk management and insurance consulting firm. Alan may be reached at 310.559.7032 or integratedrisk@ca.rr.com.

### **FC&S Editors**

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## **Breach of Fiduciary Duty**

- **Duty of Care**
  - Board members have a duty to make informed decisions. This may require them to conduct research or consult with professionals, to avoid uninformed or impulsive decisions
- **Duty of Loyalty**
  - Board members must act in good faith and the best interest of its member
- **Duty to Act**
  - Board members must act in line with the authority granted them in the By-Laws

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## Champlain Towers South Association Lawsuit

- Filed within 24 hours of claim
- Board failed to protect the lives and property of the residents, by not implementing timely repairs
- Independent budget review shows CTS was critically underfunded for necessary structural repairs (6.9% of recommended funds)

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## Solutions

- Florida is one of the most strict states in the nation– it has vigorous 40 year reinspection requirement of hi-rise buildings
- Board should get a professional appraisal to determine adequate limits/values
- Regular Inspections by Engineers
- Scheduled Maintenance and Repairs
- Adequate Property and Liability Insurance
- In the event of failures/problems, the filing of claims against the builder / architect
- Communication and cooperation of members
- Bank loans if needed
- Conflict of Interest between Board & Members

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## What Does D&O Cover

- Any actual or alleged act, error or omission, misstatement, misleading statement, or breach of fiduciary duty or other duty by an Insured Person.
- Making decisions to run and manage a business

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## D & O for Non-Profits

### TOP TEN Association D&O Claims

1. Failure to adhere to the By-Laws
2. Failure to properly notice Elections
3. Failure to properly count votes / proxies
4. Improper removal of Board Members
5. Challenges to Assessments
6. Breach of Fiduciary Duty
7. Failure to maintain Common Areas
8. Failure to properly disburse funds
9. Defamation of Board Member
10. Challenges by Members regarding Board Power

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## Coverage under your HO for Serving on a Board ?

- In short, maybe... but, probably not what you really need and not proper coverage
- Your HO policy only applies to claims for BI, PD, and PI; not wrongful acts or bad decisions
- Many Board claims are for financial damages or non-monetary damages
- HO policy has a business exclusion (Trade, Profession or Occupation) with a volunteer exception for no remuneration
- HO policy has a “Professional Services” exclusions (although your service on the Board may not be deemed professional, if you are involved in placing, consulting, or advising on the Board’s Insurance matters, that very well may be!)
- High End HO Endorsements / Stand Alone Excess Side A policies 99

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## Condo, Coops, Associations- Directors and Officers Liability (BP 17 24)

- The liability coverage section of the businessowners policy applies only to claims alleging bodily injury, property damage, or personal and advertising injury. In contrast, service on a boards of directors typically produces liability for financial injury. This exposure to liability for financial injury that faces those serving as directors and officers of condominium, co-operative building, and community associations would otherwise remain uncovered by the businessowners policy, absent the coverage afforded by BP 17 24.
- The endorsement adds a form of errors and omissions liability insurance for those entrusted with managing a condominium or co-op association. Often, the kinds of claims made against such persons involve misuse of funds or business mistakes committed when managing such properties. In addition, claims are frequently made against condominium/co-op directors/officers, in which it is alleged that they committed an employment practices violation, including (but not limited to) wrongful termination, sexual harassment, discrimination, or retaliation.

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## Condo, Coops, Associations- Directors and Officers Liability (BP 17 24)

- **Following are a handful of representative claim scenarios to which this endorsement would apply.**
- **Miscalculation of reserve fund.** A condominium association maintains a reserve fund that is earmarked for performing routine, periodic maintenance. However, 5 years after the condominium is built, the directors and officers discover significant underfunding, thereby creating a \$500,000 shortfall. This discovery necessitates that each of the condominium owners be assessed an emergency \$10,000 fee. As a result of the miscalculation, the owners sue the association and its directors and officers.
- **Negligent employee supervision.** The bookkeeper for the condominium embezzles \$250,000 from the reserve fund. The directors and officers are sued by owners of condominium units, alleging failure to prevent and detect the embezzlement.
- **Discrimination** (against a nonemployee). A Hispanic couple is denied the opportunity to purchase a condominium unit in an association, despite the fact that they can easily afford both the price and monthly maintenance fee. As a consequence of what appears to be an obvious case of discrimination, the couple sues the association and its directors and officers.
- **Wrongful termination.** An employee of the condominium association is terminated by the manager of the association, despite receiving favorable performance reviews for the previous 2 years. Nor had she ever received any prior notification that her performance had been unsatisfactory. As a result, she files a wrongful termination claim against the manager, the condominium association, and against its directors and officers.
- **Failure to perform routine maintenance.** The directors and officers fail to replace the roof of the building, which is 20 years old. (The manufacturer of the roofing material suggests replacing it every 15 years.) As a consequence of their inaction, all units in the top floor of the building suffer heavy water damage during a rainstorm.
- **Misinterpretation of zoning laws.** The directors and officers of a condominium association propose that it build a club house on land owned by the association, a resolution that is approved by the association's unit owners. Three months following the start of construction and after \$350,000 has been spent, the local building inspector advises the directors and officers that the location of the club house violates the local zoning ordinance. Given the directors' and officers' misinterpretation of the applicable zoning laws, the owners bring suit against them.

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## D & O Cover for Associations Presents Challenges

By Sherry Branson, Kevin Davis Insurance

Insurance Advocate

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- Directors and Officers Liability claims across the board have increased in the past several years. Common claims which Community Associations are facing are Breach of Fiduciary Duty, Breach of Contract, Violation of Covenants, Conditions, and Restrictions, and Discrimination.
- Having coverage that will protect and prepare an association for multiple scenarios is very important.
- Here are some examples of Directors and Officers Liability Insurance claims you can share with Community Association Property Managers and Board Members as you help them understand the importance of Directors and Officers Liability.

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## Breach of Contract

- Plaintiff seeking \$150,000 for fulfillment of contract.
- Defense Costs: \$15k An Association hires a company to maintain the grounds for a three year term. After the first year of the contract, the board is not happy with the foliage selection and fires the grounds company. Grounds company files suit against the Association for fulfillment of contract.

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## Violation of Covenants, Conditions & Restrictions:

- The Association By-Laws have several restrictions regarding the color schemes of homes. An owner is building a home and wants to paint it brown. The Association approves.
- The owner subsequently decides to paint the house pink and they don't notify the Association.
- The Association notifies the owner that the color was not approved and the owners sue for arbitrary, discriminatory treatment since they believe that other homes in the neighborhood are not on the approved color list, also.

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## Breach of Fiduciary Duty

- \$280,000 Defense Costs. A condo association was sued by a unit owner over parking spaces. The owner filed a lawsuit against the board of directors at his condo association alleging they breached their fiduciary duty in that they violated the condominium act and local parking regulations by creating illegal parking spaces.
- Specifically, the plaintiff alleged that the defendants knowingly and willfully violated the condominium act by allowing parking spaces to be auctioned off resulting in non-unit owners occupying portions of the common parking garage to the exclusion of all other unit owners. The condo owner sued the board of directors in an effort to force the association to rescind the sale of the spaces, pay for punitive damages and attorney's fees.

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## Election Dispute

- Election Dispute: \$660,000 in Defense Costs.
- Following an initial board of director's election, a dispute arose concerning the validity of that election. The association held another election to attempt to fix the dispute and that only caused more problems as the originally elected board members refused to relinquish their posts to the newly elected board members. The association had to sue the board members in an effort to determine which set of board members should be able to keep their posts.

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## Wrongful Termination

- Wrongful Termination: \$550,000 Settlement
- \$170,000 in Defense Costs. A 74-year-old condo association employee filed a wrongful termination claim against an association, claiming he was wrongfully terminated as a result of his reporting dangerous working conditions to OSHA. The employee also claimed he wasn't properly paid minimum wage and overtime wages.

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## Discrimination

- \$100,000 Settlement-\$ 140,000 in Defense Costs A complaint was filed by a prospective buyer against a Condo Association with the Department of Housing and Urban Development (“HUD”) alleging that the prospective buyers’ application to purchase a unit within the Association was denied for discriminatory reasons.
- Specifically, the buyer alleged the Association President discriminated against him by denying his application based on his age, national origin, and familial status. The HUD commission issued a finding of probable cause. During that time, the Board allowed the prospective buyer to purchase the exact unit they had initially sought.
- Despite this, the buyer filed a lawsuit against the Association alleging discrimination and included damages representing the difference of the unit purchase price during the time of the disputed application approval process, attorney fees, compensatory and punitive damages.

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## Exclusions

- Another extremely important point to bring to the attention of Board Members and Property Managers at Community Associations is for them to be aware of what is excluded in their current Directors and Officers Liability policy.
- Many policies currently available exclude breach of contract, discrimination, employment issues and architectural issues, so the old saying BUYER BEWARE!
- It is very important when considering a Directors and Officers Liability policy and what is NOT covered in the policy.

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**Non-Profit Directors and Officers Liability:**

- Defense costs are in addition to the limit of liability
- Coverage for defense costs for any actual or alleged breach of contract agreements, except breach of employment contract claims - \$25,000
- Coverage available for breach of employee contract claims
- Primary limits up to \$10,000,000 with excess limits available
- Outside Directorship Coverage
- 5 part policy, including D&O, Employment Practices Liability, Fiduciary Liability, Workplace Violence, and Internet Liability



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Wrap<sup>+</sup>

Community Association Management Liability Coverage

**THIS IS A CLAIMS-MADE AND REPORTED POLICY WITH DEFENSE EXPENSES INCLUDED IN THE LIMIT OF LIABILITY.**

**PLEASE READ THE POLICY CAREFULLY.**

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## VII. NOTICE/DATE OF CLAIM/INTERRELATED CLAIM CLAUSE/ SWORN PROOF OF LOSS

1. If, during the **Policy Period** or any Extended Reporting Period, if applicable, any **Claim** is first made against the **Named Entity Insureds**, the **Named Entity Insureds** shall, as a condition precedent to the obligations of the Insurer under this Policy, give a written notice to the Insurer as soon as reasonably possible.

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## XI. APPLICATION

The **Named Entity Insureds** represent and acknowledge that the statements contained in the **Application** are true, are the basis of this Policy and are to be considered as incorporated into and constituting a part of this Policy, and shall be deemed material to the acceptance of this risk or the hazard assumed by the Insurer under this Policy. This Policy is issued in reliance upon the truth of such representations.

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## Potential D&O Issues / Exclusions

- BI/PD exclusion
- Failure to obtain maintain insurance
- Malicious, fraudulent, criminal acts
- Willful violation of statute
- Construction defects
- Insured vs insured
- Violation of construction related inspections/maintenance
  
- A&E policy limits =- \$1-\$2 mil
- Contractual limitation of liability
- Statute of Repose

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## Marbella Condominium Assoc.

- MCA hired a contractor to install hurricane impact windows
- The windows installed were not compliant with city requirements
- Two unit owners sued MCA, the contractor, and the Association's president individually
- One of the unit owners was previously the president of MCA
- MCA tendered to its D&O carrier, who denied coverage based upon the insured vs insured exclusion.
- The D&O policy defines an "insured" as any past, present or future director, officer, employee, committee member..."
- No coverage. There was an exception if the person had not served for more than 3 years – it was not applicable<sup>16</sup>

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## HISTORY OF SHARED OWNERSHIP

- Babylonians 2000 BC
- Commonwealth of Puerto Rico – 1958
  - Arose out of housing shortage, high cost of real estate, land shortage
  - First Horizontal Property Act – sub-divides the space occupied by a building into horizontal “strata” or layers
  - Beginning of U.S. Condo law
- State of Utah - 1960
- State of Hawaii – 1961
- State of Florida – 2009 update

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What 5 States account for more than 35% of all Condo Associations in the U.S. ?

CA, FL, LA, NJ and TX

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# Hawaii

- *35% of all housing in Hawaii are Condominiums*

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File:Marco Polo condo fire on July 14, 2017.jpg

File **Talk**

Language



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## Marco Polo condo fire

The **Marco Polo condo fire** was a **high-rise fire** that occurred at 2:17pm on July 14, 2017 in the 36-story Marco Polo condominium building at 2333 Kapiolani Boulevard in the McCully-*Mō'ili'ili* neighborhood of Honolulu, Hawaii.<sup>[5]</sup> 4 people were killed, and 13 others (including 1 firefighter) were injured.<sup>[2][6]</sup> Over 200 units were damaged or destroyed<sup>[8]</sup> giving the destruction of the building at more than \$100 million.<sup>[4]</sup> Additionally, concern about the abatement of **asbestos**, which was built into the Marco Polo structure, is under investigation by the state of Hawai'i's Department of Health and Department of Labor's workplace safety division.<sup>[7][8][9][10][11]</sup>

### ■ Building history

The Marco Polo was completed in 1971.<sup>[5]</sup> A previous fire in 2013 caused \$1.1 million in property damage to two apartments, but no injuries were reported.<sup>[6][12]</sup>

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Honolulu

## Four Years After Deadly Fire, Many Honolulu High-Rises Still Lack Sprinklers

Property owners say the cost of retrofitting older buildings with sprinklers and other fire safety improvements could bankrupt them.



By Cassie Ordonio / August 16, 2021  
 Reading time: 6 minutes.



Honolulu has tried tax credits and waiving city permit fees, but many high-rise condominium owners still struggle to comply with strict fire safety rules four years after the deadly Marco Polo blaze.

The July 2017 fire, which killed four people, prompted a law to be passed the next year requiring older buildings over 10 stories tall to install automatic sprinkler systems or pass a point-based system measuring other safety features such as smoke detectors, alarm systems and concrete walls.

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In an indication of the extent of failure to comply, the 2018 law applies to 324 high-rise buildings without sprinklers, according to the Honolulu Fire Department.

### Failure To Comply

Since the Marco Polo fire, there have been 239 high-rise fires and 79.4% of the buildings that burned did not have sprinklers, according to HFD.

In the latest incentive effort, City Councilwoman Carol Fukunaga introduced a bill on Aug. 5 that would give individual high-rise condo owners property tax breaks in exchange for making the improvements. If the bill becomes law, it will go into effect on July 1, 2023.

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## Condominium

A unique form of property ownership wherein the interest of a purchaser includes:

- 1) The air space in the individual unit; [not just a box of air]
- 2) Certain property attached to the building within the unfinished perimeter walls, floors, and ceiling;
- 3) an undivided interest with all other unit-owners in the common elements
- 4) The type of individual ownership is usually fee simple. (HO-6 / Coverage "A" Building)

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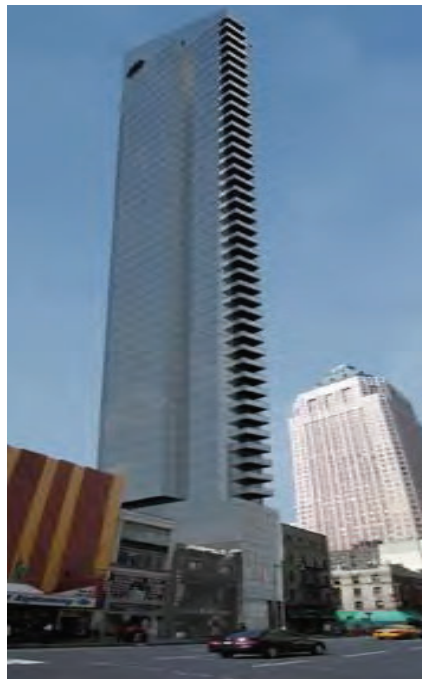
124

# Condominium



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Condominium  
8<sup>th</sup> Avenue  
New York City



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# Condominium



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## Condominium – How many Units do you need ?



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## Condominium- Commercial



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## Condominium- Comm'l/Resdt'l



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# Trump Tower

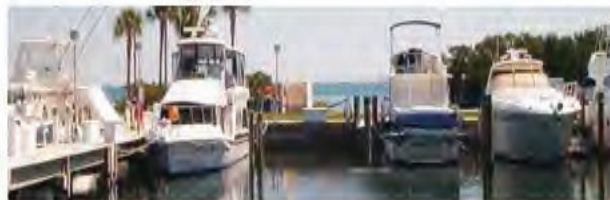
721 Fifth Ave, NYC

- Condominium
- Mixed Occupancy
- Commercial
- Retail
- Residential



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# Dockominiums



**We Sell Homes for Boats**

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**Hop aboard the Floating Condominium Community**

Updated: Friday, 25 Mar 2011, 11:00 AM CDT  
Published : Friday, 25 Mar 2011, 11:00 AM CDT

**River Cities Launches Model Sales Boat for Floating Condominium Community.**

Wouldn't it be nice to live in a condo on the water? Soon, you may be able to! "The Marquette" is a proposed 180 condo unit vessel expected to hit the water in 2012, that would be the first of its kind.

....

The boat will migrate with the seasons and travel year-round in the U.S. on a 10,700 mile cruise route of navigable rivers and Intracoastal Waterways. The waterways link 21 states in a large area from Pittsburgh to Muskogee and St. Paul to Port Isabel. The Marquette will be visiting Pensacola every year so that its residents may enjoy the cultural and recreational opportunities. The docking site will be at the Palafox Pier.

.....

Residents of the Marquette can choose from either full-time, half-time or 2 month cruising options. Prices range from \$55,000 to \$1,800,000

.....

The Marquette will offer amenities such as two restaurants, two lounges, a deli, grocery store, theaters, pools and hot tubs, fitness center, walking areas, an 18 hole chipping / putting golf course, watercraft and fishing equipment rental, health spa, and beauty and hair salon. In addition, a concierge service will be available to arrange on-shore excursions for residents. A fleet of buses, cars, mopeds and bikes will be available for residents shore transportation

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**THE MARQUETTE**

This River City will be on the move all year, cruising the northern rivers in the summer and the southern rivers and Intracoastal Waterways in the winter when weather conditions are most pleasant.



*The Marquette passing the Gateway Arch in St Louis, MO.*

With a contiguous series of 5,500 miles of rivers and 1,100 miles of Intracoastal Waterways, the United States has an extensive navigable waterway system. All of this will be at your doorstep when you make the Marquette your home.

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## “Condop”

- “Coop within a Condo”

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## Benefits of Shared Ownership

- Convenience –
  - Located near stores / shopping areas
  - Little or no outside maintenance
  - Nearby to public transportation / highways
  - Local School systems, hospitals, public services
- Economics –
  - Sharing of common expenses with other unit-owners
  - Less expensive than 1-2 family dwelling
  - Economies of Scale / Purchasing power
- Security –
  - Private security services
  - Other families nearby
  - Gated communities
  - Volunteer community patrol

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## Benefits of Shared Ownership

- Social –
  - Common community atmosphere
  - Opportunity to join with others
  - Activities / Trips
  - Clubhouse / Restaurant
- Recreational –
  - Golf
  - Skiing
  - Swimming
  - Beachfront / Beach access
  - Vacation areas

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## UNDERSTANDING CONDOMINIUM OWNERSHIP

- Condo Meaning / Origin
  - “Joint sovereignty or ownership”
  - “Together for a common benefit”
- What did I buy ? / How do I protect myself ?
  - Most people are very confused when it comes to Condominium Ownership.
  - No one has explained how an Association operates or the responsibilities.

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## UNDERSTANDING CONDOMINIUM OWNERSHIP

- Condominium
  - **Private ownership of a specific unit, coupled with the undivided joint ownership of common elements of the building and grounds.**
  
  - Deed
    - Fee Simple
    - Other types

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## UNDERSTANDING CONDOMINIUM OWNERSHIP

- Condominium Association
  - An organization composed of ALL unit owners which shares ownership of the common areas and the expenses of maintaining the condominium.
  
- Unit-Owner
  - The owner of a specific unit in the condominium, and the co-owner of an undivided interest in common elements.
  
- Board of Directors
  - Individual members of the condominium association, elected by the members of the association, to administer the association in accordance with its bylaws.

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# Mortgagee

- Mortgagee
  - A mortgage is a method of using property (real or personal) as security for the payment of a debt.
- Mortgagee Issues
  - Overlending ?
- Unit Selling Cost.....\$ 250,000
- Mortgage Amount...(80%)...\$ 200,000
- Equity.....\$ 50,000
- Total number of units..... 50
- Square Footage / Unit..... 1200
- RC per Square Foot..... \$125
- Total Replacement Cost.....\$ 7,500,000 \*
- (\$6,000,000 @ 80% Coins)
- Selling Price of all Units.....\$12,500,000
- Total Unit Mortgages (80%)..\$ 8,000,000

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# Bad Fire Loss

- Insurance Pays Policy Limit of \$7,500,000 / 50 unit owners = \$150,000 per unit owner
- 40 Unit Owners Can't pay off Mortgage with \$150,000
- Where is the Owners Equity for all 50 unit owners?
- In the LAND ! Until which time every Mortgagee agrees, the land cannot be sold.
- Unit Owners will break even if the land is sold for at least \$5,000,000
- Unit Owners with Mortgages are out \$100,000; others \$50,000

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## Community Association Insurance and Risk Management (CIRMS)

- Last fall, our entire Condo complex was destroyed by wild fires in the Smokey Mountains of Tennessee. 7 buildings and 77 units with a 100% total loss. We are now discovering that we are very short, about 5 million (25%) in insurance money to rebuild the common areas. Any special assessment is out of the question. It would required 100% approval from the owners and that is not going to happen.

Knowing our budget, many construction companies will not even place a bid to rebuild, they know we are not even close.

It appears that a vote will be taken very soon to simply dissolve the association. We will sell the remaining assets, split up the proceeds and move on.

Lawsuits are already to be talked about and I am convinced that they will happen.

Who is responsible for the lack of insurance? And is there any action that can be taken?

-

- The Board may have failed to do a required annual review, and if so, could it fall on their D&O Insurance (Directors and Officers coverage). 143  
-The Insurance agent who set up and sold the policy and said this is all you need.

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## Mortgagee Interest

- Should Mortgagee be shown on Association Master policy ?
  - » NO ! Insurable Interest ?
  - » Claim Draft is payable to who ?
  - » Certificate of Property Insurance (Acord 24)
- Should Mortgagee Interest be shown on Unit Owners Policy ?
  - » YES ! Insurable Interest ?
  - » Improvements and Betterments
  - » Additions and Alterations
  - » Full Mortgage amount ?

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RSK.IQ Question of the Week 3/11/19

**Bank as Loss Payee on Condominium Flood Policy**

Issue/Inquiry

When one or more units of a residential condominium is securing a loan from a bank, should the bank be listed as the loss payee on the flood insurance policy covering such condominium?

Response Summary

A bank cannot be listed on an RCBAP as a "mortgagee" or "loss payee" when the loan is to the unit owner and not the condominium association. In order to protect its interest, a financial institution may seek to be listed on the policy as an "other interest"; however, in the event that this cannot be done, a bank should, as a matter of best practice, have the borrower assign the borrower's interest in the RCBAP to the bank.

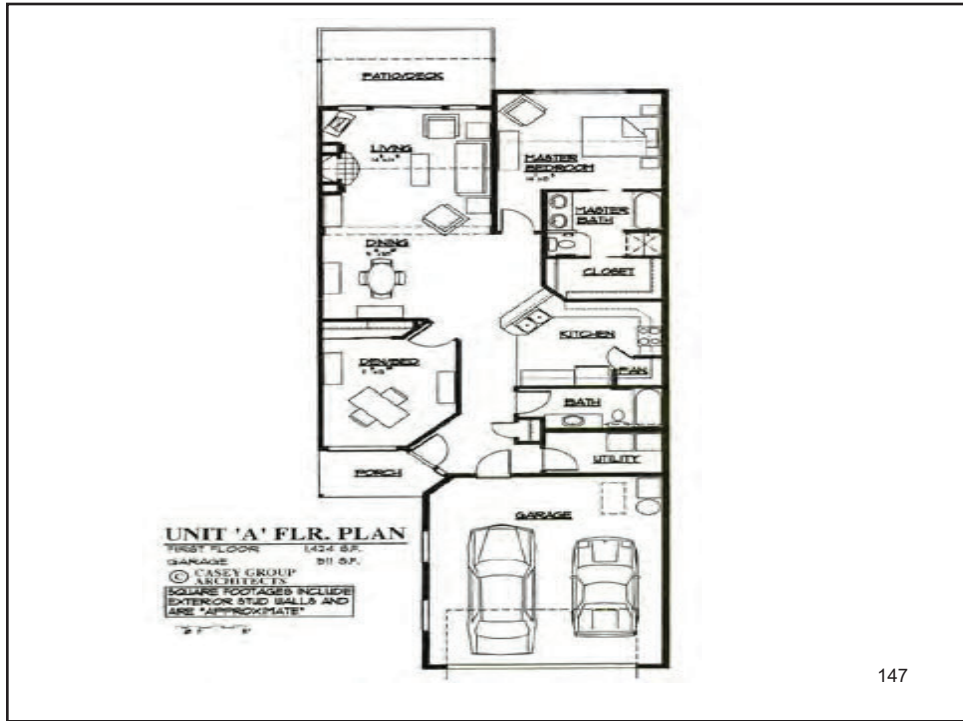
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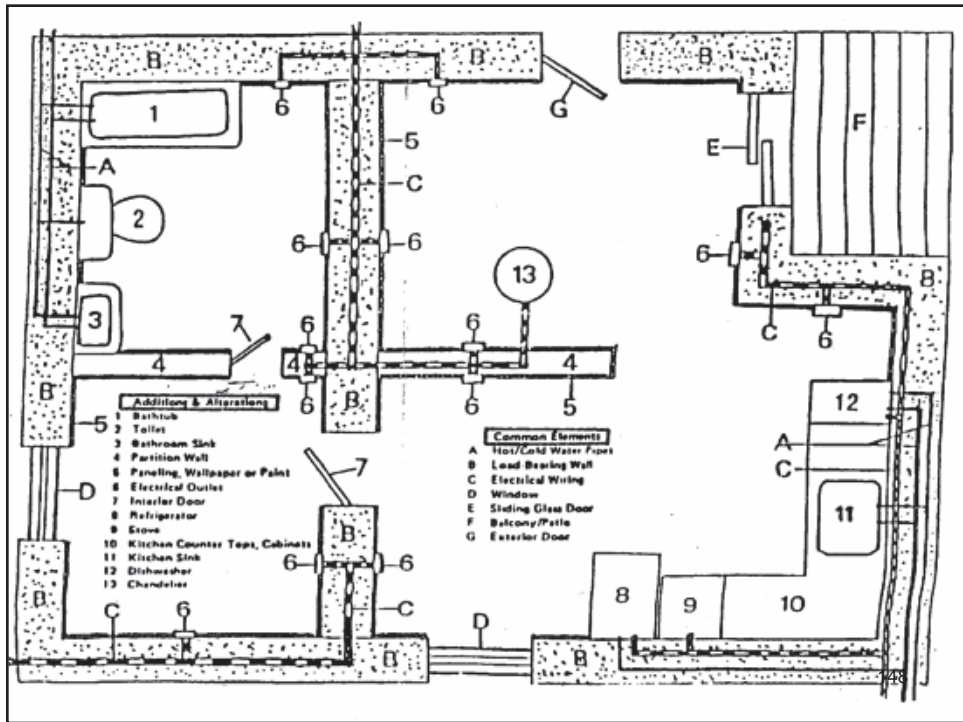
## Who's Responsible for What?

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# Uniform Common Interest Act

- Developed by the National conference of Commissioners on Uniform State Laws, to try to bring some uniformity to state condo laws.
- Associations are required to insure all real property regardless of location or ownership, or how it was classified.
  - Common Elements
  - Limited Common Elements
  - Part of “unit” as defined
- Their idea was that all real property was inextricably linked, and should be replaced together

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# Master Deed

- Charter / Master Deed / Covenant, Conditions and Restrictions (CCR)
  - **New York Condominium Act of 1964** [and subsequent revisions]
    - Article 9-B of Real Property Law (rev. 2006)
  - **NJ Horizontal Property Act (applicable to condos prior to 1970)**
  - **Condominium Act of the State of New Jersey (after 1970)**
    - NJSA 46:8 B-14 (g)
    - PL 1969C.257
- **Most important condominium document**



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# Master Deed

- Charter / Master Deed / Covenant, Conditions and Restrictions (CCR)
  - **New Hampshire Condominium Law of 1977** [and subsequent revisions]
    - Title XXXI - Chapter 356-B Condominium Act (rev. 2016)
  - **Vermont**
    - Title 27A - Uniform Common Interest Ownership Act (1994)
  - **Most important condominium document**



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# Master Deed

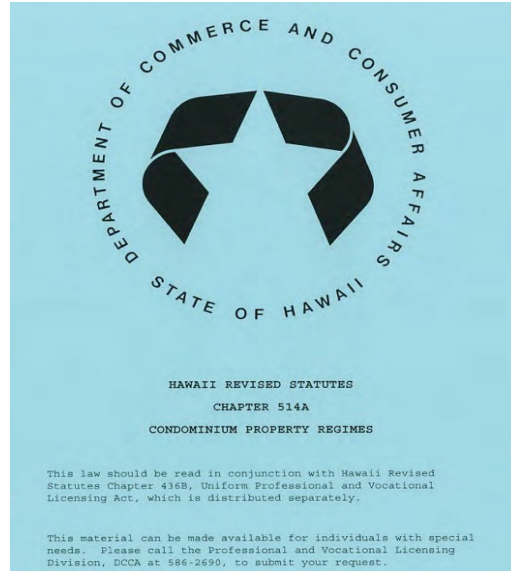
- Charter / Master Deed / Covenant, Conditions and Restrictions (CCR)
  - **Connecticut Condominium Act of 1976** [prior to 1984]
    - Title 47, Chapter 825
  - **Common Interest Ownership Act of 1984** (after 1984)
    - Title 47, Chapter 828
  - **Most important condominium document**



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# Master Deed



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## Statutes are Usually Defaults

- BE CAREFUL !
- The Uniform Common Interest Act and state statutes are often default mechanisms only; and can be over-ridden and changed by the Condo Board of Directors voting to amend the Condo document.

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## STATE STATUTES GOVERNING CONDOMINIUMS

- Common Ownership Interest Act – CT and VT
- Maryland Condo Act
  - Maryland 6/08 Appellate Division Case- Bare Walls (26 yrs)
- [HB 287](#), Condominium Master Policy Insurance. This legislation provides that condominium master policy insurance policies must cover both general common elements and common elements in units. Up to \$5000 of the deductible will be the responsibility of the unit owner where the damage originated. Each unit owner must be informed in writing each year as to the amount of the deductible. This took effect 6/1/09.
- Florida Condominium Act 2009 and revisions
  - Florida Condominium Statute (Title XL ss.Chapter 718.101-718.1256)
    - **Introduced in 1978, has been amended at least 21 times**
    - New Statute 1/1/09 (requires HO-6 + Assoc. as NI)
    - FL State Statute dictates who is responsible for what property (except NFIP)
  - Most important condominium document
  - Regulate governance and procedures
  - Define who is responsible for what vs. who maintains what
  - Address unit owners status as Additional Insured's
  - Provide Other Insurance and Subrogation procedures
  - Claims Situations / Handling

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## Florida Condo Statutes- Overview

- Applies to **residential condos** ONLY
- See Master-Deed, By-Laws, and CC&R's for non-residential
- Issues
  - Who owns what
  - Who has to maintain what
  - What has to replace what
  - Who has to insure what

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Property Coverage Residential Condominium Associations			Flood Coverage Residential Condominium Associations		
Building Feature	Association	Unit Owner	Building Feature	Association	Unit Owner
Building Plumbing	X		Building Plumbing	Primary	Excess
Building Slab/Foundation	X		Building Slab/Foundation	Primary	Excess
Building Wiring/Electrical	X		Building Wiring/Electrical	Primary	Excess
Cabinetry/Countertops		X	Cabinetry/Countertops	Primary	Excess
Doors/Framing - Exterior	X		Doors/Framing - Exterior	Primary	Excess
Doors/Framing - Interior	X		Doors/Framing - Interior	Primary	Excess
Doors/Garage Doors	X		Doors/Garage Doors	Primary	Excess
Electric Fixtures - Exterior	X		Electric Fixtures - Exterior	Primary	Excess
Electric Fixtures - Interior		X	Electric Fixtures - Interior	Primary	Excess
Flooring - Unfinished	X		Flooring - Unfinished	Primary	Excess
Flooring/Floor Coverings - Interior		X	Flooring/Floor Coverings - Interior	Primary	Excess
HVAC System (Compressors, Duct Work, etc.)	X		HVAC System (Compressors, Duct Work, etc.)	Primary	Excess
Hurricane Shutters - Association Installed	X		Hurricane Shutters - Association Installed	Primary	Excess
Hurricane Shutters - Unit Owner Installed		X	Hurricane Shutters - Unit Owner Installed	Primary	Excess
Plumbing Fixtures (Toilets, Sinks, Bathtubs)	X		Plumbing Fixtures (Toilets, Sinks, Bathtubs)	Primary	Excess
Roof Truss	X		Roof Truss	Primary	Excess
Roof Deck	X		Roof Deck	Primary	Excess
Roof Covering	X		Roof Covering	Primary	Excess
Roof Drainage	X		Roof Drainage	Primary	Excess
Roof Soffit/Fascia	X		Roof Soffit/Fascia	Primary	Excess
Siding	X		Siding	Primary	Excess
Staircases - Exterior	X		Staircases - Exterior	Primary	Excess
Staircases - Interior	X		Staircases - Interior	Primary	Excess
Skylights	X		Skylights	Primary	Excess
Walls Framing - Exterior	X		Walls Framing - Exterior	Primary	Excess
Walls Framing/Drywall/Sheetrock - Interior	X		Walls Framing/Drywall/Sheetrock - Interior	Primary	Excess
Walls - Moldings/Trim	X		Walls - Moldings/Trim	Primary	Excess
Wall Covering/Paint - Exterior	X		Wall Covering/Paint - Exterior	Primary	Excess
Wall Covering/Paint - Interior		X	Wall Covering/Paint - Interior	Primary	Excess
Water Heaters		X	Water Heaters	Primary	Excess
Window Blinds		X	Window Blinds	Primary	Excess
Window Frames/Windows	X		Window Frames/Windows	Primary	Excess

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## Different Types of Property

- Common Elements
  - Property that is owned by and benefits ALL unit owners
- Limited Common Elements
  - Property that is owned by and benefits more than one, but less than all unit owners
- Unit Owner Property
  - Property owned by and benefits just the unit owner
  - Additions / Alterations / Improvements
- Unit Owners Personal Property

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## Responsibility vs. Coverage “A”

- **Bare Walls**
  - Association responsible for Common Elements. Unit-owner is responsible for insuring all building items defined as part of the “Unit” in the Declaration. (From the bare-walls in: wallpaper, cabinets, fixtures, appliances, carpeting, etc.)
- **“Original Spec” / Upgrades Only / Studs Out**
  - All building items are insured by the Association (but only the cost necessary to return the building and units to their original condition using materials of like kind and quality) and the unit-owner is responsible for upgrades, improvements, and personal property.
- **Single Entity / Broad Form**
  - Condo Bldg. is treated as a single entity. The Association is responsible for insuring everything attached to the building, even if it is inside the unit.
- **All In / All Inclusive**
  - Similar to Single Entity, but the Association is also responsible for unit owner installed upgrades.

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## Alterations, Additions and Improvements

- **Builder Upgrades**
- **Your Improvements**
- **Previous Owners Improvement**

**8.2.2 Appearance of Units.** No Co-Owner shall make any additions, alterations, or modifications to any of the Common Elements, nor make any changes to the exterior appearance or structural elements of the Unit without the prior written approval of the Association. The Association shall not approve any alterations or structural modifications that would jeopardize or impair the soundness, safety, or appearance of the Project

**8.2.2.1 Window and Door Treatments.** Each Co-Owner shall maintain a standard window and door treatment for all exterior windows and doors that conforms to the requirements of the Association, as defined in the Master Deed and, from time to time, in the rules and regulations of the Association.

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## Improvements and Additions

**8.2.2.2 Personal property.** No Co-Owner shall display, hang, or store any clothing, sheets, blankets, laundry, or other articles of personal property outside a Unit. This restriction shall not be construed to prohibit a Co-Owner from placing and maintaining outdoor furniture and accoutrements and decorative foliage of a customary nature and appearance on a patio, deck, or balcony appurtenant to a Unit; provided, that no such furniture or other personal property shall be stored during the winter season on any open patio, deck, or balcony that is visible from another Unit or from the Common Elements.

**8.2.2.3 Other Alterations.** Any Co-Owner may make alterations, additions, or improvements within the Co-Owner's Unit without the prior approval of the board; provided that the Co-Owner shall be responsible for any damage to other Units, the Common Elements, or the property resulting from any such alterations, additions, or improvements.

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## Use and Occupancy Restrictions

**8.1 Residential Use of Units.** All Condominium Units shall be used exclusively for residential purposes, and no Unit or appurtenant Common Element shall be used for any purpose other than that of a single family residence or purposes incidental to residential use.

**8.1.1 Home Occupations.** Home occupations, including work conducted at home in the course of employment, conducted entirely within the residence and participated in solely by members of the immediate family residing in the residence that do not generate unreasonable traffic by members of the general public and do not change the residential character of the Unit or neighborhood, are permitted as incidental to primary residential use.

To be permitted as a "home occupation," there must be: (1) **no sign** or display that indicates from the exterior that the residence is being utilized for any purpose other than that of a single family dwelling; (2) **no goods** or commodities shall be kept for viewing or sale within the Condominium Unit or within the Project; (3) **no provision of services** within the Condominium Unit or within the Project; (4) **no exchange of cash** within the condominium Unit or within the Project; and (5) **no mechanical or electrical equipment** is used, other than personal computers and other office equipment. 163

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## Loss Assessment

**6.2.2 Annual Assessment.** The annual assessment to be levied against each unit in the Project shall then be determined **on the basis of the Annual Budget** and shall be equal to an amount necessary to meet the obligations of the Annual Budget (the "Annual Assessment"). The Annual Assessment shall be apportioned in a manner consistent with these Bylaws and described more fully below.

**6.2.3 Supplemental Assessment.** If at any time, the board in its sole discretion determines that the Annual Assessment levied is insufficient: (1) to pay the costs of operation and maintenance of the Common Elements; (2) to provide for the replacement of existing Common Elements; (3) to provide for additions to the Common Elements not exceeding \$5,000 or \$100 per unit annually, whichever is less; or (4) to respond to an emergency or unforeseen development; then the board shall establish an amended annual budget, if necessary, reflecting any unforeseen Expenses of Administration (the "Amended Annual Budget") and the board shall be authorized to increase the Annual Assessment (the "Amended Annual Assessment") or to levy such supplemental assessments as it deems to be necessary (the "Supplemental Assessment"). The discretionary authority of the board to levy additional Assessments, Supplemental or otherwise, will rest solely with the board for the benefit of the Association and its Members, and may not be attached by or subject to specific performance by any creditors of the Association.

**6.2.4 Special Assessment.** A special assessment, in excess of those permitted by subsections 6.2.2 and 6.2.3 regarding Annual or Supplemental Assessments, may be made by the board from time to time to meet other needs or requirements of the Association but only with the prior approval of the Co-Owners as provided for in this sub-section, including but not limited to: (1) assessments for additions to the Common Elements costing more than \$5,000 in any year.... 164

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## Loss Assessment Default

**6.4.0 Legal Remedies for Default on Assessments.** In the event of default by any Co-Owner in paying any periodic payment of an Assessment, the board may declare all unpaid installments of the any Assessment for the pertinent fiscal year to be immediately due and payable. In addition, the board may impose reasonable late charges and interest at the legal rate on such Assessment in default from and after the due date.

**6.4.1 Lien.** In the event of default, the following shall constitute a lien on the Unit prior to all other liens, except tax liens in favor of any state of federal taxing authority and sums unpaid upon a mortgage of record recorded prior to the recording of any notice of lien by the Association: unpaid Assessments, together with interest on the unpaid assessments, collection charges, and late charges.....

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## Insurance

**Insurance:** The Board of Directors shall be required to obtain and maintain to the extent obtainable insurance for the Property against loss by fire and other hazards as are covered under standard extended coverage provision for the **full insurable replacement cost** of all the Common Elements and the Apartment Units, as provided in the By-Laws.

Such coverage shall be in the name of the Association for the benefit of the Association, the Unit Owners, and their respective mortgagees, if any, as their interest may appear.

In addition, the Board of Directors shall also maintain comprehensive public liability and property damage insurance in such amounts as it shall deem desirable, insuring each Unit Owner and the Association and the Board of Directors from liability in connection with the Common Elements.

In addition, the Board of Directors shall also maintain flood insurance on the project to the extent authorized by law. The premium for all insurance purchased pursuant to the foregoing and the By-Laws shall be Common Expense.

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## Florida Broker Negligence: What is the Broker's Duty to the Insured?

Merlin Law Group –Ashley Harris April 9, 2014

- Judge Hurley of the United States Southern District Court of Florida recently set out what may be the most extensive statement of an insurance broker's duty under Florida law.<sup>1</sup> In *Tiara Condominium Association, Inc. v. xxxxxx.*, the court was posed with the question:
- When an insurance broker shares a 'special relationship' with its client, is the broker subject to an extra-contractual enhanced duty of care requiring the broker to advise the client about the amount of coverage prudently needed to meet its complete insurance needs?
- Florida law recognizes that an insurance broker owes a fiduciary duty of care to the insured.<sup>2</sup> The duty generally imposes an obligation on the broker to inform and explain the coverage it has secured **at the client's direction**.<sup>3</sup> In addition, Florida law imposes a separate duty of care upon a broker, requiring it to use reasonable care in the procurement of requested insurance coverage.<sup>4</sup>

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- The *Tiara* court answered the question posed above in the affirmative: a finding of a "special relationship" between the broker and insured imposes a heightened duty upon the broker to advise the insured regarding the amount of coverage prudently needed to meet its insurance needs.
- **The court determined that whether a "special relationship" exists between the broker and insured depends upon a multi-factor analysis, which includes:**
  - representation by the broker about its expertise;
  - representation by the broker about the breadth of the coverage obtained;
  - the length and depth of the relationship;
  - the extent of the broker's involvement in the client's decision making about its insurance needs;
  - information volunteered by the broker about the client's insurance needs; and
  - payment of additional compensation for advisory services.
- Ultimately, whether an insurance broker has a "special relationship" with its client is a question of fact for the jury.

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- Tiara is a 43 story oceanfront tower located near Singer Island, FL
- The Association had secured a \$50 mil windstorm policy through xxxx, who told them coverage was on a per occurrence basis
- Condo was severely damaged by back-to back hurricanes in 2004, causing \$130mil in damage
- xxxxx argued the full limits should apply for each loss, but even so, this would have left Tiara \$30mil short
- **When purchasing insurance the Association’s insurance committee sought to reduce its premiums by using a two year old property appraisal**
- **xxxxxx typically recommends a new appraisal, but allowed them to use the old one**
- **At the time of loss, the buildings were underinsured and the carrier threatened to invoke a coinsurance penalty**
- **Instead they negotiated an \$89 mil settlement – over \$40 mil less than it had paid to repair the damage**
- The Association sues xxxxxx, which it had retained under contract, which stated – “xxxxx would be Tiara’s exclusive insurance, risk management, and risk financing advisor and broker”. The suit alleged breach of contract, negligent misrepresentation, breach of covenant of good faith and fair dealing, and breach of fiduciary duty

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## Insurance

**7.2.3 Fidelity insurance.** The Association may obtain, if desired, fidelity coverage to protect against dishonest acts by its officers, directors, trustees, and employees and all others who are responsible for handling funds of the Association.

**7.2.5 Indemnification.** Each individual Co-Owner shall indemnify and hold harmless every other Co-Owner, the Developer, and the Association for all damages, costs, and judgments, including reasonable attorney fees, that any indemnified party may suffer as a result of defending claims arising out of an occurrence on or within individual Co-Owner’s Unit or appurtenant Limited Common Elements. This provision shall not be construed to give an insurer any subrogation right or other right or claim against an individual Co-Owner, the Developer or the Association.

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## CT. Condos now missing \$1 million in Accounting Scandal

CIRMS post

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- A Westport property management firm is facing more legal trouble in a widening accounting scandal and from fallout from a string of thefts at a Greenwich apartment complex.

This week, Community Association Underwriters of America Inc. filed a lawsuit against Consolidated Management Group of Westport, and its former controller in an attempt to recover more than \$1 million missing from the bank accounts of eight condominium associations that Consolidated manages. This lawsuit and another one brought individually by the Whitney Glen Condominium Association allege the funds have been embezzled possibly for years.

Westport Police confirmed on Thursday they are investigating the alleged embezzlement but could provide no further information at this time.

Consolidated was named as a defendant in a lawsuit earlier this month stemming from thefts at Greenwich Shore Apartments by property manager Michael Orr that started in 2009. Orr was sentenced in 2011 to 12 years in prison for stealing an estimated \$450,000 from residents in the complex.

Greenwich Shore residents Robert and Renee along with their insurance company, are suing for \$180,000.

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## Homeowner's Association Embezzler gets Six Years

Asbury Park Press

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- **FREEHOLD TOWNSHIP — THE WOMAN WHO EMBEZZLED MORE THAN \$400,000 FROM A HOMEOWNERS' ASSOCIATION WILL SERVE A SIX-YEAR PRISON TERM, MONMOUTH COUNTY PROSECUTOR PETER E. WARSHAW, JR. SAID.**
- **THERESA TIERNEY, 60, OF OAKHURST, WHO PLEADED GUILTY TO A SECOND-DEGREE THEFT CHARGE IN DECEMBER, WAS SENTENCED FRIDAY BY SUPERIOR COURT JUDGE RICHARD W. ENGLISH, WARSHAW SAID.**
- **A PROSECUTOR'S OFFICE INVESTIGATION REVEALED TIERNEY, WHO WAS PROPERTY MANAGER OF THE FREEHOLD TOWNSHIP-BASED STRICKLAND FARMS CONDOMINIUMS, MADE HERSELF THE SOLE SIGNATORY ON A BANK ACCOUNT SHE OPENED IN 2003 IN THE COMPANY'S NAME. INSTEAD OF TRANSFERRING THE FUNDS TO THE SOLOMON ORGANIZATION MANAGEMENT COMPANY, TIERNEY**<sup>174</sup>**POCKED THE MONEY.**

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## President of Homeowners Association Accused of Embezzlement

WINK News Now !

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## President of Homeowners Association Accused of Ebezzlement

- "NORTH FORT MYERS, Fla.- Board members of the Sabal Springs Golf and Raquet Club filed charges Wednesday against the former president of the homeowners association, claiming he embezzled more than a \$1 million over the last 3 years.
- Kay Joyce has lived in the Sabal Springs community for the last 16 years. When homeowners were notified the board would pursue legal action against their former leader, Joyce said, "I was really disappointed that something like that could happen to our community." The report filed with the Lee County Sheriffs Office says an audit conducted by the association's treasurer showed the accused would write a check or transfer money from the reserve account to Sabal Springs Golf, to himself, or to his father. Board members say the accused admitted to taking \$665,000.

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## Association Insurance Responsibilities

- Master Policy
  - Property & Casualty Insurance
  - Condominium Property
  - Common Elements
  
- Coverage Issues
  - Property & Casualty Insurance
  - Adequate Limits
  - Insurance to Value



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## What's the REAL Replacement Cost of a 30,000 Sq Ft Structure ?

100% Structure.....	\$ 4,500,000 (\$150/sf)
Demolition.....	\$ 100,000 (2.5%)
Debris Removal.....	\$ 300,000 (7.5%)
Architects/Engineer.	\$ 400,000 (10%)
ICC.....	\$ 600,000 (15%)
Market Conditions..	\$ 800,000 (20%)
Other *.....	\$ 800,000 (20%)



**REAL R.C.** \$ 7,500,000 (\$250/sf)

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## Valued Policy Law States

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State	Statute	Property Protected	Causes of Loss
Arkansas	23-88-101	All Real Property	Fire and natural disasters (excluding flood and quake)
California	2052, 53, 54, 55, 56, 58 and 75	Buildings	All perils covered by the property policy
Florida	627.702	Any building (including mobile and manufactured homes)	All perils covered by the property policy
Georgia	33-32-5	1 or 2 family residential bldgs.	Fire
Kansas	40-905	All improvements on real property	Fire, tornado, wind, lightning
Louisiana	22:1318	Inanimate / immovable property	Fire
Minnesota	65A.08	All property	All perils covered by the policy
Mississippi	83-13-5	Buildings	Fire
Missouri	379.140; 145	All property	Fire
Montana	33-24-102 and 103	Improvements to Real Property	All perils covered by the property policy
Nebraska	44-501.02	Real property	Fire, tornado, wind, lightning, explosion
New Hampshire	407:11	Buildings	Fire and lightning
North Dakota	26.1-39-05	Real property	All perils covered by the property policy
Ohio	3929.25	Any building	Fire and lightning
South Carolina	38-75-20	All real property	Fire
South Dakota	58-10-10	Real property	Fire, lightning, and tornado
Tennessee	56-7-801 to 803	Any building	Fire
Texas	862.053	All real property	Fire
West Virginia	33-17-9	Real property	All perils covered by the property policy
Wisconsin	632.05(2)	Owner-occupied dwellings	All perils covered by the

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## Community Association Insurance and Risk Management (CIRMS)

- Last fall, our entire Condo complex was destroyed by wild fires in the Smokey Mountains of Tennessee. 7 buildings and 77 units with a 100% total loss. We are now discovering that we are very short, about 5 million (25%) in insurance money to rebuild the common areas. Any special assessment is out of the question. It would required 100% approval from the owners and that is not going to happen.

Knowing our budget, many construction companies will not even place a bid to rebuild, they know we are not even close.

It appears that a vote will be taken very soon to simply dissolve the association. We will sell the remaining assets, split up the proceeds and move on.

Lawsuits are already to be talked about and I am convinced that they will happen.

Who is responsible for the lack of insurance? And is there any action that can be taken?

-

- The Board may have failed to do a required annual review, and if so, could it fall on their D&O Insurance (Directors and Officers coverage). 181  
-The Insurance agent who set up and sold the policy and said this is all you need.

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If nothing else, agents will consider my suggestion of a bold cover letter stating, inter alia, that the agent is not an insurance appraiser and the carrier is not an insurance appraiser and that the stated limits are not a guaranty of any kind that that stated limits are adequate to rebuild the building and that the association board and manager are strongly urged to obtain at the association's cost an independent insurance appraisal from a license company with lots of E&O coverage not limited by its contract. It protects the agent. If I were an agent I'd attach a copy of what started this discussion the post by the woman from Tennessee who lived in a 77 unit condominium that burned to the ground and there is a \$5 million shortfall. If I were a board member, I don't think I would want to be the one announcing that news to unit owners.

And to get a code expert and engineer to determine costs for ordinance and code changes and demolition.

The agents don't want to give a proposal of \$20 million of coverage if competitors are quoting based on \$10 million or maybe they d

As a condominium litigator, I am often seeking a "cure" for our clients of something that could have been prevented. Condominium insurance can be just as tricky and controversial as health insurance.

Insurance is typically one of the highest budgeted item for condominium associations. Because of this, condominium boards are often looking for a way to cut that cost in order to keep monthly expenses down. Unlike the current healthcare proposal, condominium board's cannot eliminate insurance entirely, but they can do damage. Condominium boards need to be careful what they cut you cut or don't have in the first place.

I hope I am wrong but of the 4,000 condominium associations we represent in Mass, NH and RI, I'd be shocked is half a dozen have obtained independent Insurance appraisals ever, never mind reviewing them each year.

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# Adequate Coverage

- Property
  - » Association Common Property
  - » Business Income / Extra Expense (loss of maintenance fees receivable)
  - » Bridges, Bulkheads, Docks, Piers, Retaining Walls
  - » Money & Securities on/off premises
  - » Building Ordinance & Law
  - » Elevator & Escalator Collision
  - » Fine Arts
  - » Debris Removal / Demolition
  - » Equipment Breakdown
  
- Liability
  - » Products / Completed Operations
  - » Hired and Non-Owned Autos
  - » Unit-Owners as Additional Insured
  - No Subrogation – Why ? Anti-Subrogation Rule
  
- Flood / Earthquake / DIC

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# Adequate Coverage

- Umbrella / Excess
- Fidelity / Crime
  - » Employee Dishonesty
  - » Computer Fraud / Funds Transfer
  - » Social Engineering- who's \$\$
  - » Forgery
  - » Management Company
- Garage-keepers Liability
- Directors & Officers Liability
  - » Failure to Secure or Maintain Insurance Exclusion
  - » Cross Suits / Insured vs. Insured
- Employment Practices Liability
- Workers Compensation/ Employers Liability
- Flood / Quake
- Environmental Impairment Liability – Mold / Fungus / Bacteria
- Signs / EDP
- Detached Structures / pools, etc.
- Increased Demo / Debris Removal
- Ordinance and Law – Limit, Post Loss, Green, Downzoning

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POLICY NUMBER: \_\_\_\_\_ COMMERCIAL PROPERTY  
CP 04 05 09 17

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

**ORDINANCE OR LAW COVERAGE**

This endorsement modifies insurance provided under the following:  
 BUILDING AND PERSONAL PROPERTY COVERAGE FORM  
 CONDOMINIUM ASSOCIATION COVERAGE FORM  
 STANDARD PROPERTY POLICY

**SCHEDULE**

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

Post-Loss Ordinance Or Law Option: Yes  No

\*Do not enter a Combined Limit of Insurance if individual Limits of Insurance are selected for Coverages B and C, or if one of these Coverages is not applicable.  
 Information required to complete this Schedule, if not shown above, will be shown in the Declarations. 185

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TYPE OF PROPERTY NOT COVERED	HOW TO BUY COVERAGE BACK	NOT INSURABLE
Accounts, bills, currency, food stamps or other evidences of debt, money, notes or securities.	Commercial Crime Coverage Forms	
Animals, unless "boarded" or "your stock"	CP 1410 Additional Covered Property, or Inland Marine Coverage Forms	
Autos held for sale	Garage Forms	
Bridges, roadways, walks, patios or other paved surfaces	CP 1410 Additional Covered Property, or Inland Marine Coverage Forms	
Contraband, illegal transportation/trade	N/A	XXXXXXX
Excavations, grading, backfilling or filling	CP 1410 Additional Covered Property	
Foundations of buildings, structures, machinery	CP 1410 Additional Covered Property	
Land, water, growing crops or lawns	Crops or lawns -- Inland Marine Coverage Forms	
Airborne or waterborne personal property	Inland Marine Coverage Forms, or Ocean Marine Coverage Forms	
Bulkheads, pilings, piers, wharves or docks	CP 1410 Additional Covered Property, or Inland Marine Coverage Forms	
Property covered elsewhere	BPP Form pays excess	
Retaining walls	CP 1410 Additional Covered Property	
Underground pipes flues or drains	CP 1410 Additional Covered Property	
Electronic data	CP 0430 E-Commerce or Inland Marine Coverage Forms	
Research, replace, restore information on valuable papers and records	Valuable Papers & Records CP Form, or Inland Marine Coverage Forms	
Vehicles or self propelled machines...	CP 1410 Additional Covered Property	
Certain outdoor property	Fences -- CP 1410 Additional Covered Property Signs -- CP 1440 Outside Signs Antennas -- CP 1450 Radio or TV Antennas Trees -- CP 1430 Outdoor Trees, Shrubs and Plants -- or Inland Marine Coverage Forms	

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## Wisniski v. Brown & Brown-2006

- VERY IMPORTANT CASE FOR AGENTS!
- In 1994 insured purchased package policy from agent
- On 9/7/99 insured's business was severely damaged by a flood
- Agent and package carrier denied coverage
- Insured filed suit against agent for failing to inspect, investigate and inform them that flood insurance was needed and not included in the package policy
- **Court's decision: While it very well may be a wise and sound business practice for a broker to inspect the premises and recommend insurance based upon that inspection---making such inspection mandatory would have "onerous" consequences** (Acord 60- Flood Rejection)

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## Condominium Associations Must Purchase Flood Insurance

By Chip Merlin on June 25, 2018

- Many state statutes and condominium bylaws require the purchase of reasonably available property insurance which covers all direct physical risks of loss on an extended and replacement cost basis. One issue I have heard associations and their insurance agents ask: "Is flood insurance reasonably available" so that it has to be insured.
- This question was recently answered in *Porter v. Beaverdam Run Condominium Association*. The holding is significant:
  - **[W]e conclude that the Association is obligated by the Declaration and the Condominium Act to maintain insurance against all risks of direct physical loss which are commonly insured against, to the extent that such insurance is reasonably available. We further conclude that flood is a risk of direct physical loss which is commonly insured against for residential buildings located in a FEMA-designated flood zone. Accordingly, we conclude that the Association has an obligation to provide flood insurance for the Community's buildings located within the FEMA flood zone each year when such insurance is reasonably available.**
- Condominium associations should be very wary that some insurance agents could leave the Board and Association liable for uninsured or underinsured losses by selling cheap insurance. These agents compete on premium price and propose packages of insurance that do not include commonly available coverages, especially sufficient law and ordinance coverage, flood, and earthquake coverage.
- *Porter v. Beaverdam Run Condominium Association*, No. COA17-793, 2018 WL 2011355 (N.C. App. May 1, 2018).<sup>190</sup>

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**Single Building**

As stated, the maximum limits apply per building. NFIP defines a single building as follows:

***B. Single Building***

*To qualify as a single building structure and be subject to the single building limits of coverage, a building must be separated from other buildings by intervening clear space or solid, vertical, loadbearing division walls.*

*A building separated into divisions by solid, vertical, load-bearing walls from its lowest level to its highest ceiling may have each division insured as a separate building. A solid load-bearing interior wall cannot have any openings and must not provide access from one building or room into another (partial walls).*

*However, if access is available through a doorway or opening, then the structure must be insured as one building unless the building is self contained; it is a separately titled building contiguous to*

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*the ground; it has a separate legal description; and it is regarded as a separate property for other real estate purposes, meaning that it has most of its own utilities and may be deeded, conveyed, and taxed separately.*

Following Hurricane Katrina, there were numerous errors and omissions lawsuits brought against insurance agencies involving flood insurance and the single building concept. In not understanding the single building definition, agencies wrote one \$250,000 policy on townhome complexes with multiple individual owners, as opposed to writing one policy per ~~owner.~~ In one specific case, there was a homeowners' association composed of eight buildings with eight separate units per building, each unit being separated by loadbearing, vertical, division walls. The agency wrote only eight policies, failing to realize that there were in fact 64 separate "single buildings" as defined by the NFIP manual.

**Who Buys The Policy?**

The NFIP Flood Insurance Manual is silent about the issue of whether the policy/policies are written in the name of the association or the individuals. The NFIP Mandatory Purchase of Flood Insurance Guidelines publication (September, 2007 edition date) states the following, starting on page 50:

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## Commercial Associations

- CP 0017
- Definition of Building is similar to CP 0010
- Contains extra item:
  - The following property that is in a unit and without regard to ownership, is covered: fixtures, improvements, and alternations that are part of the building/structure and any appliances for refrigeration, ventilation, cooking, dishwashing, laundering, security or housekeeping.
  - **HOWEVER**, these items are only covered if the Condominium Agreement or Bylaws state that they are to be covered by the Association Insurance.

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## Commercial Unit Owners

- BOP / CPP
- CPP Commercial Unit Owners Form CP 0018
  - Definition of BPP is similar to CP 0010
  - Same wording as CP 0017 (but opposite- if not covered by Association Insurance)
- CP 0418 Commercial Unit Owners Optional Coverages
  - Loss Assessment
    - May be limited
  - Misc. Real Property
    - A/C Units
    - Detached garage
    - Patios
    - Fences
    - Storage Buildings, etc.

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- Miscellaneous real property coverage adds miscellaneous real property that pertains to the insured's condominium or that the insured is required by the condominium association agreement to insure to the definition of covered property. Since improvements to the condominium are covered under the condominium unit owners form, this optional coverage is needed only for property that would not be considered an improvement to the condominium unit (e.g., outbuildings constructed on the grounds by the insured).

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International Risk Management Institute

## ISO Commercial Property Forms and Endorsements: Condominium Commercial Unit-Owners Coverage Form (CP 00 18)

The condominium commercial unit-owners form is designed to dovetail with the condominium association coverage form. There is no building coverage, although \$1,000 of coverage for signs attached to buildings is provided. Improvements and betterments, fixtures, and business personal property are covered under business personal property. Under the coverage extensions, the \$100,000 extension for newly acquired personal property applies, but there is no extension applicable to newly acquired buildings.

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# Sample Association Coverage Form

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1. COMMUNITY PROPERTY		
Causes of Loss	Limit of Insurance	* Deductible
Special including "Equipment Breakdown"	Guaranteed Replacement Cost	\$5,000 Per Occurrence
* In addition to the deductible which may result under D.2.		
Community Buildings	Community Structures	Community Personal Property
All buildings described in Declarations C.1. including: <ul style="list-style-type: none"> <li>• Residences</li> </ul>	All of the items listed below are covered when not forming part of, or located within, or on a building. <ul style="list-style-type: none"> <li>• "Swimming Pools"</li> <li>• Statues</li> <li>• Outdoor fixtures</li> <li>• Pool and Pump Houses</li> <li>• Signs</li> <li>• Roads, drives, walkways and other paved surfaces</li> <li>• Recreation fixtures and courts</li> <li>• Antennas and satellite dishes</li> <li>• Sheds</li> <li>• Temporary seasonal structures</li> <li>• Shelters</li> <li>• Cabanas</li> <li>• Freestanding walls (excluding retaining walls)</li> <li>• Fountains</li> <li>• Fences and gates</li> <li>• Gazebos</li> <li>• Gate houses</li> <li>• Mailboxes</li> <li>• Light and flag poles</li> <li>• Benches</li> </ul>	<ul style="list-style-type: none"> <li>• Equipment</li> <li>• Tools</li> <li>• Supplies and furnishings</li> <li>• "Money" and "Securities"</li> <li>• Non-motorized watercraft</li> <li>• "Computer equipment", and "Media"</li> <li>• "Valuable papers and records"</li> <li>• Accounts receivables</li> </ul>

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2. "UNITS": All real property comprising the "unit" as initially installed in accordance with your association's original plans and specifications, or like kind and quality of such property.

Causes of Loss	Limit of Insurance	* Deductible
Ice Damming	Guaranteed Replacement Cost	\$5,000 Per "Unit"

\* In addition to the deductible which may result under D.1.

### 3. ADDITIONAL COMMUNITY PROPERTY

Causes of Loss	Valuation	Deductible
Special including "Equipment Breakdown"	Replacement Cost	None

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## Condominium Association Insurance Policy

Covered Property	Limit of Insurance
<b>Additional Structures:</b> Bridges, Docks, Retaining Walls, Piers, Bulkheads and Wharves	\$10,000
<b>Newly Acquired Buildings and Structures</b> Buildings and Structures as described in D.1. above that you acquire at locations other than the location described in C.1.	\$250,000
<b>Newly Acquired Community Personal Property</b> Community personal property while at locations other than the "premises"	\$250,000
<b>Newly Conveyed Buildings and Structures</b> New buildings and structures built at the location described in C.1.	\$250,000
<b>"Personal Effects"</b> Personal Property of your directors and "officers" or "employees" while acting in the scope of their duties as such.	\$5,000 Per Person \$15,000 Per Occurrence
<b>Personal Property of Others</b> Personal property of others temporarily in your care, custody or control.	\$5,000 Per Person \$15,000 Per Occurrence
<b>Off "Premises" Community Personal Property</b> Community personal property while temporarily at other locations within the "coverage territory".	\$50,000
<b>Community Personal Property In Transit</b> Community personal property while on conveyances being operated between points in the "coverage territory".	\$50,000
<b>"Fine Arts"</b> Paintings, Pictures, Prints, Etchings, Sculptures, Art Glass, "Jewelry", "Furs", and other bona fide works of art of rarity, historical value or artistic merit.	\$15,000 Per Item \$50,000 Per Occurrence

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4. NATURAL OUTDOOR PROPERTY		
Causes of Loss	Valuation	Deductible
"Specified Causes of Loss"	Replacement Cost	None
Covered Property		Limit of Insurance
Trees, Lawns, Shrubs, Plants		\$1,000 Maximum Per Tree, Plant, Lawn or Shrub \$20,000 Per Occurrence

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DECLARATIONS E: PROPERTY CONSEQUENTIAL LOSS COVERAGES			
<p>Coverages apply only as a consequence of direct physical loss or damage to "covered property" caused by or resulting from a covered Cause of Loss.</p> <ul style="list-style-type: none"> <li>Unless otherwise indicated, all Limits apply on a per occurrence basis</li> <li>No Deductible applies to Property Consequential Loss Coverages</li> </ul> <p><b>1. ORDINANCE OR LAW</b>  <b>2. LOSS OF INCOME</b>  <b>3. SUPPLEMENTARY PAYMENTS</b></p>			
1. ORDINANCE OR LAW			
Covered Property	Consequential Loss Coverage	Limit of Insurance	Valuation
Community Buildings, "Units"	Undamaged Portion	Guaranteed Replacement Cost	Guaranteed Replacement Cost
Community Buildings, "Units"	Demolition Costs	\$300,000	Actual Loss Sustained
Community Buildings, "Units"	Increased Cost of Construction	\$300,000	Increased Replacement Cost
2. LOSS OF INCOME			
Community Income and Maintenance Fees and Assessments; Extra Expense; Rents; Community Income; Increased Period of Restoration; other temporary operation expenses.		Limit of Insurance	Valuation
		Actual Loss Sustained	Actual Loss Sustained

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3. SUPPLEMENTARY PAYMENTS		
	Limit of Insurance	Valuation
• Removal of Fallen Trees	\$10,000 \$1,000 Maximum per Tree	Actual Loss Sustained Actual Loss Sustained
• "Pollutant" Cleanup and Removal	\$25,000 per continuous 12 month period	Actual Loss Sustained
• Property Removal	\$300,000	Actual Loss Sustained
• Monetary Reward	\$5,000	10% of Paid Claim
• Debris Removal	\$300,000	Actual Loss Sustained
• Fire Department Service Charges	\$10,000	Actual Loss Sustained
• Fire Extinguisher Recharge	\$1,000	Actual Loss Sustained

DECLARATIONS F: CRIME COVERAGES		
• Unless otherwise indicated, all Limits apply on a per occurrence basis		
<b>Valuation</b>	<b>Deductible</b>	
Actual Loss Sustained	None	
<b>Covered Property</b>	<b>Causes of Loss</b>	<b>Limit of Insurance</b>
All "Covered Property"	"Employee Dishonesty"	\$150,000 Combined Limit
All "Covered Property"	"Computer Fraud"	
"Covered Instruments"	"Depositors Forgery"	

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DECLARATIONS G: 1. LIABILITY COVERAGES - PRIMARY AND EXCESS		
<b>1. Liability - Primary and Excess</b>	Limits of Insurance apply as:	
	<ul style="list-style-type: none"> <li>• Indemnity payments for claims or "suits" seeking damages</li> <li>• Both primary and excess unless otherwise indicated</li> </ul>	
Coverage	Limit of Insurance	Type of Limit
"Bodily Injury" And "Property Damage"	\$2,000,000	Per "Occurrence"
Products / Completed Operations	\$2,000,000 \$2,000,000	Per "Occurrence" Annual Aggregate
"Personal Injury" & "Advertising Injury"	\$2,000,000	Per "Offense"
Property Damage Legal Liability-Real Property	\$1,000,000	Per "Occurrence"
"Hired Auto" and "Nonowned Auto"	\$2,000,000	Per "Occurrence"
Medical Payments	\$5,000	Per Accident
Garage and Parking Areas Legal Liability		
Comprehensive Coverage	\$500 Deductible Applies Per "Occurrence"	Per "Occurrence" Limit
	\$25,000	
Collision Coverage	\$500 Deductible Applies Per "Occurrence"	Per "Occurrence" Limit
	\$25,000	

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**DECLARATIONS H: CLAIMS MADE LIABILITY COVERAGES**

**1. DIRECTORS AND OFFICERS LIABILITY COVERAGE**

**1. DIRECTORS AND OFFICERS LIABILITY - CLAIMS MADE**

- Limits of Insurance apply as:
- Indemnity payments for "claims" or "suits" seeking pecuniary relief.
  - "Defense costs" for "claims" or "suits" seeking non-pecuniary relief.

Coverage	Limit of Insurance
Directors and Officers Liability	\$2,000,000 Each "Wrongful Act"
	\$2,000,000 Aggregate

Retroactive Date: NONE

**This insurance does not apply to "loss" because of "wrongful acts" which took place before the Retroactive Date.**

Optional Extended Reporting Period: 3 years

The premium for the Optional Extended Reporting Period is: \$1,391

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

**■ Community Manager - Directors and Officers**

This endorsement modifies insurance provided by the Directors and Officers Liability Coverage Part under the following:

- CONDOMINIUM ASSOCIATION INSURANCE POLICY
- COOPERATIVE APARTMENT INSURANCE POLICY
- HOMEOWNERS ASSOCIATION INSURANCE POLICY
- OFFICE CONDOMINIUM ASSOCIATION INSURANCE POLICY

1. Paragraph A. of III. DIRECTORS AND OFFICERS LIABILITY WHO IS AN INSURED SECTION is amended by the addition of the following:  
Any person or organization acting as community manager for the Named Insured while performing community management duties for the Named Insured, but only with respect to liability for "wrongful acts" committed at the express direction of the Named Insured. However, your community manager is not an insured for "claims" or "suits" brought against them by you.
2. Paragraph B.2 of III. DIRECTORS AND OFFICERS LIABILITY WHO IS AN INSURED SECTION is deleted in its entirety.

All other terms and conditions of this policy remain unchanged by this endorsement.

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**DECLARATIONS I: EARTHQUAKE AND "VOLCANIC ERUPTION" COVERAGE**

1. Property Direct Coverages		Valuation
<ul style="list-style-type: none"> <li>Unless otherwise indicated, all Limits apply on an annual aggregate basis</li> </ul>		Replacement Cost
<b>a. Community Property and "Units"</b>		
Covered Property	Annual Aggregate Limit of Insurance	Deductible
Community Buildings and "Units"	\$14,697,200	5% of Each Building(s) Replacement Cost Value
Community Personal Property	Included in the Community Buildings and "Units" Limit	5% of Replacement Cost Value
Community Buildings	Units	Community Personal Property
All buildings described in Declarations C. 1., including: <ul style="list-style-type: none"> <li>Residences</li> </ul>	All real property comprising the "unit" as initially installed in accordance with your association's original plans and specifications, or like kind and quality of such property.	<ul style="list-style-type: none"> <li>Equipment</li> <li>Tools</li> <li>Supplies and furnishings</li> <li>"Money" and "Securities"</li> <li>Non-motorized watercraft</li> <li>"Computer equipment", and "Media"</li> <li>"Valuable papers and records"</li> <li>Accounts receivables</li> </ul>

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**2. Property Consequential Loss Coverages**

Coverages apply only as a consequence of direct physical loss or damage to "covered property" caused by or resulting from Earthquake or "Volcanic Eruption".

- Unless otherwise indicated, all Limits apply on a per occurrence basis
- No Deductible applies to Property Consequential Loss Coverages

- Ordinance or Law
- Loss of Income
- Supplementary Payments

**a. Ordinance or Law**

Covered Property	Consequential Loss Coverage	Annual Aggregate Limit of Insurance	Valuation
Community Buildings, "Units"	Undamaged Portion	Included in the Community Buildings and "Units" Limit	Actual Loss Sustained
Community Buildings, "Units"	Demolition Costs	Included in the Community Buildings and "Units" Limit	Actual Loss Sustained
Community Buildings, "Units"	Increased Cost of Construction	Included in the Community Buildings and "Units" Limit	Actual Loss Sustained

**b. Loss of Income**

	Annual Aggregate Limit of Insurance	Valuation
Community Income and Maintenance Fees and Assessments; Extra Expense; Rents; Community Income; Increased Period of Restoration; other temporary operation expenses.	Included in the Community Buildings and "Units" Limit	Actual Loss Sustained

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c. Supplementary Payments		
	Annual Aggregate Limit of Insurance	Valuation
Property Removal	Included in the Community Buildings and "Units" Limit	Actual Cost
Debris Removal	Included in the Community Buildings and "Units" Limit	Actual Cost

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THIS ENDORSEMENT IS ATTACHED TO AND MADE PART OF YOUR POLICY IN RESPONSE TO THE DISCLOSURE REQUIREMENTS OF THE TERRORISM RISK INSURANCE ACT. THIS ENDORSEMENT DOES NOT GRANT ANY COVERAGE OR CHANGE THE TERMS AND CONDITIONS OF ANY COVERAGE UNDER THE POLICY.

**■ Disclosure Pursuant to Terrorism Risk Insurance Act**

This endorsement modifies insurance provided by the following policies:  
 CONDOMINIUM ASSOCIATION INSURANCE POLICY  
 COOPERATIVE APARTMENT INSURANCE POLICY  
 HOMEOWNERS ASSOCIATION INSURANCE POLICY  
 OFFICE CONDOMINIUM ASSOCIATION INSURANCE POLICY

**This policy includes coverage for Certified Acts of Terrorism. Please refer to the applicable charge below.**

SCHEDULE	
Terrorism (Certified Acts)	PREMIUM \$528
Federal share of terrorism losses	80% Year 2020

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

■ **Power Failure or Interruption Coverage - Sump Pump**

This endorsement modifies insurance provided by the Property Coverage Part of the following:

CONDOMINIUM ASSOCIATION INSURANCE POLICY  
COOPERATIVE APARTMENT INSURANCE POLICY  
HOMEOWNERS ASSOCIATION INSURANCE POLICY  
OFFICE CONDOMINIUM ASSOCIATION INSURANCE POLICY

IV. **PROPERTY ADDITIONAL COVERED CAUSES OF LOSS SECTION** is amended by the addition of the following:

**POWER FAILURE OR INTERRUPTION COVERAGE – SUMP PUMP**

Subject to the limit of insurance and valuation shown below, we will pay for direct physical loss or damage to "covered property" caused by or resulting from water which backs up through, overflows, or is otherwise discharged from a sump well, if the back up, overflow or discharge results from a power failure, or power interruption to a sump pump or related equipment. No deductible applies to this coverage.

**LIMIT OF INSURANCE**

\$15,000 per occurrence

**VALUATION**

Replacement Cost

All other terms and conditions of this policy remain unchanged.

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

■ **Deductible Credit**

This endorsement modifies insurance provided by the Property Coverage Part of the following:

CONDOMINIUM ASSOCIATION INSURANCE POLICY  
COOPERATIVE APARTMENT INSURANCE POLICY  
HOMEOWNERS ASSOCIATION INSURANCE POLICY  
OFFICE CONDOMINIUM ASSOCIATION INSURANCE POLICY

The following is added to the Property Coverage Part, **VI. PROPERTY CONDITIONS SECTION, K. DEDUCTIBLE:**

**DEDUCTIBLE CREDIT**

1. When the amount we pay for direct physical loss or damage caused by or resulting from one or more COVERED CAUSES OF LOSS to "covered property" covered under I. PROPERTY DIRECT COVERAGES SECTION including any amount we pay for resulting loss or damage covered under II. PROPERTY CONSEQUENTIAL COVERAGES SECTION exceeds \$250,000 in any one occurrence, the applicable deductible amount shown in the "Declarations" is waived for that one occurrence.
2. This endorsement does not apply to:
  - a. Any deductibles shown on endorsements to this policy or deductibles shown on any other coverage part;
  - b. Any per "unit", per building, or percentage deductibles; or
  - c. Earthquake And "Volcanic Eruption" Coverage deductibles, if any, shown in the "Declarations".

All other terms and conditions of this policy remain unchanged.

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

■ **Deductible Allowance**

This endorsement modifies insurance provided by the Property Coverage Part of the following:

CONDOMINIUM ASSOCIATION INSURANCE POLICY  
COOPERATIVE APARTMENT INSURANCE POLICY  
HOMEOWNERS ASSOCIATION INSURANCE POLICY  
OFFICE CONDOMINIUM ASSOCIATION INSURANCE POLICY

The following is added to the Property Coverage Part, **VI. PROPERTY CONDITIONS SECTION, K. DEDUCTIBLE:**

**DEDUCTIBLE ALLOWANCE**

- A. For every consecutive annual "policy period" that you do not sustain a loss or damage caused by or resulting from a COVERED CAUSE OF LOSS to "covered property", to which the deductible amount shown in section D. PROPERTY DIRECT COVERAGES, 1. COMMUNITY PROPERTY on the "Declarations" applies, we will annually allot 20% of the deductible amount shown in section D. PROPERTY DIRECT COVERAGES, 1. COMMUNITY PROPERTY on the "Declarations" to a Deductible Allowance to be used in the event of a future loss or damage resulting from a COVERED CAUSE OF LOSS to "covered property".
- B. The Deductible Allowance is subject to the following conditions:
  - 1. The Deductible Allowance shall be used for any loss or damage caused by or resulting from a COVERED CAUSE OF LOSS to "covered property" that exceeds the applicable deductible shown in section D. PROPERTY DIRECT COVERAGES, 1. COMMUNITY PROPERTY on the "Declarations";
  - 2. The Deductible Allowance may not be used if loss or damage caused by or resulting from a COVERED CAUSE OF LOSS to "covered property" is less than the applicable deductible shown in section D. PROPERTY DIRECT COVERAGES, 1. COMMUNITY PROPERTY on the "Declarations";
  - 3. The Deductible Allowance is eliminated in the event we pay a loss or damage caused by or resulting from a COVERED CAUSE OF LOSS to "covered property" for which the deductible shown in section D. PROPERTY DIRECT COVERAGES, 1. COMMUNITY PROPERTY applies;
  - 4. The Deductible Allowance cannot exceed the applicable deductible amount shown in section D. PROPERTY DIRECT COVERAGES, 1. COMMUNITY PROPERTY on the "Declarations". The maximum Deductible Allowance you may accrue is \$5,000.
- C. For example, if your deductible amount shown in section D. PROPERTY DIRECT COVERAGES, 1. COMMUNITY PROPERTY on the "Declarations" is \$5,000 and you do not sustain a loss or damage from a COVERED CAUSE OF LOSS to "covered property" for four consecutive annual "policy periods", the Deductible Allowance will have accrued \$4,000. If you then sustain a loss or damage caused by or resulting from a COVERED CAUSE OF LOSS to "covered property", that exceeds the applicable deductible shown in section D. PROPERTY DIRECT COVERAGES, 1. COMMUNITY PROPERTY on the "Declarations", and the deductible shown in section D. PROPERTY DIRECT COVERAGES, 1. COMMUNITY PROPERTY applies, the Deductible Allowance of \$4,000 may be used to reduce the applicable deductible by \$4,000.
- D. This endorsement does not apply to any deductibles shown on endorsements to this policy, shown on any other coverage part, or to any per "unit", per building, or percentage deductibles.

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All other terms and conditions of this policy remain unchanged by this endorsement.

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

■ **Employee Dishonesty - Community Manager**

This endorsement modifies insurance provided by the Property Coverage Part of the following:

CONDOMINIUM ASSOCIATION INSURANCE POLICY  
COOPERATIVE APARTMENT INSURANCE POLICY  
HOMEOWNERS ASSOCIATION INSURANCE POLICY  
OFFICE CONDOMINIUM ASSOCIATION INSURANCE POLICY

Definition 18. "Covered employee" (PROPERTY) of **XXII. DEFINITIONS SECTION** is deleted and replaced by the following:

18. "Covered employee" (PROPERTY) means:
- a. Any natural person:
    - (1) While in your service (and for 30 days after termination of service);
    - (2) Whom you compensate directly by salary, wages or commissions; and
    - (3) Whom you have the right to direct and control while performing services for you.
  - b. Any natural person employed by an employment contractor while that person is subject to your direction and control and performing services for you. However, any such person is excluded while having care and custody of property outside the "premises".
  - c. Any natural person who is a duly elected or appointed director, trustee, "officer", "committee" volunteer or "committee member", whether salaried or not, and any other person acting on behalf or at the direction of an "officer" or board of directors of your Association with the exception of the developer when acting in a capacity as the developer.
  - d. Other than your "employee", any person or any organization while acting as your community manager.
- But covered employee does not include
- a. Any "employee" immediately upon discovery by:
    - (1) You; or
    - (2) Any of your "officers" and directors not in collusion with the employee, director, "officer" or board member; of any dishonest act committed by that employee, director, "officer" or board member whether before or after being hired or appointed by you.

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## Unit Owners Insurance

- Determination
  - Non-Standard Agreements
  - Disagreements
  - Claims Adjusters
- Description of Unit
- Valuation
- Same carrier as Master Policy, if possible
- Insuring Concepts
  - Bare Walls
  - “Original Spec” / Single Entity / Broad Form
  - All In

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## Responsibility vs. Coverage “A”

- Bare Walls
  - Association responsible for Common Elements. Unit-owner is responsible for insuring all building items defined as part of the “Unit” in the Declaration. (From the bare-walls in: wallpaper, cabinets, fixtures, appliances, carpeting, etc.)
- All In / All Inclusive
  - Similar to Single Entity, but the Association is also responsible for unit owner installed upgrades.
- “Original Spec” / Single Entity / Broad Form
  - All building items are insured by the Association (but only the cost necessary to return the building and units to their original condition using materials of like kind and quality) and the unit-owner is responsible for upgrades, improvements, and personal property.

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## Unit Owners Insurance

- Structural Items Required under Master Deed and By-Laws
  - Non-load bearing walls
  - Utilities servicing your unit
- Personal Property
- Improvements & Betterments / Additions & Alterations
- Loss of Use
- Personal Liability
- Detached Structures (on/off premises)
  - Garage
  - Boat Dock
- Decks / Patios
- Builder supplied upgrades as Incentives
- Loss Assessment

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## HO-3 vs. HO-6

- Coverage “A” Special Form / **Broad Form**
- Coverage “B” Special Form / **Broad Form**
- Coverage “C” Broad Form / **Broad Form**
- Coverage “D” Loss of Use / **Ingress+Egress**
- Coverage “E” Personal Liability
- Coverage “F” Medical Payments

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## Homeowners HO-6 Unit Owners Policy

- Coverage "A": Dwelling **(Broad Form)**
  - Includes \$5000
  - Insurance to Value – PROBLEM!

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### SECTION I – PROPERTY COVERAGES

HO 00 06 1122

#### A. Coverage A – Dwelling

1. We cover:

- a. The alterations, appliances, fixtures and improvements which are part of the building contained within the "residence premises";
- b. Items of real property which pertain exclusively to the "residence premises";
- c. Property which is your insurance responsibility under a corporation or association of property owners agreement; or
- d. Structures owned solely by you, other than the "residence premises", at the location of the "residence premises".

2. We do not cover:

- a. Land, including land on which the "residence premises", real property or structures are located;
- b. Structures rented or held for rental to any person not a tenant of the dwelling, unless used solely as a private garage;
- c. Structures from which any "business" is conducted; or
- d. Structures used to store "business" property. However, we do cover a structure that contains "business" property solely owned by an "insured" or a tenant of the dwelling, provided that "business" property does not include gaseous or liquid fuel, other than fuel in a permanently installed fuel tank of a vehicle or craft parked or stored in the structure.

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## Homeowners HO-6 Unit Owners Policy

- Coverage “A”: Dwelling **(Broad Form)**
  - Includes \$5000
  - Insurance to Value – PROBLEM!
  - **Mutual Service Office policies / Others**
- Coverage “B”: Other Structures **(Broad Form)**
  - Part of Coverage “A”
  - Excludes OS off premises
  - Held for rental
  - Used in Business
- Coverage “C”: Personal Property- Limit selected by Insured **(Broad Form)**
  - Owned or used by an insured anywhere in the world
  - Property in an apartment regularly rented or held for rental- NOT COVERED

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## Homeowners HO-6 Unit Owners Policy

- Coverage “D”: Loss of Use – 50% of Coverage “C”
  - Additional Living Expense / Rental Income
  - Ingress / Egress
- Coverage “E”: Personal Liability
- Coverage “F”: Medical Payments
- **RENTAL OF UNIT: HO 17 33 or DWELLING FIRE POLICY** [watch endorsement on DP forms]

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### Loss Assessment

a. We will pay up to \$1,000 for your share of loss assessment charged during the policy period against you, as owner or tenant of the "residence premises", by a corporation or association of property owners. **The assessment must be made as a result of direct loss to property, owned by all members collectively,** of the type that would be covered by this policy if owned by you, *caused by a Peril Insured Against under Coverage A*, other than:

- (1) Earthquake; or
- (2) Land shock waves or tremors before, during or after a volcanic eruption.

The limit of \$1,000 is the most we will pay with respect to any one loss, regardless of the number of assessments. We will only apply one deductible, per unit, to the total amount of any one loss to the property described above, regardless of the number of assessments.

b. We do not cover assessments charged against you or a corporation or association of property owners by any governmental body.

c. **Special Limit -- We will not pay more than \$1,000 of your assessment per unit that results from a deductible in the policy of insurance purchased by a corporation or association of property owners.** **\*\*Deleted in 2011 Form\*\***

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## Loss Assessment

### • Coverage E – Personal Liability

Coverage E does not apply to:

1. Liability:

a. For any loss assessment charged against you as a member of an association, corporation or community of property owners, except as provided in D. Loss Assessment under Section II – Additional Coverages;

### • Personal Umbrella / Excess Policy

- Usually Excluded

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## Top Ten List for Condo Unit Owners Coverage

1. Get a copy of the Condo Documents
2. Have client estimate RC on structural items they are responsible for (AA+ IB)
3. Ascertain Master policy deductible
4. Add items 2 + 3 together and round up
5. Convert from Named Perils to Special

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## Top Ten List for Condo Unit Owners Coverage

6. Add Special form Contents coverage
7. Add Personal Injury Endt.
8. Add sewer, water backup, and sump pump failure coverage
9. Propose Flood and Earthquake
10. Recommend adequate Liability Limits and Umbrella
11. Loss Assessment Coverage- special form and earthquake

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<b>Unit Owner Responsibility</b>	<b>Replacement Cost</b>
Carpeting, hardwood floors, ceramic tile, other flooring	\$5,000
Wall Coverings	\$2,000
Lighting Fixtures	\$1,000
Plumbing Fixtures	\$2,000
Built-In Appliances	\$5,000
Kitchen Cabinets	\$15,000
Unit Owner Installed Improvements	\$2,000
Improvements by previous owners	\$-0-
Structural Items- Master Deed/By-Laws	\$5,000
Master Policy Deductible	\$-0-
<b>Total</b>	<b>\$37,000</b>

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<b>Unit Owner Responsibility</b>	<b>Replacement Cost</b>
Carpeting, hardwood floors, ceramic tile, other flooring	\$20,000
Wall Coverings	\$5,000
Lighting Fixtures	\$2,000
Plumbing Fixtures	\$8,000
Built-In Appliances	\$10,000
Kitchen Cabinets	\$30,000
Unit Owner Installed Improvements	\$10,000
Improvements by previous owners	\$10,000
Structural Items- Master Deed/By-Laws	\$50,000
Master Policy Deductible	\$10,000
<b>Total</b>	<b>\$155,000</b>

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.  
**LOSS ASSESSMENT COVERAGE** [HO 04 35](#)  
SCHEDULE\*

"Residence Premises" – Additional Amount Of Insurance:	
A	.
B	Additional Locations .  Location Of Unit And Limit Of Liability
*Entries may be left blank if shown elsewhere in this policy for this coverage.	

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## Interesting.....

- As you broaden the coverage provided under the HO-6 policy, you also broaden Loss Assessment Coverage ....
  - With exceptions
- Broad Form > Special Form Coverage "A"
- Personal Injury Endt
- Add Earthquake Endt.
  - No !

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POLICY NUMBER:

HOMEOWNERS  
HO 04 36 10 00

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

**LOSS ASSESSMENT COVERAGE FOR EARTHQUAKE**

SCHEDULE\*

A. Location Of The Unit And Limit Of Liability

B. Earthquake Loss Assessment Deductible Percentage Amount:

\*Entries may be left blank if shown elsewhere in this policy for this coverage.

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## Bill's Dilemma –

- Bill lives in a COA
- Bill's HO-6 has a \$500 deductible and a \$4,400 hurricane deductible, which is 2% of his \$220,000 Coverage A limit.
- His policy runs 1/1/22 – 1/1/23.
- On 1/25/22 a hurricane damages his home and he is paid for the \$25,000 in damage less his 2% hurricane deductible.
- On 2/1/22 he is assessed \$2900 for repairs to the COA clubhouse which was damaged in the same hurricane.

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## Bill's Dilemma –

- Is this one claim or two separate claims, and how many times does the deductible apply?
- Does his policy pay the \$2900 assessment less his \$500 deductible; OR
- Does his policy not pay this anything, because the assessment does not exceed his 2% (\$4400) hurricane deductible ??

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## Bill's Dilemma –

The assessment is a completely separate loss to the homeowners policy holder. They may or may not have suffered damage when the COA property was damaged.

The trigger for loss assessment coverage, as pointed out earlier, is the assessment by the COA– not the occurrence.

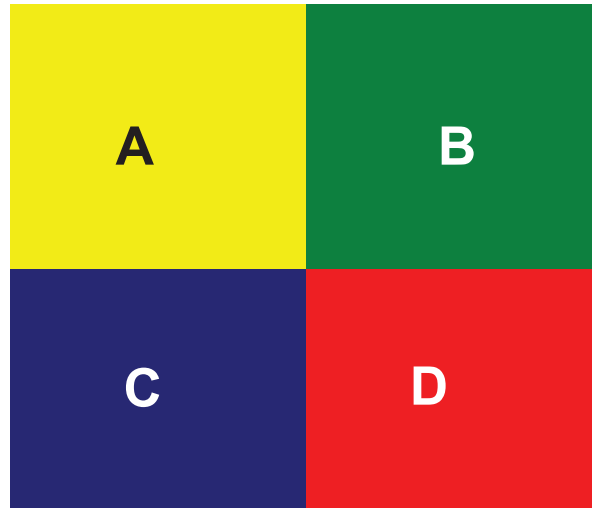
The homeowners policyholder has suffered loss when the COA passed along an assessment for damage to common property. Their loss did not result from the peril of windstorm during a hurricane...it resulted from an assessment made by the COA.

Keep in mind too, the assessment is a separate loss to the insured, a separate occurrence, and a separate deductible applies.

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## Simple Condo Association



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LOSS ASSESSMENT FOR  
FLOOD ?

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## Unit Owner Examples

- **NO RCBAP**

- If the unit owner purchases building coverage under the DP and there is no RCBAP, the DP policy responds to assessments against unit owners for damages to common areas up to the dwelling limit.
- However, if there is damage to the building elements of the unit as well, the building coverage limit under the DP may not be exceeded by the combined settlement of unit building damages, which would apply first, and the loss assessment.

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## Unit Owner Examples

- **RCBAP Insured to at least 80% of RC**

- If the unit owner purchases building coverage under the DP, and there is a RCBAP insured to 80% RC, the DP policy responds to assessments against unit owners for damages that exceed the 80% of building's RC.
- **The loss assessment coverage under the DP will not cover the associations policy deductible.**
- If building elements within units have also been damaged, the DP pays to repair building elements after the RCBAP limits that apply to the unit have been exhausted. Combined coverage cannot exceed ~~038~~ \$250,000 per unit.

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## Unit Owner Examples

- **RCBAP Insured to less than 80% of RC**
  - If the unit owner purchases building coverage under the DP, and there is a RCBAP insured to less than 80% RC, the loss assessment coverage cannot be used to reimburse the association for its coinsurance penalty.
  - Loss assessment is only available to cover the building damages in excess of the 80% required amount at the time of loss. Meaning, the covered damages to the condo association building must be greater than 80% of the buildings RC at the time of loss, before loss assessment becomes available.
  - Covered repairs to the unit, if applicable, would have <sup>239</sup> priority over loss assessments under the DP

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## Endorsements

- **HO 04 35 Loss Assessment Coverage**
  - Increases the basic \$1,000 loss assessment limit for damage to the residence premises up to \$50,000
- **HO 04 90 Personal Property Replacement Cost**
  - Changes loss settlement for Personal Property to Replacement Cost
- **HO 04 36 Loss Assessment Coverage For Earthquake**
  - Provides loss assessment coverage for an earthquake loss
- **HO 04 77 Ordinance Or Law Increased Amount**
  - Increases the 10% coverage limitation of the homeowners policy
- **HO 04 54 Earthquake**
  - Adds the peril of earthquake for the dwelling, other structures, and personal property coverage
- **HO 17 31 Unit-Owners Coverage C Special Coverage**
  - Changes Coverage C – Personal Property to open perils
- **HO 17 32 Unit-Owners Coverage A Special Coverage**
  - Changes Coverage A – Dwelling to open perils
- **HO 17 33 Unit Owners Rented to Others**
  - Permits Rental of Unit ? / Dwelling Fire Policy – Watch endorsements !
- **HO 24 82 Personal Injury**
- **HO 1734 Other Insurance Revision**
  - Permits Unit owner to recover regardless of whether Assoc. can or not <sup>240</sup> (large deductible)

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## **\$12 Million Reasons Your Associations Need Liability Insurance**

CIRMS Blog 10/10/13

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## **\$12million Reasons**

- On January 16, 2011, Andrew Curtis, a nine-year-old boy, and his father were riding their bicycles on U.S. Highway 1 in the town of Jupiter, Florida.
- Andrew was following his father as the two approached the driveway of the Villas on the Green Condominiums. While Andrew's father passed the driveway without incident, as Andrew began to cross, he was struck by a minivan driven by Helen Bygel.
- Andrew was airlifted from the scene of the accident to St. Mary's Medical Center, where doctors were unable to save his life. 242

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- Andrew's mother, Tracy Curtis, filed a wrongful death claim against driver Bygel, as well as property owner, Villas on the Green Condominium Association, Inc., and property management company, M.M.I. of the Palm Beaches Inc.
- Plaintiff claimed that Bygel failed to yield the right of way. In addition, Plaintiff claimed that both the property owner and property management company failed to comply with state and local regulations concerning the height and location of stop signs and hedges, which contributed to the fatal accident. Specifically,
- Plaintiff claimed that the hedges at the entrance to Villas on the Green were four feet eight inches high, nearly double the maximum allowable height. Also, the stop sign governing the intersection of the driveway with Highway 1 was four feet too short and too far back from the sidewalk pursuant to the Florida Department of Transportation's regulations.

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- Defendant Bygel claimed that she stopped at the stop sign but did not see either of the riders. At trial, Bygel's attorney alleged that the collision occurred because neither Bygel nor the bicyclists could see each other due to the height of the hedges and the improper placement of the stop sign.
- Counsel for the property owner and management company claimed that the collision occurred solely because of Bygel's negligence for failing to check for pedestrians or cyclists before proceeding forward.
- After a four-week trial the jury concluded that all the Defendants were responsible for the accident and apportioned 10% to Bygel, 30% to the property owner and 60% to the property management company.

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- They awarded Plaintiffs \$64,302 for medical, funeral and burial expenses and \$12,000,000 for pain and suffering.
- \*VERDICT:\* \*\$12,064,302\*
- \*COURT:\* \*15th Circuit Court for Palm Beach County, Florida\*

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## Minnesota Pool Owner Settles for \$8 Million in Case with Girl Fatally Hurt

September 5, 2008

The Minneapolis Golf Club says it has reached an \$8 million settlement with the family of Abigail Taylor, the 6-year-old girl who was fatally wounded by a swimming pool drain. Taylor died of injuries she suffered last summer when she sat on the drain of the club's wading pool. The powerful suction ripped out part of her intestinal tract.

**Club President Herb Houndt says in a statement on September 3 that the amount exceeds the limits of the club's insurance, so the members had to vote to get a loan to pay the difference.**

Houndt says the club and its members are happy to have reached the settlement for the sake of closure for both the club and Taylor's family. He did not immediately return a call from the *Associated Press*.

After Abigail died in March, her family was instrumental in persuading the state Legislature to pass a new pool safety law. <sup>246</sup>

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# Dolphin Towers Condo Ass'n. Sarasota, Florida

Herald Tribune

Kevin McQuaid

July 14, 2011

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## Dolphin Towers on Gulfstream Ave. in Downtown Sarasota, Florida



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## Dolphin Tower owners walk away

June 27, 2011



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- *SARASOTA* - Frustrated by a lack of repair progress and swelling costs to fix severely damaged concrete, a growing number of Dolphin Tower unit owners appear to be walking away from the troubled 15-story downtown condominium.
- The owners' decisions to stop paying monthly condo dues of \$520 and other assessments comes as the expected costs to repair the building's primary concrete slab have risen to as much as \$11.5 million, or roughly \$100,000 per unit, according to a recent estimate communicated by the building's homeowners group.
- Previously, the expense to fix that key two-foot-thick transfer slab was believed to be about \$8.2 million, or \$70,000 per unit.

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## Who Will Pay for San Francisco's \$750M Sinking Luxury Tower?

February 2, 2017 / By James Tarmy and Kartikay Mehrotra

Nina Agabian, a retired director of research in global health science at the University of California, bought a 29th-floor apartment in San Francisco's Millennium Tower in 2010. "It was supposed to be a wonderful building," she said in January, sitting in a leather chair in the building's vast, low-lit, owner's-club level. "For many of us, who left our business lives to start our older years, this had become a nice, comfortable place."

The building, which opened in 2008 and was touted as the most luxurious tower in San Francisco, became a beacon of the city's burgeoning wealth, attracting tech millionaires, venture capitalists, and even the San Francisco 49ers retired quarterback Joe Montana.

The 58-story tower's shine faded on May 10, 2016, when Agabian attended a homeowners association meeting and was informed that the building had sunk 16 inches into the earth and tilted over 15 inches at its tip and 2 inches at the base, according to suits filed by residents and the city of San Francisco. "You can imagine how distressed we were to know that, for one, our lifetime investment and savings are at risk," she said. "And we have no idea whether or not there's a fix to it, and if there is a fix to it, what it will entail."

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## The situation at San Francisco's sinking skyscraper is so dire, residents are selling their condos at a loss of millions

- [Melia Robinson](#)
- Dec. 22, 2017, 12:40 PM
- 29,325



Millennium Tower (left) rises 58 stories above San Francisco's Financial District. Vanguard Properties

- Millennium Tower, a luxury residential building in San Francisco, has sunk 17 inches and tilted 14 inches since it was completed in 2008.
- Residents say they're selling multimillion-dollar condos at a loss.
- A two-bedroom, three-bath unit at Millennium Tower sold in December 2017 for 30% less than what it sold for in 2013.

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# OCEAN POINT CONDO ASSOCIATION

Miami Beach, Florida  
August 2012

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## The Trouble with Condos

(and their Boards of Directors)

- One of my friends (an insurance producer) owns a condo near South Beach, Fl. His condo association has only 2 employees, plus a maintenance worker that they paid using a 1099. The maintenance worker was killed in 2010 while working on the elevator (something failed & he was crushed in the elevator shaft).
- The young man's parents are now threatening to sue the condo assoc, and are demanding \$2MM to settle.
- The condo association did not purchase workers compensation insurance because FL State law does not require companies with 4 or less employees to purchase it. So the condo assoc had no workers compensation insurance.
- The condo assoc's CGL denied coverage citing policy exclusions for claims resulting from employee injuries, employers liability, etc.

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# The Trouble with Condos

(and their Boards of Directors)

- The condo assoc made the common mistake of assuming that by simply paying a worker on a 1099, that that would protect the assoc against any claims. Unfortunately the assoc was this workers' sole employer, so the CGL carrier argues that despite the 1099, he was an employee of the association.
- But right now the condo association is looking at a wrongful death lawsuit right now without any insurance coverage.
- They recently sent out the attached notice to all their unit owners, including my friend. Although he has a Chubb masterpiece policy on his primary NJ home, I understand that since this is a second home, my friend bought only an inexpensive HO6 from a FL agent for this condo, which provides only \$1,000 in loss assessment coverage.
- So he could be looking at a substantial loss assessment, without enough coverage!

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# Worker killed in elevator shaft

- 11 October 2010 t
- One worker was killed and one worker was hurt in an elevator accident inside a South Beach condominium.
- Two people were working on an elevator at the Ocean Point Condo, located at 345 Ocean Drive according to Miami Beach Fire Chief Javier Otero. One person was inside the elevator, while the other was on top of the elevator in the shaft.
- According to news reporters on the scene the building employee who was on top of the elevator got trapped, then crushed between the elevator and the elevator shaft wall between the fifth and sixth floors. Chief Otero says the person inside the elevator was not hurt, unlike the person in the shaft that was killed.
- He had gone through the roof opening into the shaft and for still unknown reasons, the elevator began to move, which caused him to be crushed.
- On condo resident described the man as very well liked. "What a sweet guy, he was. Friday I needed a battery for my husband's motor scooter and he went all the way to the store out and away from here to get the battery," she said, her voice choking with emotion. "Very painful."
- More than three hours after the accident, the dead man's body remained wedged in the elevator shaft.
- The Otis Elevator Company sent technicians to help officials with the removal of his body.
- Chief Otero says it's not known what caused the accident.

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**OCEAN POINT ASSOCIATION, INC.**  
**345 Ocean Drive**  
**Miami Beach, Florida 33139**

**Re: Claim by Estate of Edelberto Fernandez**

Dear Members:

This letter is being sent to each Member of Ocean Point Association, Inc. The purpose of this letter is to advise you of certain claims being made against the Association and the potential liability that may result from the claims. The claims are being made by The Estate of Edelberto Fernandez. Edelberto Fernandez was contracted to provide various services to the Condominium operated by the Association. On October 11, 2010, it is alleged that Mr. Fernandez suffered fatal injuries as a result of being crushed by an elevator he was working on at the Condominium. The insurance carrier that provides coverage for claims of this type has denied coverage. Among other things, they take the position that Mr. Fernandez was employed by the Association as an employee, rather than as an independent contractor. Bodily injury claims of employees are typically covered by Workers' Compensation insurance and are excluded under the general liability policy which would normally provide coverage for this type of claim.

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While the Association is still investigating the denial of the claim, the specifics of the claim itself and other avenues which may provide relief from the claim, the Board determined that the members should be aware of the claim. Currently, the attorneys for the Estate of Edelberto Fernandez have demanded that the Association pay them \$2 Million dollars no later than the close of business, August 1, 2012. They threatened that, if payment is not made, they will file a lawsuit and will ask a jury to return a verdict of at least \$10 Million dollars. Obviously, the Association does not have \$2 Million dollars to pay this claim and it is not clear that the Association is liable or that the denial of insurance coverage is proper. Nonetheless, all of the members of the Association may be faced with a significant financial obligation to the extent the claim remains denied and to the extent The Estate of Edelberto Fernandez is successful in pursuing its claim in court, as threatened. If legal action is commenced, and the denial of coverage remains, you will be provided a formal notice under the provisions of the Florida Condominium Act regarding the potential liability of each owner and each owners' right to intervene and defend any action brought against the Association. No lawsuit has yet been commenced, but this claim raises serious concerns.

If you are involved in any sales transaction, you may be required to disclose this information as part of your obligations as a seller. The Association will be required to disclose this information as part of the reporting requirements under the Condominium Act, to the extent a lawsuit is commenced. The Board is committed to passing on any additional information as such information becomes available.

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Please Also Note that :

"At the time of the incident in October 2010, Ocean Point Association did not have workers compensation insurance covering Mr. Fernandez."

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## **Big Assessment Coming for Gallery Tower**

- Before you read any further, I want to make this very clear. This assessment that Gallery is getting ready to enact is absolutely necessary and it's a good thing. With any assessment of this size, there's going to be some heartburn that goes along with it. But Gallery has made the right choice – they are no longer ignoring needed maintenance, they are tackling it with a plan!
- With that all said, Gallery Tower is readying a 1 million to 1.3 million dollar assessment. The assessments to individual home owners will range from about \$5,000 to over \$10,000.
- Yes, this is a large amount, but by no means the largest Downtown has seen. The Airye Condominium levied assessments a few years ago ranging from \$15,000 to over \$80,000 for the penthouse. Even MarketHouse assessed \$15,000 to \$20,000 per unit back in 2007 for window replacement and building repair/updating.
- What makes Gallery unique is the percentage of the assessment against the cost of the units. With one bedrooms selling for around \$50,000, this makes the assessment almost 10% of value!

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# Wayne condo owners could be on the hook for \$3M in repairs

Philip DeVencentis, North Jersey Record | Published 10:00 a.m. ET Aug. 31, 2018 | Updated 3:24 p.m. ET Sept. 5, 2018



(Photo: Danielle Partizkaran/NorthJersey.com)

CONNECT TWEET LINKEDIN COMMENT 3 EMAIL MORE

Brittany Chase, a sprawling complex of 395 condominiums and town houses off Berdan Avenue in Wayne, is meticulously landscaped and its streets are home to families and senior citizens alike.

Beneath its polished exterior, however, a problem exists that could disrupt hundreds of lives: the foundations of two town houses on the eastern edge of the complex are failing, according to documents obtained by [NorthJersey.com](http://NorthJersey.com) and the USA TODAY NETWORK New Jersey.

And the cost to repair it is in the millions.

For homeowners at Brittany Chase, the situation has become a potential financial nightmare: they've been told they may have to foot the bill to pay for the repairs — even if their homes aren't directly affected. A final decision is pending.

"I don't understand how it could be fair," said 92-year-old Lucille Kotran, a condominium owner on a fixed income.

Unit owners were told in May about the problems, which were blamed on a "construction defect." The price to fix them: more than \$2.6 million.

LET'S TAKE A BREAK !

SEE YOU BACK HERE IN 10  
MINUTES

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## The Lowest Bidder

It is unwise to pay too much, but it is worse to pay too little. When you pay too much, you lose a little money—that is all. When you pay too little, you sometimes lose everything, because the thing you bought is incapable of doing what it was bought to do. The common law of business balance prohibits paying a little and getting a lot—it can't be done. If you deal with the lowest bidder, it is well to add something extra for the risk you run. And if you do that, you will have enough to pay for something better”

John Ruskin (1819-1900)

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# James K. Ruble Seminar

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

## Section 4

# **Insuring Trusts Protecting Your Client's Wishes**



# INSURING TRUSTS

## PROTECTING YOUR CLIENT’S WISHES

PRESENTED BY  
PAUL W. BURKETT JD, CPCU, CIC, ARM, ARM, ALCM  
SNOASPEN INSURANCE GROUP, INC.  
RENO, NEVADA  
[Paul.burkett@att.net](mailto:Paul.burkett@att.net)

## I. INTRODUCTION

### A. OBJECTIVES

1. Provide a basic introduction to the concepts of establishing a trust and the requirements for a trust.
2. Discuss the Trustee’s Powers and Responsibilities and the assumed liabilities a trustee incurs for insurance purposes.
3. Discuss Beneficiaries Insurable Interests and Creditors Rights and related insurance issues facing the trust.
4. Trustee liabilities and insurance solutions.
5. Trust liabilities and insurance solutions.

### B. DESCRIPTION OF TRUSTS

1. A trust is a fiduciary relationship concerning specific property – tangible and/or intangible.
2. The trust is a form of a business organization allowed by state law which can include personal and business trusts.
3. A trust is an estate planning tool and does not exist until funded by the transferred property – land, home, life insurance proceeds, stocks, bonds, etc.
4. Trusts typically arise when someone (the trustee or settlor) transfers legal title to property to another (the trustee), with direction for the latter to hold and distribute these assets for the benefit of others (the beneficiaries).
5. It is often stated that, while the trustee holds legal title to the trust ownership in tangible and intangible property the equitable title or beneficial interest of the transferred tangible or intangible property is owned by the beneficiaries.



6. Once an effective transfer of property has been made to the trustee, the trustor (original owner of the property) is no longer the owner of the assets.
7. The trustee is obligated to adhere to the terms of the trust with respect to the preservation, enhancement, and distribution of the assets within the trust.
8. When insuring a trust, the Trust Instrument and the Memorandum of Trust specifically detail the obligations and responsibilities of the trustee to the beneficiaries including the requirements to provide insurance for the assets of the trust and professional liability of the trustee in some instruments.
9. There are three broad categories of trusts:
  - a. **Express trusts** – any trust created by the deliberate and voluntary actions of the trustor or settlor as evidenced by a written document.
  - b. **Implied trusts** – any trust not created by deliberate and voluntary action of a trustor or settlor but by operation of law.
    - 1) **Resulting trust** comes about because of a perceived or inferred intent of a property owner. The law assumes that the party is holding the property in trust for someone else. [Purchase money resulting trust, failed trust, and over-endowed trust.]
    - 2) **Constructive trust** is a trust created by the courts of equity to right a wrong such as acquiring title to property unlawfully or unfairly.
  - c. **Special situation trusts** are a catch-all used to include distinct types of trust situations.
    - 1) **Spendthrift trust** is a private trust in which the trustor or settlor specifies that the beneficiary’s interest in the trust may not be attached by creditors.

- 2) **Short term trusts or Clifford Trusts** are trusts that are created for a brief period to establish a child in business, provide annual charitable gifts for a period, to provide college tuition payments, etc.
  - 3) **Totten trusts** are bank accounts people open in their own names for someone else. They are not true trusts, because there is no trust purpose, no trustee, no immediate beneficiary, and the creator has total control over the funds.
  - 4) **Marital deduction trusts** are tax advantage trusts permitted to legally married couples in which any property left to the surviving-spouse may pass tax free as a marital deduction.
  - 5) **Life insurance trusts** specify that the beneficiary to the life insurance benefits is the trust that is already in existence created by separate legal documents. [Pour Over Trust]
10. The law of trust has developed its own terminology that is critical to understanding insurance exposures.
- a. **Settlor or Trustor** – The party who creates the trust.
  - b. **Trustee** – The party to whom the settlor/trustor transfers the trust property. The trustee holds legal title to the trust property and manages the property for the duration of the trust.
  - c. **Beneficiaries** – The parties who hold equitable interests in the trust usually in a divided or bifurcated methodology stated in the trust. The parties to whom the trustee owes a fiduciary duty.
  - d. **Declaration of Trust** – If the settlor/trustor is also the trustee, the expression of the intent to create the trust, along with the terms of the trust, is called a declaration of trust. It must be in writing if real property is part of the trust.

- e. **Deed of Trust** – If someone other than the settlor/trustor is the trustee, the expression of the intent to create the trust, along with the terms of the trust, is called a deed of trust. It can be written or oral and it only involves private property.
- f. **Res/Corpus** – The trust property is often referred to as the trust res, or trust corpus, or just trust property.
- g. **Inter Vivos Trust** – If the trust is created while the settlor/trustor is alive, it is an inter vivos trust. A trust is created when it is funded and that means when property is transferred to the trust/trustee.
- h. **Revocable Trust** – The settlor or trustor retains the power to revoke the trust.
- i. **Trusts Arising by Operation of Law** – These are either money trusts for insurance proceeds or failed property transfers to the trust. These are for minors requiring guardianship or for incompetent persons.
- j. **Testamentary Trust** – If the trust is created when the settlor/trustor dies, wither in the settlor’s/trustor’s will or funded via the settlor’s/trustor’s will, it is called a testamentary trust.

## C. ELEMENTS NECESSARY FOR A TRUST TO EXIST

- 1. Trust Intent:
  - a. The trustor must manifest, via words or conduct, a present intention to create a trust relationship.
  - b. The trustor’s intention is determined from the language utilized, his or her relationship with the parties involved, and any other appropriate circumstances.
- 2. Trust Property:
  - a. A trust cannot exist without property which is the subject of the trust relationship.

- b. The trustor must be capable of conveying to the trustee the property which is to serve as the assets of the trust.
  - c. Property can be both tangible and intangible property that has a value and it must be specifically described and capable of being identified.
  - d. Property interests which can be added to a trust include:
    - 1) Vested possessory interests in property.
    - 2) Contingent, non-possessory, or future interests.
    - 3) Contract rights including patent, copyright, trademark, trade dress, trade secrets, etc. (Intellectual Property Rights); and
    - 4) Equitable interests in another trust.
  - e. The trustor can make a transfer of assets while alive.
  - f. The trustor can declare himself or herself the trustee over particular or named tangible or intangible property.
  - g. The trustor can, in a valid will, direct the executor of the estate to distribute property to the trustee (testamentary trust).
  - h. A trustor can enter into an enforceable contract with another person who thereby becomes obligated to transfer the property to a trustee for the purposes of establishing a trust.
3. Beneficiaries:
- a. Except with respect to charitable trusts, a trust must have identifiable beneficiaries, whose interests will vest or fail within a period of time which is not a violation of the Rule Against Perpetuities in every state’s law. Sometimes called the **Statute of Uses** – which declares that no use was laid unless it imposed active duties upon the trustee.

**RULE AGAINST PERPETUITIES [COMMON LAW RULE]**

Beneficial interest in a trust (including class gifts) which are in violation of the general rule that **“no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest” will be void.**

While the rule is directed toward remoteness of vesting, its ultimate purpose is to prevent the clogging of titles beyond reasonable limits in time by contingent interests and to keep the assets freely alienable in the marketplace. Allows for turnover of assets.

The Common-Law Rule can be overridden by “Wait and See” State Statutes, “Cy Pres” State Statute. “Patch Up” State Statutes, and “Alternative Perpetuities Periods” State Statutes.

- b. Any natural or artificial person (yet to be born) may be a beneficiary if he or she can legally own property. However, limiting the trust disbursement to age 21 is allowed but beyond age 21 may violate the rule or perpetuities.
- c. A minor or legally incompetent person may be a beneficiary and will need the assignment of a guardian.
- d. Non-charitable associations can be a beneficiary but the “Rule Against Perpetuities” will apply and the support cannot be indefinitely.
- e. A class of beneficiaries may be designated in the trust.
  - 1) Presently ascertainable beneficiaries - spouse, children, niece, nephew, etc.
  - 2) Ascertainable at a future time – grandchildren, great grandchildren, etc. However, by listing by class and not by name the rule of perpetuities may be violated.
  - 3) Trustee is usually tasked in the trust to make the determination of those that qualify under the class rules written into the trust.

- 4) The salvage doctrines may apply to limit the common law problems created by the rule of perpetuities.

4. **Trustee:**

- a. The trustee has responsibility for the legal title to and the management of the trust’s property.
- b. A trustee must have the mental capacity to administer the trust.
- c. The trustee must accept the responsibility.
- d. If no trustee is designated, or if he or she is (1) incompetent, (2) fails to survive the trustor, or (3) fails to qualify, the courts will ordinarily appoint a new trustee.
- e. Co-trustees are allowed but specific rules will apply if one dies and that depends upon each state statute.

5. **Valid Trust Purpose:**

- a. Trusts can be created for any purpose except for one which is:
  - 1) Trusts based upon Illegal Agreement will be unenforceable.
  - 2) Trusts in restraint of marriage will be unenforceable.
  - 3) Trusts to induce religious conversion are unenforceable.
  - 4) Trusts that exclude beneficiaries who have contact with certain or specific family members are unenforceable.
  - 5) Trusts used to defraud creditors are unenforceable.

- 6) Trusts that are contrary to public policy are unenforceable.
- b. The trust serves the trustor’s intent if it is not one of the above limitations.
  - c. It is a flexible legal instrument.
  - d. There are five major categories of restrictions placed on the creation of a valid enforceable trust.
    - 1) The trust must be active, imposing active duties upon the trustee.
    - 2) The trust cannot violate the Rule Against Perpetuities by existing for an unreasonably long time.
    - 3) The trustor or settlor can specify investments for the trustee that may involve reference to legal list for safety’s sake,
    - 4) All trustees and beneficiaries cannot be the same person(s).
    - 5) The purpose for which the trust was created cannot be illegal or contrary to public policy.
  - e. Typical Trusts can include:
    - 1) Inter Vivos Trust
    - 2) Testamentary Trust
    - 3) Trusts Arising from Contract
    - 4) Totten Trusts
    - 5) Charitable Trusts
    - 6) Trusts arising by operation of law.

## II. THE TRUSTEE’S POWERS AND RESPONSIBILITIES

### A. SOURCES OF TRUSTEE’S POWER

1. The trust instrument either expressly or by implication provides trustee’s power.
2. The Trustee’s general powers can be granted by statute or can be implied by the laws of the state as necessary or appropriate to accomplish the trust’s purpose.
3. If the trust instrument is unclear as to whether a contemplated action is permitted by the trustee, clarifying instructions may be obtained from a proper court. **Failure to garner clarification can create liability for the trustee.**
4. A trustee has the power to:
  - a. Make improvements to trust property.
  - b. Sell or lease trust assets; and
  - c. Incur reasonable expenses which are necessary to maintain trust property.
5. A trustee has no implied power for the following:
  - a. Mortgage or otherwise encumber trust property; or
  - b. Invade trust principal for a beneficiary who has merely the right to receive income from the trust.
6. The Trustee’s exercise of discretion is ordinarily reviewed under an objective standard of care and the trustee must act reasonably under the circumstances. [Ordinary Negligence]

### B. TRUSTEE’S DUTY OF LOYALTY

1. A trustee owes a duty of utmost good faith and loyalty to the beneficiaries in carrying out his or her obligations under the trust.



2. The trustee must not delegate the performance of the trust duties. As a fiduciary, the trustee is required to act personally for the benefit of the trust and the beneficiaries.
3. A trustee is prohibited from “self-dealing,” in any manner even if it is done in good faith with trust assets.
  - a. Cannot purchase assets from or sell assets to the trust.
  - b. Cannot borrow money from or loan money to the trust.
4. A trustee is precluded from obtaining “any personal benefit” other than the agreed upon statutory fees because of his or her position.
  - a. Please note that trustees that are insurance agents, stockbrokers, or real estate agents have been precluded from receiving their usual commissions for any services involving trust property by state statutes. [Know the Law]
  - b. Certain extra-legal fees by an attorney approved by the court may be paid if the trustee is an attorney.
5. The trustee is not absolutely prohibited from entering transactions with the beneficiaries of the trust that they are administering.  
**REMEMBER THAT THE TRUSTEE HAS A FIDUCIARY RELATIONSHIP WITH THE BENEFICIARIES AND MUST DISCLOSE ALL PERTINENT FACTS CONCERNING SUCH TRANSACTIONS TO THE OTHER BENEFICIARIES.**
6. The trustee cannot obtain any personal benefit from a third party with respect to dealings involving the trust estate.
7. The trustee is precluded from permitting himself or herself to be in an apparent conflict of interest with respect to the trust and third parties. Therefore, a corporate or bank trustee should not purchase its own shares or deposit trust funds into an account at its institution.
8. Individual trustees are expected to segregate trust assets from his or her own assets and earmark or otherwise identify trust property.

9. Corporate trust fiduciaries are permitted by statute to utilize pooled or common trust funds for various trusts to make diversified and desirable investments for the trust.
10. The trustee is required to maintain accurate records and accounts of his or her management of the assets and these accounts must be provided to the beneficiaries.
11. The trustee is required to take possession of the trust property and to make it profitable. [It is considered a breach of fiduciary obligations if the trustee does not make the trust assets profitable.]
12. The trustee must see that all debts of the trust are paid, such as the mortgage, property taxes, etc.

### **C. AFFIRMATIVE DUTIES WITH RESPECT TO TRUST ASSETS**

1. The trustee’s actions are examined under an objective standard of care, and it depends upon whether operating as an individual trustee or as professional trustee.
  - a. The individual trustee must exercise that degree of care, skill, and prudence with respect to trust assets as would a reasonable prudent businessperson with respect to his or her own affairs and property.
  - b. The professional trustee (bank or trust company) that possesses superior business expertise is held to a higher standard of care. They are held to the care, skill, and prudence of an individual or entity possessing those capabilities.
2. The trustee has a duty to collect and preserve trust assets.
3. The trustee has a duty to make a trust property productive. Land should be leased, private property utilized, and intellectual property licensed.
  - a. Prudent investor rules will apply to the trustee.

- b. There will be permissible investments that the trustee must follow whether in the trust agreement or by state statute. [Government and highly rated corporate bonds; first trust deed mortgages; blue chip common and preferred stocks]
- 4. The trustee has a duty to maintain a clear and accurate accounting with respect to all transactions which he or she enters on behalf of the trust.
- 5. The trustee has a duty to maintain a clear and accurate accounting with respect to all transactions which he or she enters on behalf of the trust.
- 6. A trustee cannot transfer its duties or delegate its duties that are discretionary or decisional in nature concerning trust assets.

#### **D. TRUSTEE’S LIABILITY**

- 1. Remember that a trustee stands in fiduciary relationship with respect to the beneficiaries of the trust.
- 2. When duties owed to the beneficiaries are breached, any questions of liability are typically resolved against the trustee.
- 3. Breach of the Duty of Loyalty:
  - a. The trustee uses trust funds for personal purposes.
  - b. Use of comingled funds for personal use.
  - c. When property is removed from the trust and it has dissipated or can no longer be identified, the trustee is liable for its value and any interest which could have been earned on those funds.
  - d. There is a possibility of punitive damages.
  - e. Can be a basis for removal of the trustee.
- 4. Breach of investment duties

- a. Improper investments
  - b. Failure to take reasonable steps to make trust assets productive.
5. Liability of successor trustee for breach of former trustees’ duties, therefore there is a duty to audit prior to accepting responsibilities as a trustee.
6. Improper transfer of trust assets to a non-bona fide purchaser.
7. Tort Liability or personal liability while performing tort duties to third parties.
- a. Ordinary negligence – Duty, Breach, Damages, Actual or Proximate Cause
  - b. Strict liability
  - c. Liability for contingent liability or vicarious liability created by respondent superior principles.
8. Contractual Liability
- a. The trustee has an implied right to reimbursement and indemnification against the trust where the contract was for the benefit of the trust and within the trustee’s authority.
  - b. All creditors must go directly against the trust but there may be an action if the trustee exceeds authority in contracting with creditors.

### **III. TRUSTEE LIABILITIES AND INSURANCE COVERAGES**

#### **A. Trustee Operations Insurance Program**

1. Trustees may need Building and Business personal property and business personal property of others coverage for operations outside of insuring the trust property.

2. Trustees may need Business Income and Extra Expense coverage for operations.
3. Trustees may need separate crime insurance including employee theft coverage and social engineering coverage.
4. Trustees may need EDP coverage, Equipment Breakdown Coverage, and Inland Marine coverage for equipment and installation floaters if construction and repair work is provided to trust property.
5. Trustees may need Workers Compensation Coverage, Employment Practices Liability Coverage, Fiduciary Liability Coverage for ERISA exposures for employees.
6. Trustees may need business auto coverage.
7. Trustees may need excess or umbrella coverage.

**B. Commercial General Liability (“CGL”) Policy does not cover Trustee Fiduciary Liability but can be endorsed to provide some Fiduciary Coverage for specific Operations.**

1. General Exclusions and mandatory endorsements impact ERISA Fiduciary Liability.

**e. Employer's Liability**

"Bodily injury" to:

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

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

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

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2. CG 21 47 EMPLOYMENT-RELATED PRACTICES EXCLUSION

- a. Many claims arising out of employment practices would seem not to fall within the scope of CGL coverage in the first place and this also impact the fiduciary duties of the trustee concerning Trustee employees and Commercial or Business Trust employees as well.
- b. Discrimination in hiring or promotion, for example, typically produces neither "bodily injury," "property damage," nor "personal and advertising injury" as those terms are defined in the CGL policy.
- c. Damages awarded when such claims are successful usually represent lost wages or lost potential wages—a form of economic loss not contemplated by general liability insurance.
- d. Moreover, where an employment practice does produce bodily injury (physical manifestation of emotional stress, for example), such claims commonly fall within the workers compensation system and therefore within the CGL workers compensation exclusion.
- e. But employment-related claims and particularly those alleging wrongful termination have triggered coverage disputes under general liability policies with increasing frequency in recent years.
- f. One reason is that, in cases of fired employees, the exclusive remedy of workers compensation obviously no longer applies, because the claimant is no longer the insured's employee.

- g. Moreover, wrongful termination claims often involve allegations that can be framed in terms of personal and advertising injury offenses.
- h. For example, companies that have given unflattering references to prospective employers of a terminated employee can find themselves facing libel or slander suits, offenses that are specifically covered by CGL insurance.
- i. The circumstances of an employment termination itself can produce claims of the same kind if those circumstances are unpleasant and heated enough.
- j. Claims of these kinds have been paid under CGL policies, even though it has long been the position of insurers that employment-related liability is not an appropriate subject of general liability insurance.
- k. The employment-related practices exclusion is seen by insurers as a way of restoring coverage to its proper scope.

**CG 21 47 Employment – Related Practices ENDORSEMENT Excludes Coverage For Both Coverage A and Coverage B**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

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

This insurance does not apply to:

"Bodily injury" to:

(1) A person arising out of any:

- (a) Refusal to employ that person;
- (b) Termination of that person's employment; or
- (c) Employment-related practices, policies, acts, or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation,

harassment, humiliation, discrimination, or malicious prosecution directed at that person; or

- (2) The spouse, child, parent, brother, or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the injury-causing event described in Paragraphs (a), (b) or (c) above occurs before employment, during employment or after employment of that person;
- (2) Whether the insured may be liable as an employer or in any other capacity; and
- (3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

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

This insurance does not apply to:

"Personal and advertising injury" to:

- (1) A person arising out of any:
- (a) Refusal to employ that person;
- (b) Termination of that person's employment; or
- (c) Employment-related practices, policies, acts, or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, 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.

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- 3. Remember that a Trust can be a named insured on the CGL, and the trustee is an automatic insured, but the beneficiaries are not automatically covered for bodily injury, property damage, personal injury, and advertising liability.

## SECTION II—WHO IS AN INSURED

- 1. If you are designated in the Declarations as:
  - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
  - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
  - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
  - d. An organization other than a partnership, joint venture, or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
  - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.**

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- 4. Additional Insured – Executors, Administrators, Trustees or Beneficiaries CG 20 23 12 19 should be added to the CGL.

**A. Section II – Who Is An Insured** is amended to include as an additional insured any executor, administrator, trustee, or beneficiary of your estate or living trust while acting within the scope of their duties as such. However:

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

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

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

1. Required by the contract or agreement; or
2. Available under the applicable limits of insurance; whichever is less. This endorsement shall not increase the applicable limits of insurance.

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5. Some carriers may use their own endorsement that can be added to provide bodily injury, property damage, and some personal injury coverage for a fiduciary.
6. These endorsements do not act as a replacement for Fiduciary Liability or Professional Liability Coverage because it does not offer any protection to the insured for the mismanagement of Trust Property.

**C. Specific Endorsements That Can Be Added to the CGL Coverage Form**

1. Fiduciaries – Fiduciary Interest Endorsement CG 24 11
  - a. When an entity operates in a Professional Fiduciary

Capacity and has its own Commercial General Liability Policy, this endorsement will provide protection for liability arising out of Fiduciary Activities.

- b. The fiduciary liability exposure itself – the professional liability for loss in connection with the management of the trust – is not the subject of general liability insurance.
- c. Bodily injury, property damage, and personal and advertising injury arising out of the ownership, maintenance, or use of the trust property including all related operations are covered.

This endorsement modifies insurance provided under the following:

#### COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance applies to "bodily injury", "property damage", "personal and advertising injury" or medical payments arising out of the ownership, maintenance, or use, including all related operations, of property in any trust, guardianship, or estate for which you are acting in a fiduciary or representative capacity, subject to the following additional provisions:

- A. Section II – Who Is An Insured** is amended to include as an insured each of the following to the extent set forth below:
1. Any co-fiduciary or co-representative of yours with respect to acts or omissions as such;
  2. Any person or organization legally responsible with respect to your acts or omissions in a fiduciary or representative capacity; and
  3. Any beneficiary, devisee, legatee, ward, heir or distributee of the trust, guardianship or estate, and any co-owner or life tenant of the property, with respect to acts or omissions as such.

However, the insurance, as afforded to any person or organization described in Paragraphs **1.**, **2.** or **3.** above, or to any person or organization while acting as your real estate manager, does not apply:

- a. To any "executive officer" or "employee" with respect to "bodily injury" to another "executive officer" or "employee" of the same employer or while performing his or her duties related to the conduct of your business;

- b. With respect to property or operations you designate in a written notice stating that this insurance is not required for such property or operations. The written notice must be given to us within 30 days after your knowledge of commencement of a fiduciary or representative relationship.
- B.** This insurance does not apply to "bodily injury" or "property damage" which occurs, or "personal and advertising injury" arising out of an offense which began, before you first had the right or duty to act in a fiduciary or representative capacity with respect to the pertinent property in such trust, guardianship, or estate.
- C.** Property in any trust, guardianship, or estate for which you are acting in a fiduciary or representative capacity will be deemed to be property owned by you.
- D.** Exclusion j. (2) of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:
- This insurance does not apply to:
- j. "Property damage" to:
- (2) Premises you or the person or organization you succeed or represent, have sold, given away or abandoned, if the "property damage" arises out of any part of those premises;
- E.** Exclusion I. of **Section I – Coverage A – Bodily Injury And Property Damage Liability** is replaced by the following:
- This insurance does not apply to:
- I. "Property damage" to "your work" or work performed by or on behalf of the person or organization succeeded or represented by you and 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, or on behalf of the person or organization succeeded or represented by you, by a subcontractor.
- F.** The following is added to Paragraph 8. **Transfer Of Rights Of Recovery Against Others To Us** of **Section IV – Conditions**:

This condition does not entitle us to the right to exoneration or reimbursement from property with respect to which you have a fiduciary relationship.

**G.** The definition of "your product" in the **Definitions** Section is replaced by the following:

"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) The person or organization you succeed or represent; or

(d) 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.

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2. Exclusion Fiduciary or Representative Liability of Financial Institutions CG 22 38

- a. This endorsement is added if a bank or other financial institution to exclude coverage under its Commercial General Liability form relating to property for which it is acting as a Fiduciary.
- b. The endorsement’s purpose is to exclude the fiduciary's vicarious liability that might arise out of the entity's capacity as a fiduciary.
- c. A trustee with responsibility for managing real property such as a home, a ranch, or a farm or even a business enterprise may sometimes be held vicariously liable for bodily injury or property damage incurred on that property or caused by the business's operations.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

This insurance does not apply to "bodily injury" or "property damage" arising out of the ownership, maintenance, or use, including all related operations, of property for which you are acting in a fiduciary or representative capacity.

**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" arising out of the ownership, maintenance, or use, including all related operations, of property for which you are acting in a fiduciary or representative capacity.

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- 3. Financial Institutions (Reporting Provision and Limitation to Fiduciary or Representative Interest) CG 24 05
  - a. Banks and other financial institutions that regularly act as a fiduciary will use this endorsement.
  - b. It is appropriate for use on a CGL policy purchased by the trust department of a financial institution to protect the trusts

and the financial institution from liability suits arising from property owned by the trusts.

- c. It requires the financial institution to make monthly reports of property acquisitions and divestitures and to provide an immediate notice of the start of any fiduciary relationship in which the insured assumes active management of a business.

This endorsement modifies insurance provided under the following:

#### COMMERCIAL GENERAL LIABILITY COVERAGE PART

The coverage provided under **Section I – Coverages** applies only with respect to "bodily injury", "property damage", "personal and advertising injury" or medical payments arising out of the ownership, maintenance, or use, including all related operations, of property in any trust, guardianship or estate for which you are acting in a fiduciary or representative capacity and is subject to the following additional provisions:

**A. Section II – Who Is An Insured** is amended to include as an insured each of the following to the extent set forth below:

1. Any co-fiduciary or co-representative of yours with respect to acts or omissions as such;
2. Any person or organization legally responsible with respect to your acts or omissions in a fiduciary or representative capacity; and
3. Any beneficiary, devisee, legatee, ward, heir or distributee of the trust, guardianship or estate, and any co-owner or life tenant of the property, with respect to acts or omissions as such.

However, the insurance, as afforded to any person or organization described in Paragraphs 1., 2. or 3. above, or to any person or organization while acting as your real estate manager, does not apply:

- a. To any "executive officer" or "employee" with respect to "bodily injury" to another "executive officer" or "employee" of the same employer or while performing his or her duties related to the conduct of your business;
- b. With respect to property or operations you designate in a written notice stating that this insurance is not required for such property or operations.

The written notice must be given to us within 30 days after your knowledge of commencement of a fiduciary or representative relationship.

**B.** This insurance does not apply to "bodily injury" or "property damage" which occurs, or "personal and advertising injury" arising out of an offense which began, before you first had the right or duty to act in a fiduciary or representative capacity with respect to the pertinent property in such trust, guardianship, or estate.

**C.** Property in any trust, guardianship, or estate for which you are acting in a fiduciary or representative capacity will be deemed to be property owned by you.

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

This insurance does not apply to:

**j.** "Property damage" to:

**(2)** Premises you or the person or organization you succeed or represent, have sold, given away or abandoned, if the "property damage" arises out of any part of those premises;

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

This insurance does not apply to:

**I.** "Property damage" to "your work" or work performed by or on behalf of the person or organization succeeded or represented by you and 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, or on behalf of the person or organization succeeded or represented by you, by a subcontractor.

**F.** The following is added to Paragraph **8. Transfer Of Rights Of Recovery Against Others To Us** of **Section IV – Conditions**:

This condition does not entitle us to the right to exoneration or reimbursement from property with respect to which you have a fiduciary relationship.

**G.** The definition of "your product" in the **Definitions** Section is replaced by the following:

"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) The person or organization you succeed or represent; or
  - (d) 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.

**H.** With respect to this insurance, you are to:

1. Report in writing to us, on the 60th day following inception of this Coverage Part and every 60 days thereafter, properties in which you have acquired, relinquished, or terminated a fiduciary or representative interest, including the date of acquisition, relinquishment, or termination; and
2. Notify us immediately at the start of any fiduciary, management, or representative relationship in which you assume active management or control of any commercial enterprise.

We may use this information for premium computation, but your failure to notify us will not invalidate this insurance.

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4. Fiduciary Liability of Banks CA 99 13

- a. Banks acting regularly in a Fiduciary capacity have an endorsement that also attached to their Business Auto Policy.

- b. Provided bodily injury and property damage coverage as per the terms and conditions of the Business Auto Policy.

This endorsement modifies insurance provided under the following:

**BUSINESS AUTO COVERAGE FORM**

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This policy is changed as follows:

**A. Changes In Covered Autos Liability Coverage**

1. The following exclusion is added:

This insurance does not apply to:

Liability of the "insured" as fiduciary arising from "bodily injury" or "property damage" that occurred before you first had the right or duty to act in a fiduciary capacity in which the "insured" is liable.

2. The following is added to **Who Is An Insured:**

Any "employee" of yours is an "insured" for any covered "auto" not owned by you, by such "employee" or by any members of his or her household but only while the covered "auto" is used in your business.

**B. Changes In Conditions**

The **Transfer Of Rights Of Recovery Against Others To Us** Condition does not apply to the "insured's" right of exoneration or reimbursement from property for which the "insured" is a fiduciary.

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**D. Trustees Professional Liability Insurance**

1. A trustee’s duties are much more than a “miscellaneous profession.”
2. Trustees are sophisticated professionals with specific legal exposures inherent to their business and their errors and omissions policy should reflect just that.

3. Trustees Professional Liability protects trustees handling a variety of trusts:
  - a. Living trusts
  - b. Beneficiary trusts
  - c. Family trusts
  - d. Testamentary trusts
  - e. Liquidating trusts
  - f. Charitable trusts
  - g. Special needs trusts
  - h. Pooled trusts
  - i. Estate guardianship agreements
  - j. Conservatorship agreements
  
4. The following are common examples of claims made against trustees and support need for coverage.
  - a. **Investment decisions** – even good investments are subject to criticism.
    - 1) A trustee conservatively purchased securities that held their value while yielding particularly good dividends, thus producing income for the trust and the trust’s income beneficiaries.
    - 2) The residual beneficiaries (the trustee’s stepdaughters) nonetheless complained.
    - 3) They alleged the trustee had invested for income, benefiting the then-current income beneficiaries, when he should have invested for growth or appreciation, to benefit them.

- 4) The trustee is now defending a \$12 million claim, at his own expense, because the assets of the trust had been fully distributed to the residual beneficiaries before their claims were made.

b. **Accounting objections** – winning can be expensive.

- 1) A trustee managed a trust holding commercial real estate, generating high income and appreciation, even in the current market, but the trustee was sued by a beneficiary asserting numerous objections to the trustee’s accounting.
- 2) The beneficiary contended, for example, that the bookkeeping summaries were too hard to understand, and not in accord with Generally Accepted Accounting Principles (GAAP) and hired an expert to support his request for \$4 million in damages.
- 3) All the complaints (claims) were denied by the court, but not before the trustee incurred \$315,000 to defend himself.
- 4) The beneficiary now asserts the trustee should pay these fees from his own pocket.

c. **Negligent delegation** – trustees get blamed for falling markets

- 1) The decedent spent a lifetime building a successful enterprise of interrelated distribution companies, but by the time he died (of suicide), his affairs were in disarray, the value of his business was declining, due to unavoidable industry changes, and insider theft had run rampant.
- 2) The trustee moved quickly to contain the damage, restore profitability, and maximize the value of several properties.

- 3) The trustee has nonetheless been challenged by the decedent’s surviving spouse, who alleges the trustee’s negligence in retaining executives and professionals to run the decedent’s business is the cause of many losses.
  - 4) Regardless of the merits of these accusations, it has proved expensive and difficult for the trustee to defend himself, and he faces millions in potential liability.
- d. **Taxes** – only two things are certain in life, and one of them is trustee exposure.
- 1) Failure to gain the most favorable tax treatment for the trust and the beneficiaries is a frequent source of claims against trustees.
  - 2) The taxation of estates is immensely complicated, even to tax attorneys and accountants, and the rules change every year.
  - 3) Yet trustees are required to make a number of fairly quick and irreversible decisions and elections within a limited period.
  - 4) Many decisions will be based on speculation as to future occurrences, such as which of the decedent’s assets are most likely to appreciate within an undefined period.
- e. **Dead men tell no tales** – liability at the expense of a deceased trustee’s family.
- 1) Sometimes a trustee is not around to defend himself.
  - 2) Any liability in this instance could be assessed against the deceased trustee’s own estate, at the expense of the deceased trustee’s heirs, such as his surviving spouse and children.

- 3) In one case a beneficiary claimed the trustee had favored some beneficiaries at the expense of others and had otherwise mismanaged the trust.
- 4) When the trustee died, the beneficiary continued her action against the deceased trustee’s estate.
- 5) This left the deceased trustee’s family to defend the action, without the benefit of their star witness (the deceased trustee), and, significantly, without the benefit of the trust finances with which to defend the deceased trustee’s actions.

f. **Co-trustee liability** – you are your brother’s keeper.

- 1) Having a co-trustee does not always make a trustee’s job easier.
- 2) Unlike in sole trustee agreements, there is always the chance of disagreement and impasse among co-trustees, who often may be siblings or other close but antagonistic relatives, particularly when they are also beneficiaries of the trust.
- 3) For example, when a trustee’s discretionary authority prevents the investment of trust funds, his co-trustee may bring allegations against him based upon trust management decisions in which he claims he was not involved yet had financial ramifications to him – not as a co-trustee, but as a beneficiary entitled to trust distributions.

g. **Charities are not always charitable to trustees.**

- 1) The trustee of a charitable trust is subject to most of the same challenges as other trustees, but he is frequently also under the scrutiny of well-funded beneficiaries (often wealthy and assertive institutions, such as hospitals, universities, and religious organizations), the attorney general, and in some cases, the donor/settlor.

- 2) Typical claims involve excessive compensation, decisions related to the investments chosen, and gifts to ineligible or disfavored donees.
- h. **Liquidating trusts.** Liquidating trusts present their own special hazards.
- 1) **Shareholder investments, for example, can be especially hard to characterize in the context of a poorly managed corporation.**
  - 2) Treating an investment as contribution to capital versus a loan will have a profound effect: in one case the shareholder recoups her investment pro rata at the expense of the creditors, in the other case the shareholder is paid last if at all.
  - 3) Another contentious item involves the payment of claims because each claim honored reduces the shares of the other claimants.
  - 4) Payment of claims that are inflated or otherwise miscalculated, potentially time barred, or of a non-priority class will expose the trustee to legal challenge.
5. **Typical Trustees Professional Liability Coverage Form language** is tailored to the specific coverage needs of trustees and the exposures therein, including discretionary investment authority.
- a. Coverage for negligent delegation
  - b. Coverage for negligent tax preparation
  - c. Coverage forms allow for the appointment of a defense counsel that specializes in trustee litigation.
  - d. There are spousal and domestic partner coverage endorsements or extensions of coverage.

- e. Coverage for insured trustees that are also trust beneficiaries whereby a suit is brought against another insured trustee [Insured versus Insured suits]
  - f. Punitive damages up to the full limit of liability where insurable by law
  - g. Final adjudication language for fraud claims
  - h. Coverage can be extended to employees of the trustee. (Paralegal, clerical)
  - i. Some policies push for mediation and will give up to a 50% retention credit for claims settled in formal mediation.
  - j. Some will provide personal injury offense coverage which must be coordinated with the Commercial General Liability Coverage Form Coverage B.
6. Some insurance companies will provide coverage through a Miscellaneous Professional Liability (MPL) Coverage Form that must be carefully reviewed, and several endorsements may be required.
- a. MPL insuring agreements cover "wrongful acts" resulting from "insured services" for specifically described professional services.
  - b. Such acts encompass two broad areas:
    - 1) Negligent acts, errors, and omissions and
    - 2) Various personal injury perils that include libel, slander, false arrest, wrongful detention, false imprisonment, wrongful entry, and malicious prosecution.
7. Bankers Professional Liability Endorsement to a Bank’s D&O Insurance Contract



- a. The following are a number of specific professional banking activities for which coverage would be available under a professional liability endorsement to a financial institution D&O liability policy.
- b. Administering trusts, estates, or guardianships within the company's trust department
- c. Administering individual retirement accounts or Keogh retirement accounts
- d. Acting as a receiver, trustee in bankruptcy or assignee
- e. Administering a program for lending securities administered for trust and custodial customers.
- f. Acting as a trustee under a bond indenture
- g. Acting as a dividend disbursing agent, exchange agent, redemption, or subscription agent, or warrant or scrip agent.
- h. Acting as a fiscal or paying agent, or tax withholding agent
- i. Acting as a custodian or depository, or a managing agent for securities or money
- j. Acting as an escrow agent
- k. Acting as a registrar, transfer agent, or clearing agent
- l. Acting as a fiduciary as defined by the Employee Retirement Income Security Act (ERISA) of 1974
- m. Acting as tax planner and/or tax preparer to trusts, estates, and individuals.
- n. Servicing loans, leases, or extensions of credit
- o. Acting as a securities broker/dealer
- p. Selling municipal general obligation bonds
- q. Acting as an investment, financial, or economic adviser or investment manager
- r. Acting as a consumer financial planner to individuals

- s. Acting as a wire transfer agent
- t. Providing accounting, net asset valuation, or transfer services for mutual funds
- u. Acting as a notary public
- v. Acting as a real estate broker, agent, appraiser, or real or private property manager for others
- w. Acting as an insurance agent or broker
- x. Selling travelers checks, certified checks, or money orders
- y. Administering or selling credit cards or credit card services
- z. Administering or leasing lockboxes
- aa. Providing electronic data processing services or acting as a custodian for database or sensitive information stored electronically.

**E. What is ERISA and why does it create Trustee Liability and the need for Fiduciary Liability Insurance?**

1. The Employee Retirement Income Security Act of 1974 (ERISA) is a federal statute that establishes minimum standards for pension plans in private industry.
2. The liability and duties under the statute for employers and their employees involved in ERISA welfare plans are similar if different from those facing a Trustee for a Trust.
3. I will point out the similarities and highlight the needed insurance coverage for each – Trustee Professional Liability and Fiduciary Liability.
4. ERISA addresses ALL employee benefit plans, and the statute is not restricted to only retirement and profit-sharing plans.

If your employer maintains a pension plan, ERISA specifies when you must be allowed to become a participant, how long you have to work before you have a non-

forfeitable interest in your pension, how long you can be away from your job before it might impact your benefits, and whether your spouse has a right to part of your pension in the event of your death. Most of the provisions of ERISA are effective for plan years beginning on or after January 1, 1975

5. ERISA does not require any employer to establish a pension plan. It only requires that when employers establish plans that they must meet certain minimum standards.
6. The Commercial General Liability Coverage Form does not cover Fiduciary Liability or Trustee Professional Liability.
7. ERISA does the following:
  - a. Requires plans to provide participants with information about the plan including essential information about plan features and funding.
  - b. The plan must provide some information regularly and automatically.
  - c. ERISA sets minimum standards for participation, vesting, benefits accrual, and funding.
  - d. ERISA requires accountability of plan fiduciaries.
  - e. ERISA gives participants the right to sue for benefits and breaches of fiduciary duty.
  - f. ERISA guarantees payment of certain benefits if a defined benefit plan is terminated, through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation.
8. **Who is a FIDUCIARY according to ERISA?**
  - a. A Fiduciary is the person(s) who has discretionary authority or responsibility for plan administration.

- b. A Fiduciary is the person(s) who exercises any discretionary authority or control respecting plan management.
- c. A Fiduciary is the person(s) who exercises any authority or control (regardless of whether it is discretionary) regarding the management or disposition of plan assets or to render investment advice for a fee or other compensation, directly or indirectly, concerning any plan money or property.
- d. In an organization, a Fiduciary could be:
  - 1) The Plan Sponsor, which is normally the employer.
  - 2) The Plan Trustees and the Administrator.
  - 3) The Internal Investment Committee and ANYONE with discretionary authority to give advice or counsel to an employee regarding benefits.
- e. Under ERISA, a person is not a fiduciary because of the position he or she holds, his or her title in the company, or what the contract provides.
- f. THE DETERMINATIVE FACTOR IS THE FUNCTIONS PERFORMED BY THE ENTITY OR PERSON AT ISSUE.

**9. ERISA and the Pension Reform Act of 1974 further defines Fiduciary Responsibilities under the statutory scheme**

- a. The BASIC RULE that ERISA applies to fiduciaries who invest plan assets is like trustees and the investment of trust assets.

Would a prudent person (fiduciary or trustee) in the same situation view the investment as a responsible way of investing plan assets (trust assets) within the context of a diversified investment portfolio?

- b. ERISA applies the PRUDENT PERSON DOCTRINE of the common law and the statutory codification of the Uniform Trustee’s Power Act to the duties of the Fiduciary and to Trustees of a trust.
- c. The Uniform Trustee’s Power Act defines PRUDENT PERSON as follows.

A prudent person means a trustee whose exercise of trust powers is reasonable and equitable in the view of the interests of income or principal beneficiaries, or both, and in view of the manner in which men of ordinary prudence, diligence, discretion, and judgment would act in the management of their own affairs.

**10. What are the responsibilities of a Fiduciary?**

- a. ERISA Section 403(c)(1) requires Plan Fiduciaries to discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries and:
- b. For the exclusive purpose of:
  - 1) Providing benefits to participants and their beneficiaries; and
  - 2) Defraying reasonable expenses of administering the plan.
- c. With care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.
- d. Exclusive Purpose Rule applies to ERISA Fiduciaries but also to Trust Trustees.

All activities and transactions performed by a fiduciary must be for the **EXCLUSIVE PURPOSE** of providing benefits to the participants.

- e. The Diversification Rule applies to ERISA Fiduciaries but also to Trust Trustees.

Fiduciaries must ensure that there is diversification of assets to minimize the risk of large losses to the beneficiaries.

- f. The Prudence Rule applies to ERISA Fiduciaries but also to Trust Trustees.

Fiduciaries are required to exercise the same care, skill, diligence, and prudence that a person familiar with such matters would do in managing a comparable situation.

- g. ERISA forbids Fiduciaries from engaging in SELF-DEALING and PARTY-IN-INTEREST transactions.
- h. The Fiduciary must monitor Investment Performance, and this includes ongoing scrutiny of investment returns and the performance of outside investment professionals.

#### 11. Plans Covered by ERISA

- a. Pension Plans for Retirement
- b. Profit Sharing Plans
- c. Thrifts Add Savings Plans (401k)
- d. Employee Stock Ownership Plan (ESOP)
- e. TRASOP (Tax Reform Act Stock Ownership Plan)
- f. Defined Benefit Plan
- g. Welfare Plans
  - 1) Hospital, Surgical, Medical Insurance Plans (HSA or MSA) as per the Affordable Health Care Act.
  - 2) Life Insurance Plans

- 3) Dental and Vision Plans
- 4) Accident Insurance (AFLAC)
- 5) Disability Insurance
- 6) Scholarship Plans which are funded
- 7) Supplemental Unemployment Plans
- 8) Prepaid Legal Services
- 9) Certain Severance Pay Plans
- 10) COBRA Benefits

**12. Plans Not Subject to ERISA**

- a. Workers Compensation
- b. Unemployment Compensation
- c. Mandatory No-Fault Auto Insurance Plans
- d. Mandatory Uninsured and Under-insured Motorist Plans
- e. State Short Term Disability Plans
- f. Plans maintained outside the United States that are primarily for non-resident aliens.
- g. Unfunded Plans are maintained solely to provide benefits for certain employees more than the limitations imposed on benefits and contributions for tax purposes.
- h. Plans of federal, state, and political subdivisions
- i. Church Plans

## F. FIDUCIARY LIABILITY INSURANCE

1. There are several approaches to financing a fiduciary exposure.
  - a. Self-insurance with emphasis on loss avoidance. According to industry studies, most corporations insure the exposure, although some large corporations with internal resources to handle the various aspects, including loss control, do elect to self-insure.
  - b. Fiduciary insurance coverage. Typically, this coverage pays all sums the insured becomes obligated to pay because of a fiduciary's breach of duty. The policy excludes dishonesty, libel, or slander, breach of fiduciary duty, failure to carry bonds or insurance for the plan, bodily injury, and property damage.
  - c. Endorsement to directors' and officers' liability policy. Typically, D&O policies exclude protection for fiduciaries; however, some insurers will add it by endorsement. However, the endorsement limits coverage to directors and officers; other persons involved in the administration of the plan remain unprotected.
  - d. Endorsement to the commercial general liability policy. Many insurers will endorse their CGL with an "Employee Benefits Liability" endorsement, which covers errors or omissions in administration of benefit plans, though it does not extend to statutory liability under ERISA for decisions.
2. Fiduciary Liability Policies will pay on behalf of the insured, the legal liability arising from claims for alleged failure to prudently act within the meaning of the Pension Reform Act of 1974.

### **Fiduciary Liability Coverage Insuring Clause 1 1.**

The Company shall pay, on behalf of the Insureds, Loss on account of any Fiduciary Claim first made against the Insureds during the Policy Period, or, if exercised, during the Extended Reporting Period, for a Wrongful Act committed, attempted or allegedly committed or attempted before or during the Policy Period by such



Insureds, or by any person for whose Wrongful Acts the Insureds are legally responsible, but only if such Claim is reported to the Company in writing in the manner and within the time provided in Subsection 11 of this coverage section.

### **Voluntary Settlement Program Coverage Insuring Clause 2 2.**

The Company shall pay, on behalf of the Insureds, Settlement Fees and Defense Costs with respect to a Settlement Program Notice first given to the Company during the Policy Period, or, if exercised, during the Extended Reporting Period, provided (i) the Settlement Fees and Defense Costs are incurred after such Settlement Program Notice is first given to the Company, and (ii) the Company’s maximum liability for all Settlement Fees and Defense Costs with respect to all Settlement Program Notices first given to the Company during the Policy Period (including the Extended Reporting Period, if applicable) shall be \$100,000. Such amount shall be part of, and not in addition to, the Limit of Liability otherwise applicable to this coverage section.

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Fiduciary Liability Coverage Section

3. Claims Made Fiduciary Liability Coverage is intended to respond to liability arising from:
  - a. Discretionary judgment in addition to allegations of administrative errors or mistakes
  - b. Errors and omissions in communication
  - c. Administration of employee benefits.
4. Policies may also cover liability arising from errors and omissions in administering covered plans, which makes it unnecessary to purchase Employee Benefits Liability coverage when a fiduciary liability policy is obtained on the covered plans.

Wrongful Act means with respect to any Plan:

(a) any breach of the responsibilities, obligations or duties imposed by ERISA upon fiduciaries of the Sponsored Plan in their capacity as such fiduciaries.

(b) any negligent act, error or omission in the Administration of any Plan committed, attempted, or allegedly committed or attempted by an Insured in the Insured’s capacity as such; or

(c) any other matter claimed against an Insured solely by reason of the Insured’s service as a fiduciary of any Sponsored Plan.

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Fiduciary Liability Coverage Section

5. Broad coverage because of definition of Employee Benefits Program or Employer Sponsored Plan.

Sponsored Plan means:

(a) any Employee Benefit Plan, Pension Benefit Plan or Welfare Benefit Plan, as each are defined in ERISA, which is operated solely by the Organization or jointly by the Organization and a labor organization solely for the benefit of the Employees or Executives of the Organization located anywhere in the world and which existed on or before the inception date set forth in Item 2 of the Declarations of the General Terms and Conditions or which is created or acquired after such inception date; provided

(i) any coverage with respect to any such Plan created or acquired during the Policy Period shall apply only for Wrongful Acts committed, attempted, or allegedly committed or attempted after the effective date of such creation or acquisition and shall be subject to Subsection 15 of this coverage section, and

(ii) any coverage with respect to an employee stock ownership plan created or acquired during the Policy Period shall be further subject to Subsection 19 of this coverage section.

(b) any other employee benefit plan or program not subject to ERISA which is sponsored solely by the Organization for the benefit of the Employees or Executives, including any fringe benefit or excess benefit plan.

(c) any other plan or program otherwise described in paragraphs (a) or (b) above while such plan or program is being actively developed, formed or proposed by the Organization prior to the formal creation of such plan or program; provided,

however, no coverage is afforded under this coverage section for any Claim against an Insured in a settlor or similar uninsured capacity with respect to any plan or program; and

- (d) any other plan, fund, or program specifically included as a Sponsored Plan by endorsement to this coverage section.

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Fiduciary Liability Coverage Section

6. Endorsement can be added to specifically list the various plans that will be covered by the ISO Fiduciary Policy – MP DS 08 10 06 Amended Schedule of Employee Benefit Plans
7. BE AWARE OF ISO EXCLUSION ENDORSEMENTS – MP 21 36 10 06 Exclusion – Conversion from Defined Benefit Plans to Defined Contribution Benefit Plans.
8. Managed Care Endorsement needed to expand Employee Benefit Program definition. The two most common claim scenarios associated with the managed care exposures involve an injured employee-claimant suing an employer sponsor of a managed health care plan, alleging:
  - a. That the employer-sponsor of a managed health care plan negligently selected the managed health care plan provider; and
  - b. That the employer-sponsor of a managed health care plan wrongly denied or delayed medical benefits provided by the plan.
9. Nonstandard and usually issued on a claim made basis.
10. Frequently written as part of an “executive liability” package.
11. Bodily injury, Property Damage and Personal Injury Exclusion

For bodily injury, mental anguish, emotional distress, sickness, disease or death of any person or damage to or destruction of any tangible property including loss of use thereof whether or not it is damaged or destroyed;

12. Failure to maintain ERISA Bonds Exclusion

Based upon, attributable to, or arising out of any actual or alleged failure or omission to effect or maintain insurance or fidelity bond for the “employee benefit program” [Sponsored Program] as required under ERISA.

13. Fraudulent and dishonest acts Exclusion

Based upon, attributable to, or arising in fact out of any dishonest, fraudulent, deliberately criminal, or malicious act or any willful violation of any statute or regulation.

14. Illegal Profits Exclusion

**The Insurer shall not be liable for Loss on account of any Claim made against any Insured ... based upon, arising out of, or attributable to such Insured gaining in fact any personal profit, remuneration or financial advantage to which such Insured was not legally entitled.**

15. Discrimination in violation of any law Exclusion

**The Insurer shall not be liable to pay any Loss ... in connection with any Claim ... for discrimination in violation of any law other than ERISA or any Similar Act.**

16. Prior Act and/or Litigation Exclusions

Based upon, arising from or in consequence of any demand, suit, or other proceeding pending against, or order, decree or judgment entered for or against any Insured, on or prior to the applicable Pending or Prior Date set forth in Item 7 of the Declarations for this coverage section, or the same or substantially the same fact, circumstance or situation underlying or alleged therein.

a. Before Retroactive Date

b. Prior Litigation

17. Failure to Fund Plan Exclusion

**The Insurer shall not be liable to make any payment for Loss in connection with a Claim made against an Insured(s) ... for failure to fund a Plan in accordance with Employee Benefit Law ... except that this exclusion shall not apply to Defense Costs.**

18. Pollution Exclusion

Based upon, arising from or in consequence of:

- (i) any actual, alleged, or threatened exposure to, or generation, storage, transportation, discharge, emission, release, dispersal, escape, treatment, removal, or disposal of any Pollutants; or
- (ii) any regulation, order, direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize any Pollutants, or any action taken in contemplation or anticipation of any such regulation, order, direction or request, including but not limited to any Claim for financial loss to any Organization or Plan or creditors based upon, arising from or in consequence of any matter described in clause (i) or clause (ii) of this Exclusion 4(c);

provided that this Exclusion 4(c) shall not apply to

(A) any Claim by or on behalf of a beneficiary of or participant in any Sponsored Plan based upon, arising from or in consequence of the diminution in value of any securities owned by the Sponsored Plan in any organization other than the Organization, if such diminution in value is allegedly as a result of the matters described above in this Exclusion 4(c), or

(B) Loss (other than fees and expenses incurred in testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing Pollutants) incurred by an Insured Person for which the Organization is not permitted by common or statutory law to indemnify or for which the Organization is not able to indemnify by reason of Financial Impairment;

19. Contract Liability Exclusion including hold harmless and indemnification language.

Based upon, arising from or in consequence of the liability of others assumed by any Insured under any written or oral contract or agreement; provided that this Exclusion 4(e) shall not apply to the extent that:

- (i) an Insured would have been liable in the absence of a contact or agreement,
- (ii) the liability was assumed in accordance with and under the agreement or declaration of trust pursuant to which the plan was established.

20. Insolvency or Bankruptcy of Financial Institution Exclusion

21. Failure to comply with the MANDATORY PROVISIONS of certain Statutes and Acts Exclusion

For the failure of the Insured to comply with any workers’ compensation, unemployment insurance, social security or disability benefits law or any amendments thereto or any rules or regulations promulgated thereunder, or any similar provisions of any federal, state, or local statutory law or common law anywhere in the world, except (i) the Consolidated Omnibus Budget Reconciliation Act of 1985, (ii) the Health Insurance Portability and Accountability Act of 1996, or (iii) any amendments to or any rules or regulations promulgated under such Acts;

22. Failure to Collect Contributions Exclusion

23. Benefits Payable to Beneficiary Exclusion

24. Plans not described by definition or supplemental schedule Exclusion. (This is a critical issue – get all plans listed.)

## IV. TRUST LIABILITY AND INSURANCE COVERAGES

### A. KEY UNDERWRITER QUESTIONS FOR INSURING THE FIRST-PART AND THIRD-PARTY EXPOSURES FOR A TRUST

1. To systematically handle these potential trust exposures, insurers have developed a series of questions that will efficiently identify trust arrangements that pose extraordinary risks.
2. These risks can be reviewed for special underwriting attention.
3. Examples of pertinent questions include the following.
  - a. Who are the parties to the trust (grantor, trustee, beneficiary)?
  - b. What is their relationship to each other?
  - c. How is the trust worded? [Memorandum of Trust provided]
  - d. Is it a personal trust?
  - e. What tangible property does the trust hold (e.g., house, jewelry, boats, autos)?
  - f. Is there any business use of any property held by the trust?
  - g. What rights has the Settlor/Trustor/Grantor reserved regarding the property held in trust?

### B. INSURING A TRUST WITH PERSONAL LINES PROPERTY TRANSFERRED TO THE TRUST

1. The growing popularity of trusts, however, means that insurance agents and insurance companies should anticipate the day when the use of trusts will spread throughout their homeowners, personal auto, and umbrella book of business.

2. Homeowners Insurance Coverage Form Issues that also apply to Grower and Rancher Coverage Forms as well.
  - a. One approach that some insurers take is to simply add the trust as an additional insured under the homeowners policy, with no changes to the named insured (Trustors, Grantors, Settlers).
  - b. Problems can result for the trust, however, because the additional insured is provided no coverage for personal property, loss of use, or medical payments.
    - 1) So, if the trust owns some of the jewelry or if there is a rental exposure (tenants or roomers), coverage gaps can result.
    - 2) A better approach to better protect the exposures of the Trustors/Grantors/Settlers/Resident and the property and liability exposures of the trust and trustee is to list all parties as co-named insureds on both the underlying and umbrella policies.
    - 3) For example, the declarations could list the named insured as the following: [Use the Memorandum of Trust to get the exact name of the trust]  
  
*"John and Mary Doe and Alan White, as Trustee of the John and Mary Doe Revocable Trust Dated May 3, 2015."*
  - c. The naming as listed above can result in unintended exposures for the insurance company.
    - 1) If a family trust is listed as a named insured, personal property losses to trust property in other states may not have been anticipated and underwritten by the underwriter.
    - 2) Any business-related exposures of the trust are a concern for insurers.
    - 3) For these reasons, some insurers do not like this approach, having legitimate concerns that they may



pick up some other liability exposures of the trust unrelated to the home itself.

- 4) Therefore, care would need to be taken to properly limit the loss exposures surrounding the trust to the residence premises.
  - 5) To address this concern, an insurer-developed manuscript endorsement could specify that if the trustee does not regularly reside on the residence premises, the personal liability and medical payments insurance applies only to bodily injury and property damage due to the maintenance, ownership, or use of the residence premises.
  - 6) This special endorsement should also specify that there is no coverage under the trust's homeowners policy for any resident of the trustee's household.
  - 7) This approach helps lessen any coverage gaps the insured may have and alleviates the concerns insurers may have by extending coverage to the trustee.
  - 8) There is no consensus on this complex issue.
  - 9) What also complicates matters is that there is no "standard" trust agreement.
  - 10) An underwriter would find it difficult to analyze every trust agreement to fully understand exactly who has what insurable interests and liability exposures.
3. **The ISO introduces the HO 06 15 Trust Endorsement in the 2011 HO program to replace the Residence Held In Trust (HO 05 43) endorsement.**
- a. This allows the policy to be issued in the name of the trustor/grantor/settlor of the trust instead of in the name of the trust.

- b. A scenario will help illustrate how a trust works and how this endorsement works.

Assume that John and Mary Doe, a wealthy married couple in their sixties, take the advice of their attorney and transfer their \$3 million home into a trust.

John and Mary thus become the trustor/grantor/settlor under the trust. Note that the trustor/grantor/settlor can also serve as the trustee, but if the trustor/grantor/settlor does not have the expertise or the time to do this, the trustor/grantor/settlor can appoint an experienced trustee for the trust.

The trustee is responsible for managing the trust's assets and for executing the goals outlined in the trust instrument. John and Mary appoint Mary's brother, Alan White, as the trustee of the trust.

Please note that the trustee could also be the trustor/grantor/settlor or a qualified trust company such as a bank, which holds and manages the property in the trust. John and Mary continue to live in the house. Thus, the trustee holds the legal ownership or legal title to the home, and John and Mary as the trustors/grantors/settlors hold the equitable/beneficial ownership.

- c. The Residence Held In Trust (HO 06 15) endorsement schedule allows for the entry of the following.
  - 1) Trust name (listed as Item 1) and trust address for informational purposes.
  - 2) Trustee(s) name (listed as Item 2) and trustee(s) address to indicate his or her status as an insured.
  - 3) Trust name (Item 3) if designated as an insured.

The following provisions apply with respect to the Trust and Trustee(s) named in Items **1.** and **2.** in the Schedule of this endorsement:

**DEFINITIONS**

**A.** The following is added to Definition **5.** "Insured":

**5. "Insured" means:**

**d.** The Trust, if recognized under applicable state law as a legal entity with the capacity to sue or be sued in a court having jurisdiction and if named in Item **3.** in the Schedule as an Insured, but only for the following coverages:

- (1)** Coverage **A** – Dwelling and Coverage **B** – Other Structures; and
- (2)** Coverage **E** – Personal Liability and Coverage **F** – Medical Payments To Others, but only with respect to "bodily injury" or "property damage" arising out of the ownership, maintenance, or use of an "insured location" as defined under Definitions, Paragraph **B.6.a.** of this endorsement.

**e.** The Trustee(s) named in Item **2.** in the Schedule as an Insured but only for the following coverages:

- (1)** Coverage **A** – Dwelling and Coverage **B** – Other Structures; and
- (2)** Coverage **E** – Personal Liability and Coverage **F** – Medical Payments To Others, but only with respect to "bodily injury" or "property damage" arising out of the ownership, maintenance, or use of an "insured location" as defined under Definitions, Paragraph **B.6.a.** of this endorsement.

However, this Paragraph **A.5.e.** applies only with respect to the Trustee's duties as a Trustee of the Trust named in Item **1.** In the Schedule.

**d.** The endorsement amends the definition of an "insured" to include the trust (but only if it is recognized under the applicable state law as a legal entity with the right to sue or be sued in a court of law) and if named in Item 3 in the schedule as an insured.

**e.** Note, however, that the trust itself is an insured for only four coverages:

- 1) Coverage A: dwelling
- 2) Coverage B: other structures

- 3) Coverage E: personal liability/Coverage but only for bodily injury and property damage arising out of the ownership, maintenance, or use of an insured location.
  - 4) Coverage F: medical payments: but only for bodily injury and property damage arising out of the ownership, maintenance, or use of an insured location.
  - 5) Please note that dwellings owned by a trust but the trustor/grantor/settlor do not occupy require a separate Dwelling Fire Policy that requires that the named insured be the trust. [Some carriers will not insure a trust on a Dwelling Policy and you may be required to issue a Businessowners Policy for the Dwelling Exposure since it is being rented out to tenants.
- f. The trustee designated in Item 2 is an insured for the same coverages, but this status is limited only with respect to the trustee's duties as a trustee.

**For example, assume the grantor's bank is listed as the trustee. This endorsement would not provide any property or liability coverage for any of the bank's other loss exposures; coverage would apply only to its duties as a trustee for the house being covered under the policy.**

- g. The "business" definition is amended to stipulate that any of the trustee's activities in connection with this trust are not considered "business" activities in this policy and are thus covered.
- h. The "insured location" definition is amended so that the location includes certain real property if legal title to such property is held in the trust listed on the endorsement schedule.
- i. The endorsement includes other coverage amendments, as follows.

- 1) The intra-family exclusion is amended to incorporate a reference to the trustee.
  - 2) The cancellation and nonrenewal provisions are amended so any notice(s) will be mailed to the trustee named in the schedule.
  - 3) A trust documents provision stipulates that the insurer, as often as it requests, must be provided with copies of the trust documents.
  - 4) A changes and notification requirements provision specify that the insurer be notified of any amendments to the trust such as:
    - a) The name and address of the trust or trustee,
    - b) Termination of the trust,
    - c) The death or disability of the trustee, or
    - d) The trustor/grantor/settlor moving out of the house.
  - 5) A personal injury coverage provision stipulates that, if the personal injury endorsement is added to the policy, the intra-family exclusion incorporates a reference to the trustee within the endorsement.
4. PLEASE NOTE - Since some states do not recognize trusts as legal entities, a state-specific ISO endorsement will become available that does not enable insurers to list the trust as an insured.
  5. The Personal Auto Policy can be impacted by a trust arrangement.
    - a. The ISO PP 13 03 01 05 Trust Endorsement, introduced in conjunction with the 2005 PAP program, is needed for situations in which the title to an automobile is held solely in the name of the trust.

With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by endorsement.

**I. Definitions**

The following is added to Paragraph **C.** of the **Definitions** Section:

For purposes of this policy, a private passenger type auto, pickup or van shall be deemed to be owned by a person if title is transferred to the trust shown in the Schedule or in the Declarations.

**II. Part F – General Provisions**

Part **F** is amended as follows:

The following is added to the Termination provision:

If this policy is terminated, notice will also be mailed to the Trustee(s) shown in the Schedule or in the declarations.

This endorsement must be attached to the Change Endorsement when issued after the policy is written

- b. The endorsement amends the definitions section by stating that a private passenger auto, pickup, or van is owned by a person if the title is transferred to the trust designated in the endorsement schedule.
- c. This is like the current approach as respects leased vehicles.
- d. If the policy is canceled or non-renewed, the notice shall also be mailed to the trustee listed in the endorsement schedule.
- e. Prior to the PP 13 03 endorsement, the Certificate of Insurance – Trusts PP 03 33 endorsement was utilized, which specified that vehicles owned jointly by the named insured and a trustee were considered insurable under the PAP's liability section.

- f. In most cases involving trusts, however, vehicles are not jointly owned because the title is transferred solely to the trust before the insurer is even aware of the existence of the trust.
  - g. Normally, the trustor/grantor/settlor party who establishes the trust is the party requesting the PAP and formerly owned the vehicle now being held in the trust.
  - h. In most instances, the trustor/grantor/settlor will usually be designated as the trustee.
  - i. The type of trusts required to be addressed under the PAP are usually revocable living trusts. Remember that a living trust is created during the grantor's lifetime and takes effect during the grantor's lifetime.
6. Personal Umbrella Policy must be modified as well.
- a. The named insured definition in the ISO personal umbrella definition is similar to what is found in many underlying policies.
  - b. The ISO personal umbrella delineates five "insured" categories, paraphrased as follows:
    - 1) You
    - 2) A family member
    - 3) Any person using an owned and insured (a) auto, (b) recreational vehicle (RV), or (c) watercraft, including any person using a temporary substitute for such auto or RV.
    - 4) Any other person or organization with respect to the legal liability for acts or omissions of the named insured or family member while the named insured or family member is using an auto or RV covered under the personal umbrella policy; however, the owner or

lessor of an auto or RV loaned to or hired for use by an insured is *not* an insured.

5) Any person or organization responsible for animals owned by the named insured or a family member; however, a person or organization using or in custody of such animals (a) during any business or (b) without the owner's consent, is NOT an insured.

6) PLEASE NOTE that the trust or trustee is not a named insured by definition.

c. However, some insurance companies provide the coverage for the trust in their definition. The Farmers form includes within its "insured" definition "any trustee of your estate or living trust while acting within the scope of their duties as such" as long as underlying insurance is in force for this exposure.

d. Most personal umbrella forms exclude losses arising from professional services, as this exposure should be covered under a separate professional liability policy.

e. Therefore, a trustor/grantor/settlor that also becomes the trustee will still need a stand-alone Trustees Professional Liability Policy to cover their activities on behalf of the trust.

f. Remember that Homeowners policies exclude coverage for professional liability like the umbrella.

Coverages **E** and **F** do not apply to the following: ...

**3. Professional Services**

"Bodily injury" or "property damage" arising out of the rendering of or failure to render professional services;



### **C. INSURANCE FOR A PERSONAL OR BUSINESS TRUST THAT HAS RENTED DWELLINGS OR SMALL BUSINESS ENTITIES TRANSFERRED TO THE TRUST**

1. The Businessowners Policy has become the best solution.
2. Both ISO and American Association of Insurance Services (AAIS) have businessowners policies, and some insurers still have their own forms.
3. If the insured is designated in the declarations as a Personal Trust or as a Business Trust, the entity is insured but the Trustee and beneficiaries may not and they will need to be added, but only with respect to the conduct of the Trust.
4. For a Personal or Business Trusts to be eligible for coverage under a typical businessowners policy, none of its locations can exceed 35,000 in square footage (excluding basements do not open to the public) and \$6 million in annual gross sales. The types of Business Trusts enterprises are eligible for these programs as summarized below.
  - a. Apartment buildings of any size, including residential condominium associations
  - b. Contractors are subject to several restrictions, such as an annual payroll of \$300,000 or less and doing no work at heights of more than three stories.
  - c. Mercantile risks
  - d. Processing and service risks
  - e. Wholesale risks
  - f. Office buildings not over six stories tall or exceeding 100,000 total square feet.
  - g. Motels not more than three stories tall, subject to no square foot restriction

- h. Restaurants
  - i. Self-storage facilities
  - j. Convenience food/gasoline store/restaurants with limited cooking and fast food
  - k. Grocery stores and supermarkets that sell gasoline.
  - l. Business personal property in eligible apartment buildings, offices, and mercantile, wholesale, service, or processing operations are also eligible for BOP coverage.
  - m. An owner-occupant's building and personal property must be insured in the same policy.
5. Building coverage for the Business Trust would apply to the following.
- a. The buildings or structures identified in the declarations.
  - b. Completed additions.
  - c. Fixtures, including outdoor fixtures.
  - d. Permanently installed machinery and equipment
  - e. Owned personal property used to service and maintain the building and premises.
  - f. Additions under construction, alterations, and repairs to the building or structure, if they are not covered by other insurance.
  - g. Materials, equipment, supplies, and temporary structures within one hundred feet of the premises that are used in making the additions, alterations, or repairs.
  - h. Personal property in apartments, rooms, and in common areas, furnished by the insured as property owner.

- i. The businessowners coverage form covers exterior and interior building glass in the same manner and to the same extent as any other covered property.
6. Business Trust business personal property coverage applies to property of the following types, while located within one hundred feet of the premises.
  - a. Owned personal property used in the business.
  - b. Personal property of others in the insured's care, custody, or control
  - c. Leased personal property that the insured is contractually responsible to insure.
  - d. Tenant's improvements and betterments
  - e. Exterior building glass owned by or in the care, custody, or control of an insured tenant.
  - f. The Business Trust personal property coverage category of the businessowners forms includes property of others in the insured's care, custody, or control.
  - g. A Business Trust that has customers' property on its premises for processing or service has coverage without the need to purchase a separate coverage limit.
  - h. Trust leased personal property that the insured is obligated to insure, such as a photocopy machine, is also covered under the business personal property category.
7. An additional coverage in the property section of the businessowners coverage form provides business income and extra expense coverage for loss resulting from a covered direct damage loss, complete with a civil authority coverage extension for the Business Trust. **[Important Coverage]**

- a. Coverage applies to the insured's actual loss of business income resulting from either the partial slowdown or complete cessation of the insured's business activities or the untenability of part or all of the described premises during a period of restoration.
  - b. The described premises include not only the portion of the building the insured occupies but also any area used to gain access to the insured's premises.
  - c. There is no dollar limit and no coinsurance provision applicable to the business income and extra expense coverage provided by the businessowners policy. However, there is a 12-month maximum on the insured's loss recovery, and ordinary payroll coverage is limited to 60 days but can be increased.
8. Many of businessowners liability provisions are identical to counterparts in the ISO commercial general liability (CGL) form for the Business Trusts operations. The businessowners liability coverage form provides the following three categories of coverage:
  - a. Business liability coverage for covered damages for which the insured is legally liable, subject to the applicable limit of insurance.
  - b. Supplementary payments for expenses associated with claims and suits defended by the insurer, in addition to the limits of insurance.
  - c. Medical expenses in connection with an accident on the insured's premises or involving the insured's operations, regardless of fault, are subject to the medical payments limit.
9. Remember that the Personal Trust for Dwellings or the Small Business Trust in a BOP does not have coverage for the following and they may need to be separately purchased.
  - a. Auto Insurance

- b. Workers Compensation
- c. Professional Liability
- d. Excess Liability or Umbrella Coverage

#### **D. INSURANCE FOR A COMMERCIAL OR BUSINESS TRUST WITH COMMERCIAL PROPERTY TRANSFERRED TO THE TRUST**

1. Commercial Property Insurance can insure trust property when it is leased to the First Named Insured by adding additional insured endorsements to the commercial property coverage form.
  - a. It is hereby agreed and understood that The Harold Smith and Virginia Smith Irrevocable Trust dated July 1, 2015, is added as an additional insured as their interests may appear with respect to the apartment complex property at 17245 Harvest Road, Spokane, WA.
  - b. The phrase "as their interests may appear" has occasionally been interpreted by the courts as limiting not just loss recovery, but also immunity from subrogation. The phrase "with respect only to" could certainly be interpreted in the same way.
    - 1) Immunity from subrogation is usually not a big concern for commercial property additional insureds.
    - 2) Additional insureds on commercial property policies are usually the owners of property that is leased to the insured; they seldom have any access to or control of the covered property, and thus they are very seldom in a position to negligently cause a loss to covered property.
    - 3) Furthermore, commercial property policies virtually always have a subrogation provision that allows the insured to waive recovery rights in writing prior to loss, and there is highly likely to be a provision in the

lease wherein the insured tenant waives any recovery rights against the building owner.

2. A trust that owns multiple commercial properties and leases them out to others can have the first named insured be the trust and then insure the locations on a schedule or blanket basis. The trust should require that the tenants provide coverage to the trust using similar ISO endorsements.
  - a. The Additional Insured – Building Owner Endorsement CP 12 19 will establish that the building owner identified in the endorsement schedule is a named insured with respect only to the coverage provided for direct physical loss or damage to the building designated in the endorsement schedule. The endorsement schedule allows for the entry of three buildings and their owners.
  - b. Alternatively, a "building owner loss payable" option added to the Loss Payable Provisions endorsement, CP 12 18, can be used. It establishes that loss to the building will be adjusted with the building owner shown in the endorsement schedule, and that loss to improvements and betterments will be adjusted with the insured, unless the lease stipulates otherwise.
  - c. The Business Income – Landlord As Additional Insured (Rental Value) endorsement, CP 15 03, allows an insured tenant who is required to obtain coverage for loss of rental income for the benefit of the property owner to fulfill this requirement. It adds the individual or entity identified in the endorsement schedule as an insured, for loss of "rental value."
3. The Commercial General Liability Coverage Form can be issued in the name of a trust to provide coverage for the commercial enterprises being operated by the trust.
  - a. The standard commercial general liability (CGL) insuring agreement is a promise to pay liability damages on behalf of "the insured" and to defend "the insured" against suits seeking such damages.

- b. Since status as an insured for the Business Trust is a condition of having coverage under the policy, the policy's terms and conditions that determine "who is an insured" are of crucial importance.
- c. Section II of the policy contains those terms and conditions and must be reviewed carefully.
- d. A CGL policy need not have more than one "insured"—the "named insured," the person or organization to whom the policy is issued, whose name appears on the declarations page and who is responsible for paying the policy premium.
- e. The policy may, however, have more than one named insured, listing each named insured in the declarations and designating one of them as the "first named insured."
- f. In such cases, it will be the first named insured who is responsible for paying the policy premium and to whom notice of cancellation is sent. References in the policy to "you" are references to the named insured(s).
- g. Persons acting as trustees within the trust have automatic insured status with respect to their duties.
- h. Trustees of a named insured's estate (when the named insured is an individual) and trustees of a living trust are sometimes added by endorsement as insureds to the individual named insured's policy.
- i. CG 20 23 Additional Insured — Executors, Administrators, Trustees or Beneficiaries may need to be added.
- j. However, the CG 20 26 – ADDITIONAL INSURED — DESIGNATED PERSON OR ORGANIZATION may be the best coverage for the trust to handle both operations and premises exposure that the trust may be exposed because of its ownership of the designated property if not the first named insured or a named insured on the policy.

**SECTION II—WHO IS AN INSURED**

1. If you are designated in the Declarations as:
  - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
  - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
  - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
  - d. An organization other than a partnership, joint venture, or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
  - e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
- k. Coverage for premises liability, operations liability, products liability, completed operations liability, insured contract, vicarious or contingent liability, operation of mobile equipment, personal injury, and advertising injury will apply.
- l. Defense will be outside the limits.
- m. All coverage exclusions will apply.
- n. All attached endorsements will also apply to coverage.
4. Commercial Crime Forms can be purchased by the trust to cover specific loss exposures and the named insured can be the trust.  
**Commercial Crime Forms are as follows:**



- a. CR 00 20, Commercial Crime Coverage Form (Discovery Form) (for use in a package policy)
  - b. CR 00 21, Commercial Crime Coverage Form (Loss Sustained Form) (for use in a package policy)
  - c. CR 00 22, Commercial Crime Policy (Discovery Form) (monoline crime policy)
  - d. CR 00 23, Commercial Crime Policy (Loss Sustained Form) (monoline crime policy)
  - e. The most important coverage will be for the trustee to be covered under the Employee dishonesty coverage (sometimes called employee theft coverage). It is the single most important type of crime coverage.
  - f. Please note that directors and trustees of the insured's business are not considered employees except while they are performing duties that come within the scope of an employee's usual duties as the trustee.
  - g. Distribution of funds from the trust is an important loss exposure that needs the employee theft coverage.
  - h. In addition, independent contractors, agents, brokers, etc., persons who are paid by the named insured to perform a service but who are not under the direction and control of the insured in the performance of that service are not considered employees of the trust.
5. Business autos can be owned by a Trust used in the operation of a business enterprise.
- a. The named insured can be in the name of the trust as the first named insured if all of the vehicles are owned by the trust.
  - b. If certain autos are owned by the trust but the primary first named insured is different than the trust, an endorsement

will be needed to make the auto a covered auto and the trust an insured.

- 1) Symbol 1 for any auto (Covers the Auto)
- 2) CA 20 48 10 13 DESIGNATED INSURED FOR COVERED AUTOS LIABILITY COVERAGE ENDORSEMENT should be added to the auto policy to cover the trust.

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 this endorsement. This endorsement identifies person(s) or organization(s) who are "insureds" for Covered Autos Liability Coverage under the Who Is An Insured provision of the Coverage Form. This endorsement does not alter coverage provided in the Coverage Form. This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below:

Each person or organization shown in the Schedule is an "insured" for Covered Autos Liability Coverage, but only to the extent that person or organization qualifies as an "insured" under the Who Is An Insured provision contained in Paragraph **A.1.** of **Section II** – Covered Autos Liability Coverage in the Business Auto and Motor Carrier Coverage Forms and Paragraph **D.2.** of **Section I** – Covered Autos Coverages of the Auto Dealers Coverage Form.

6. Commercial Umbrella or Excess Liability Coverage Forms must be modified to include the trust for liability loss exposures.
  - a. If the trust is the enterprise, then the trust can be the named insured. Make sure that the underlying policies have the trust as the first named insured to make sure that coverage is concurrent.

- b. If the trust is an additional insured, then the definition of insured should be reviewed to determine if additional insured is included. If not, then add the additional insured endorsement should be added. The ISO Umbrella automatically includes trust and additional insureds.

## SECTION II – WHO IS AN INSURED

1. Except for liability arising out of the ownership, maintenance, or use of "covered autos":

a. If you are designated in the Declarations as:

- (1) An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- (2) A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- (3) A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
- (4) An organization other than a partnership, joint venture, or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
- (5) A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees. . . .

- c. Must read the insurance contracts carefully.

## V. CONCLUSION

### A. RISK IDENTIFICATION IS THE KEY TO SUCCESS

1. The keys to successful risk identification are insatiable curiosity, an imaginative mind, a bit of pessimism, and the ability to communicate well with others.
2. Some of the tasks of getting information can be delegated or requested from others, such as cash exposures, trust agreements, and securities at risk from the financial officers.
3. Therefore, it is important to have systematic methods for ensuring that all phases of risk identification are completed.
4. Some organizations rely on periodic audits from risk management consultants to see that the job is being performed properly; some use the consultant on a continuing retainer basis.
5. However, the general practice for most organizations without in-house staff is to rely on the agent or broker.
6. Insurance agents and brokers therefore should all be thoroughly conversant with the techniques of risk identification and measurement.
7. Even though their compensation is from the sale of insurance, they will often be called upon to act as risk manager.
8. The producer who can perform continuing risk analyses for a client and provide periodic detailed information will be of immense value to the client and specifically if involved in the trust decisions being made by the client.

### B. DID NOT FOCUS ON FOREIGN TRUST LAWS

1. There are trust laws and/or trust like devices in many countries around the world.
2. The 1985 Hague Convention on the Law Applicable to Trusts and on Their Recognition provides guidance around the world.

3. Be careful when dealing with foreign trusts.

**C. FIVE COMMON REASONS FOR USING TRUSTS**

1. The avoidance of probate.
2. Providing property management for those who cannot, out not, or wish not to manage for themselves.
3. Providing for the limited and successive enjoyment of property over several generations.
4. The saving of taxes; and
5. The insulation of the trust property from the claims of beneficiaries’ creditors.

**D. REMEMBER: A trust involves three elements, namely: (1) a trustee who holds the property and the property is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his or her benefit; and (3) trust property, which is held by the trustee for the beneficiaries.**

1. **KNOW WHICH PARTY YOU ARE INSURING.**
2. **There are over one hundred (100) distinct types of trusts, and they all have varying purposes.**





# James K. Ruble Seminar

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## Section 5

# **Understanding Occurrence and Claims-Made Triggers**





# UNDERSTANDING OCCURRENCE and CLAIMS MADE TRIGGERS



1

# LYON CONSULTING SERVICES, LLC



**Steven D. Lyon**  
**CPCU, CRM, CIC, AAI, ARM, AIS, CRIS,**  
**MLIS, AFIS**

2

## **DISCLAIMER**

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

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

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

3

## Coverage Triggers

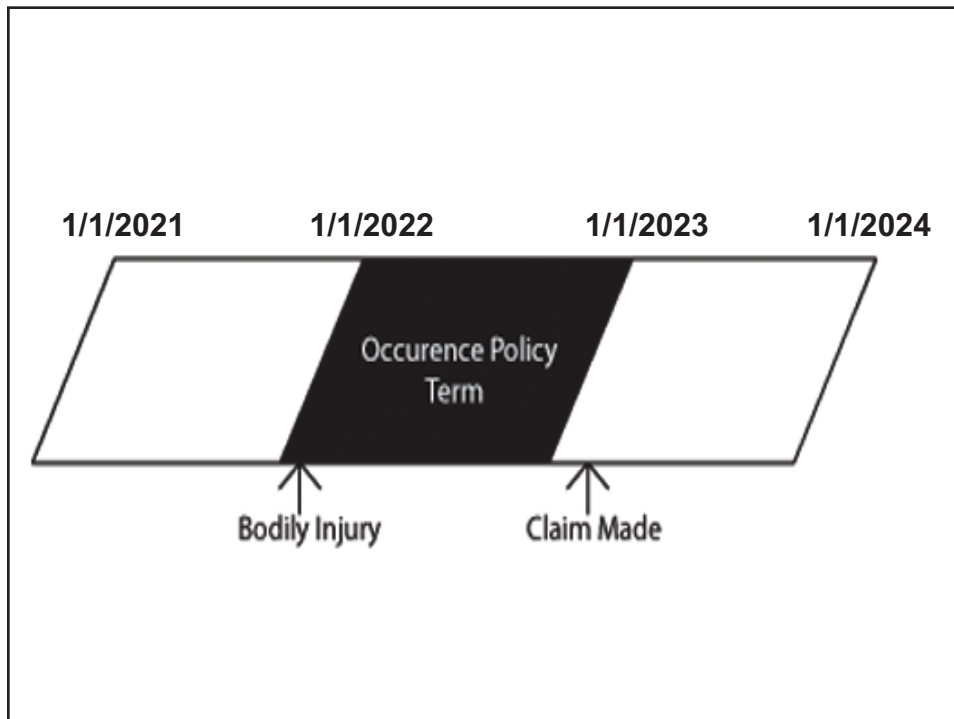
- Refers to the event that must occur before a liability policy applies to a loss
- Determines which liability policy among a series of liability policies covers a loss
- Two types
  - Occurrence
  - Claims-made

4

# Coverage Triggers

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

5



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## Claims Reporting – Occurrence

Bob Smith, a long time client is very cost conscious. You have moved his account from company to company over the past 22 years. On January 20, 2022 Bob came into your office with a lawsuit alleging negligence on a project he completed in 2016 caused an injury to the claimant in 2020. Which Insurance Company should you report the claim to?

- 97-00 Podunck Mutual \$300,000
- 00-02 Lloyds of Lubbock \$500,000
- 02-16 Browntree Ins Co \$500,000
- 16-21 Everly Ins Group \$1,000,000

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## Claims Reporting – Occurrence

Bob Smith, a long time client has decided to retire and cancels his policies on 12/31/21. During the past years, Bob has had coverage with the following carriers, shown below. On June 10, 2022 there is a fire in a home which was built by Bob in 2016, where a young girl is badly injured. On December 10, 2022 a lawsuit is filed against Bob for negligence and faulty construction. Which carrier will respond to this claim ?

- 97-00 Podunck Mutual \$300,000
- 00-02 Lloyds of Lubbock \$500,000
- 02-16 Browntree Ins Co \$500,000
- 16-21 Everly Ins Group \$1,000,000

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## Occurrence Policies.....

- **DO NOT HAVE “TAILS”**
- **DO NOT HAVE “EXTENDED REPORTING PERIODS”**
- THESE ARE “CLAIMS MADE” TERMS
- *Same potential problem with CM an CM&R*

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## Discontinued Products and Completed Operations Coverage

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

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## Statute of Repose

AL=7	AK=10	AZ=8	AR=4	CA=10	CO=6	CT=7	DE=6
DC=10	FL=10	GA=8	HI=10	ID=6	IL=10	IN=10*	IA=10*
KA=10	KY=7	LA=5	ME=6	MD=10	MA=6	MI=6	MN=10
MS=6	MO=10	NE=10	NV=10	NH=8	NJ=10	NM=10	NY=na
NC=6	ND=10	OH=10	OK=10	OR=10	PA=12	RI=10	SC=8
SD=10	TN=4	TX=10	UT=9	VT=na	VA=5	WA=6	WV=10
WI=7	WY=10						

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## Misunderstanding...

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

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**‘Officers and directors may be held individually liable for personal participation in tortious acts even though performed solely for the benefit of the corporation’**

- *Terr. of the U.S.V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 794 n.153 (Del. Ch. 2007)
- *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, 70 P.3d 35, 41 (Utah 2003);
- *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002);
- *Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 788 A.2d 268, 273 (N.J. 2002);
- *Haupt v. Miller*, 514 N.W.2d 905, 909 (Iowa 1994);
- *Camacho v. 1440 Rhode Island Ave. Corp.*, 620 A.2d 242, 246-47 (D.C. 1993);
- *Weir v. McGill*, 203 Ga. App. 431, 417 S.E.2d 57, 59 (Ga. 1992);
- *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88, 95 (Neb. 1991);
- *Ingram v. Machel & Jr. Auto Repair, Inc.*, 148 A.D.2d 324, 325, 538 N.Y.S.2d 539 (N.Y. App. Div. 1989);
- *Mississippi Printing Co. v. Maris, West & Baker, Inc.*, 492 So. 2d 977, 978 (Miss. 1986); *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 157 Cal. Rptr. 392, 598 P.2d 45, 52 (Cal. 1979);
- *Jabczenski v. Southern Pac. Memorial Hosp.*, 119 Ariz. 15, 579 P.2d 53, 57 (Ariz. Ct. App. 1978);
- *Taylor v. Alston*, 79 N.M. 643, 447 P.2d 523, 525 (N.M. Ct. App. 1968);
- *New Eng. Box Co. v. Gilbert*, 100 N.H. 257, 123 A.2d 833, 835 (N.H. 1956).”

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## **Can I Set Up An LLC To Avoid Personal Liability In A Lawsuit?**

- Posted on [May 26, 2009](#) by [Max Kennerly, Esq.](#)
- Among the many creative “legal” ideas floating around on the internet is:
- If you set up an LLC for yourself and conduct all your business through it, the LLC will be liable in a lawsuit but you won’t.
- Last week, I was asked if this “asset protection strategy” worked. No, it doesn’t. Conducting your personal business through an LLC provides no protection against a tort verdict, the type of liability that most people are worried about. The use of corporate forms — like LLCs, S-Corporations, or Incorporation — has many important purposes, but avoiding personal tort liability for your own conduct is not one of them.

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- If Warren Buffet defrauded Mom and Pop’s Ice Cream Stand wholly for the benefit of Berkshire Hathaway, he would *personally* be on the hook for the damage just the same as Berkshire.
- Let’s go back to your personal LLC. Assume you hit a pedestrian with a car, defame someone in a blog post, or cause a building fire. It doesn’t matter if you were “employed” by your LLC when you did it — you will still be *personally* liable, as will the LLC that “employed” you.
- Thus, in order to “protect your assets,” you need to put enough money into the LLC that it can completely pay any tort judgment against you, or else the injured person can go for your assets long after it has bankrupted the LLC.
- That just defeats the nominal purpose of the LLC (to avoid liability), since you’ll have to pay the same amount anyway, just through the LLC. Again, there are plenty of reasons for setting up an LLC, such as protecting investors, limiting *contractual* liability, limiting liability arising from *employee’s* conduct, and a host of business and tax uses, but avoiding personal liability for your own conduct isn’t one of them.
- There’s an easier and more effective way. Buy good personal liability insurance and buy a Liability and Umbrella Insurance policy with good limits

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

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

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## Coverage A Insuring Agreement

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

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## Known Loss Claim

- 1/1/22-23 CGL renewal
- 10/15/22 insured receives notice of claim
- Claim settled 7/23
- While 2023 policy will not respond at all; the known loss provision of the 2022 policy will not apply, since the insured was not aware of the claim at the beginning of the 2022 policy period
- Watch “first known” wording – limits coverage to one policy (non-standard)

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## Introduction to Claims Made

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

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## Why Change?

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

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## Setting Occurrence Rates

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

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## Time Lags in Making Claims

- Time necessary for injuries/damages to manifest
  - Architect
- Time necessary for injuries/damages to be discovered
  - Title company
- Claimants don't seek immediate legal redress
  - Reluctance by some
  - Unaware of true severity
  - Unable to assess who caused injury
- Attorneys intentionally delay filing suit
  - Some Injuries worsen over time
  - CM policy limits increase
  - SOL, lack of witnesses, etc.
- Inflation
  - Medical Costs
  - Public Attitude toward Ins Co. / Claimant
  - Adequacy of Limits (Occ. vs. CM)

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## Which Carrier is Responsible for the Pollution Claim ?

Company A	1/1/66—1/1/67	\$500,000 *
Company A	1/1/67—1/1/68	\$750,000 *
Company B	1/1/68—1/1/69	\$750,000 *
Company B	1/1/70—1/1/71	\$1,000,000 *
Company C	1/1/71—1/1/72	\$2,000,000 **
Company C	1/1/72—1/1/73	\$2,000,000

\* Pollution begins and continues to worsen      \*\* Lawsuit filed for cleanup  
My Case- Dry Cleaner

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## Theories of Allocation of Losses

Taken from a series of articles written  
by  
Craig Stanovich

24

## CGL Trigger

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

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## CGL Trigger

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

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## Coverage Trigger

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

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## Coverage Trigger

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

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

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

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

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

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## CGL Trigger

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

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## CGL Trigger Theories

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

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## Exposure Theory

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

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## Manifestation Theory

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

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## Injury-in-Fact Theory

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

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## Trigger of Coverage and Funeral Home Malpractice

Randy Maniloff  
White and Williams  
Coverage Opinions  
July 10, 2019

36

- At issue in *Zack v. Clock Funeral Home*, No. 343732 (Mich. Ct. App. June 11, 2019) was trigger of coverage for a unique scenario. An infant passed away in February 2015. The parents arranged for funeral and burial services with Clock Funeral Home of White Lake. The visitation and funeral services were conducted on February 16 and 17, 2015. Burial was delayed due to a required autopsy. The parents requested that their son be cremated and that his ashes be buried in an urn they provided to Clock. Clock conducted a burial service interring the urn on April 18, 2015. In January 2016, an employee of the funeral home discovered a box labeled as the ashes of the infant. The employee delivered the box to the parents. During an investigation, in March 2016, their son's grave was exhumed and the urn was empty.
- At the time of the funeral and burial, the funeral home was an insured under a commercial general liability policy issued by Westfield. The policy included an additional coverage part for acts and omissions arising out of services rendered or the failure to render services as a funeral director. The policy was cancelled on December 19, 2015 for nonpayment of premium.
- At issue was the potential for coverage under the policy for a claim against the funeral home. The overarching question was whether "bodily injury" took place during the policy period, as required to trigger coverage.

**To summarize, the policy was on the risk at the time of the funeral and burial. However, it was no longer on the risk at the time that the grave was exhumed.**

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- **The court concluded that "bodily injury" did not take place during the policy period: "Because plaintiffs did not learn that their son's ashes were not, in fact, buried until after the policy coverage had ended, they did not suffer their emotional, mental and physical injuries resulting from that negligent act until after the policy had terminated."**
- The court rejected the argument that the policy was triggered on the basis that, it was during the policy period, that the empty urn was buried. They argued that "interference with their right to control the final disposition of their son's remains" was the injury, and such injury was incurred when the empty urn was buried. "However," the court held that "the interference was simply the wrongful action Clock engaged in that resulted in injuries to plaintiffs."
- Not surprisingly, as often happens in cases involving trigger of coverage, the court turned to its environmental case law on the subject, to see what that has to say about it. The court addressed the Michigan Supreme Court's 1998 decision in *Gelman Sciences*, in which the court addressed four theories for when gradual property damage, caused by pollution, takes place.
- *Gelman Sciences* did not help the parents here in their pursuit of coverage: "**Our Supreme Court held that the policy language concerning when coverage was triggered was unambiguous and, according to the policies' explicit terms, actual injury must occur during the time the policy is in effect in order to be indemnifiable, i.e., the policies dictate an injury-in-fact approach.** The *Gelman* Court acknowledged that determining the precise timing of actual property damage is sometime difficult and while it appreciate[s] the difficulty of proof in this regard, this difficulty cannot justify redrafting unambiguous policy terms in the guise of judicial interpretation."

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## Continuous Trigger Theory

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

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## Trigger Theories

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

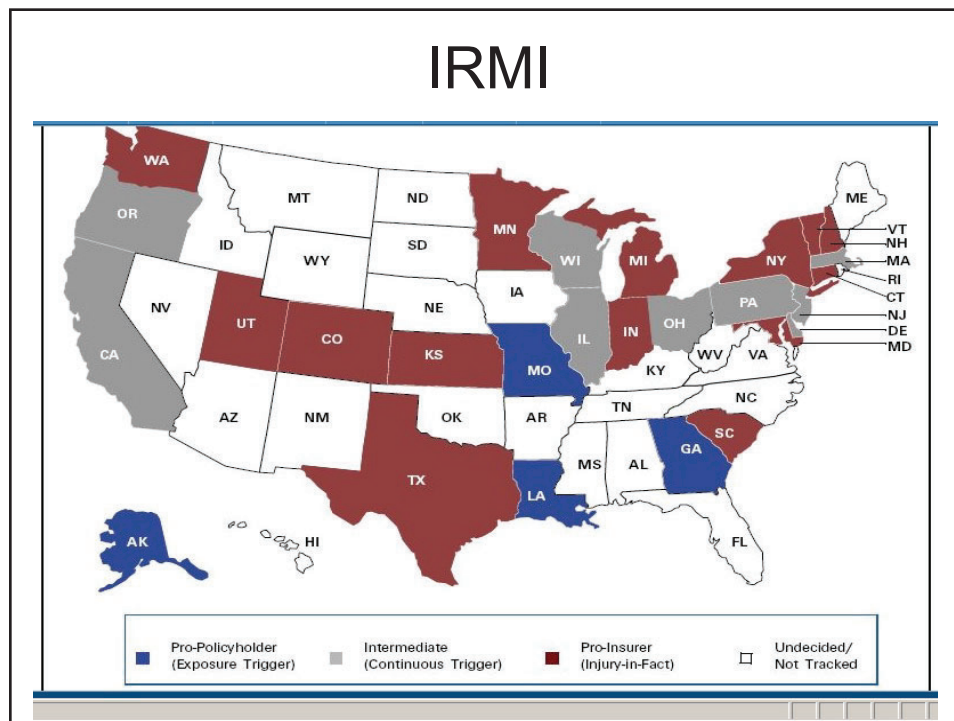
40

## Examples of Theories by State

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

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## IRMI



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

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

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## Texas Supreme Court

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

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## Texas Supreme Court

ANSWER- cont'd:

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

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## CGL Trigger

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

46

## Allocation of Loss Theories

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

47

## Allocation of Loss Theories

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

48



## Allocation of Loss Theories

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

49

## ALL SUMS THEORY

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

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## ALL SUMS APPROACH

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

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## PRO RATA APPROACH

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

52

## PRO RATA APPROACH

- Courts may allocate ABC loss by “Time on Risk”.
- Each insurer had one year out of three on the risk, each insurer is liable for 1/3 of \$5mil or \$1,666,666 each.
- Insurers pay: \$3,666,666
- ABC is NOT fully covered, and will be uninsured for \$1,333,332
  
- Year One - \$1,666,666 paid by AIG – Limit is \$ 5mil
- Year Two - \$1,000,000 paid by Zurich – Limit is \$1mil  
(ABC uninsured for \$666,666 for year two)
- Year Three - \$1,000,000 paid by ACE – Limit is \$1mil  
(ABC uninsured for \$666,666 for year three)

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## Theories of Allocation by State

- **ALL SUMS** – AR, CA\*, DE\*, **DC**, IL\*, IN\*, MA, NY, OH\*, OR, **PA\***, TX, WA\*, WV
  
- **PRO RATE** – AL, CA, CO\*, **CT\***, GA\*, HI\*, IL, KS\*, KY\*, IN\*, **MD**, MI, MN\*, MO, **NH\***, **NJ\***, **NY\***, OH, OR, SC, TX

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## WATCH OUT !!

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

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## WATCH OUT !!

- Effects of endorsements on ABC when Pro Rata allocation is used:
  - What if ACE and Zurich had exclusions for any injury or damage commencing prior to its policy period?
  - ABC is insured for only \$1,666,666 and uninsured for \$3,333,334
- Year One - \$1,666,666 paid by AIG- Limit is \$5mil
- Year Two - \$0 paid by Zurich – Limit is \$1mil  
(ABC uninsured for \$1,666,666 –excluded as prior PD)
- Year Three- \$0 paid by ACE – Limit is \$1mil  
(ABC uninsured for \$1,666,666 – excluded as prior PD)
  - ALL SUMS WOULD STILL PROVIDE COMPLETE COVERAGE FOR ABC as they can go Vertical!

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

**PRIOR WORK EXCLUSION**

This endorsement modifies coverage provided under the following:  
**COMMERCIAL GENERAL LIABILITY COVERAGE FORM**

This policy changes the policy effective on the inception date of the policy unless another date is indicated below.

	Inception Date	Expiration Date
Endorsement Effective	Policy Number	
	LGBGL75488	
Named Insured	Countersigned By:	
[Redacted]		

( Authorized Representative )

The following is added to SECTION - I COVERAGES, COVERAGE. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2. Exclusions:

**Prior Work**

This insurance does not apply to "bodily injury" or "property damage" that arises out of "your work", that was completed prior to:

- (1) The inception date of the first policy in a series of uninterrupted renewal policies issued by us; or
- (2) The inception date of this policy.

"Your work" will be deemed completed at the earliest of the following times:

- (1) When all of the work called for in your contract has been completed;
- (2) 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; or
- (3) 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.

This exclusion applies even if the "occurrence" continues during the policy period.

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# Prior Work Exclusion and the Sunset Clause

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## Known Injury or Damage Wording - Montrose

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

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## Known Loss or Damage Illustration

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

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## Known Loss or Damage Illustration

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

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## Known Loss or Damage Illustration

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

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## Known Loss or Damage Illustration

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

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## Who has to Know?

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

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# “Who has to have Knowledge” Endorsement

## “NOTICE OF OCCURRENCE”

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

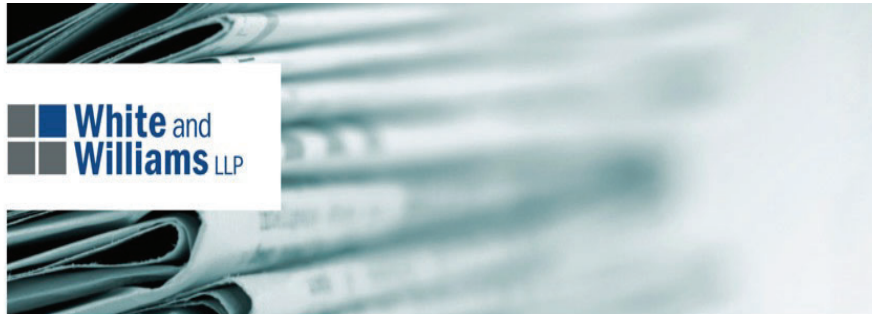
e. Knowledge of an "occurrence," claim, or "suit" by the agent, servant or employee of any insured shall not in itself constitute knowledge of the insured unless individuals in the following positions shall have received such notice from the agent, servant or employee:

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### First Circuit: No Coverage, No Duty to Investigate Alleged Loss Prior to Policy Period

*Insurance Coverage and Bad Faith Alert* | April 3, 2020

By: Eric B. Hermanson and Austin D. Moody

On April 1, 2020, the First Circuit, applying Massachusetts law, issued a potentially useful decision addressing the *Montrose* “known loss” language in ISO Form CGL policies. In *Clarendon National Insurance Company v. Philadelphia Indemnity Insurance Company*,<sup>[1]</sup> the court applied this language to allow denial of defense for claims of recurring water infiltration that began before the insurer’s policy period, and it found an insurer had no duty to investigate whether the course of property damage might have been interrupted, or whether other property damage might have occurred during the policy period, so as to trigger coverage during a later policy.

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In the underlying dispute, a condominium owner (Doherty) asserted negligence claims against her association's property management company (Lundgren) stemming from alleged water infiltration into her condominium. The complaint said leaks developed in 2004 in the roof above Doherty's unit, and repairs were not made in a timely or appropriate manner. The following year, the complaint said, a Lundgren employee notified Doherty that the threshold leading to her condominium's deck was rotting. In February 2006, Doherty discovered a mushroom and water infiltration on the threshold and notified Lundgren. At that time, Lundgren asked its maintenance and repair contractor (CBD) to replace the rotting threshold. According to the complaint, CBD did not do this repair in a timely manner and left debris exposed in Doherty's bedroom.

In March 2006, the complaint said, a mold testing company hired by Lundgren found hazardous mold in Doherty's unit, caused by water intrusions and chronic dampness. Lundgren's attempts at remediation were ineffectual. In September 2008, Doherty's doctor ordered her to leave the condominium and not to return until the leaks were repaired and mold was eliminated.

In February 2009, Doherty filed suit. Lundgren tendered defense to two different insurers: Clarendon, which insured Lundgren from June 24, 2004, to June 24, 2005, and Philadelphia Indemnity (Philadelphia), which insured the company from September 1, 2007, to September 1, 2008. Clarendon agreed to defend under reservation of rights. Philadelphia declined to defend, based on the "known loss" provision in its CGL insuring agreement:

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

....

(3) Prior to the policy period, no insured listed . . . 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,

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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.

After the underlying case settled, Lundgren assigned its rights to Clarendon, which sued Philadelphia. Clarendon argued that Doherty's complaint could be read to suggest that leaks prior to Philadelphia's policy period had been repaired. It argued that new leaks might have arisen during the period of Philadelphia's policy. At a minimum, Clarendon argued, Philadelphia had an obligation to investigate the underlying allegations before denying defense.

The District of Massachusetts rejected Clarendon's arguments. Clarendon appealed, and the First Circuit affirmed. It found the underlying complaint unambiguously alleged damage resulting from continuing leaks that began prior to the Philadelphia policy's inception, and it found nothing in the complaint was "reasonably susceptible" to an interpretation in which the original leaks were resolved prior to Philadelphia's policy inception.

Finally, and importantly, the First Circuit held that when an underlying complaint does not contain allegations that would implicate coverage, the insurer has no duty to investigate further. An insurer cannot ignore known facts extrinsic to the complaint, but it has no duty to go looking for such facts.

The First Circuit's decision provides helpful guidance for insurers faced with allegations of property damage prior to policy inception, and clarifies – importantly – that an insurer in this situation has no independent duty to investigate for damage during the policy period.

If you have any questions or need more information, contact Eric B. Hermanson (hermansone@whiteandwilliams.com; 617.748.5226), or Austin D. Moody (moodya@whiteandwilliams.com; 617.748.5206).

[1] No. 19-1212, 2020 U.S. App. LEXIS 10257 (1st Cir. Apr. 1, 2020).

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## Strict Sameness

- When does the same damage become different damage?
- If PD is known in second year, but fixed in third year.
- If you go back and try to fix previous damage, at what point does it become different damage?
- Policy does not say. Let's go to the courts.

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## Strict Sameness Test

- Developer H&H is building a residential subdivision when sued by neighbors Malone & Blair in 2004 for damage to the property of each caused by excessive storm water runoff, silt and sediment.
- H&H tenders claim to its insurer. Insurer denies coverage based on known damage limitation. Basis of denial is another homeowner had complained about H&H to the city and H&H in 2000, about drainage issues from the same subdivision.
- Does this constitute known PD for H&H ? Is this the same PD ?

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## Strict Sameness Test

- Court found on Summary Judgment that unless it is the same damage, it is not known damage.
  - No prior evidence that properties of Malone and Blair had prior damage known to H&H.
  - Court applied the “strict sameness” test, concluding the same “type” of damage is not the “same” damage.
- Essex Ins Co v. H&H Land Developers 525F. Supp. 2d 1244 (M.D. Ga 2007)

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## There's NOT just one type of Occurrence or Claims Made Form !

Pure Occurrence Forms  
First Manifestation Occurrence Forms  
Pure Claims Made Forms  
Claims Made and Reported Forms  
Claims Sustained Form

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

Dwight Kealey, Esq.

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## Manifestation Occurrence \*

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

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## Claims “Sustained” Form

Prohibits any notice of a claim other than actual litigation

Not commonly used - hard market tool

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## Changing Named Insured

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

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## Situation #2

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

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## Situation #3

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

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## Situation #4

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

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## Situation #5

### “Of Counsel” Attorneys ?

- Any problems meeting the definition of “insured” under the CGL policy ?
  - Are they the entity?
  - Are they a partner ?
  - Are they a manager and/or member ?
  - Are they a director of officer ?
- Are they an Employee?

"Of counsel" originally described a semi-retired or retired partner who still kept a hand in the firm. Today, the designation "of counsel" is used to describe everything from a full-time outside lawyer providing expertise in a particular specialty, to a firm of the guy down the hall who is available to discuss cases over coffee. -- Nancy Kaufman October 2000

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## Introduction to Claims Made

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

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## Two Versions of CGL Form

- OCCURRENCE VERSION – CG 00 01
- CLAIMS MADE VERSION – CG 00 02

**“Occurrence” Definition is the same for Occurrence and Claims Made Coverage Forms**

*13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. [wte]*

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

### ***b. Occurrence Form Trigger (CG 00 01)***

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;

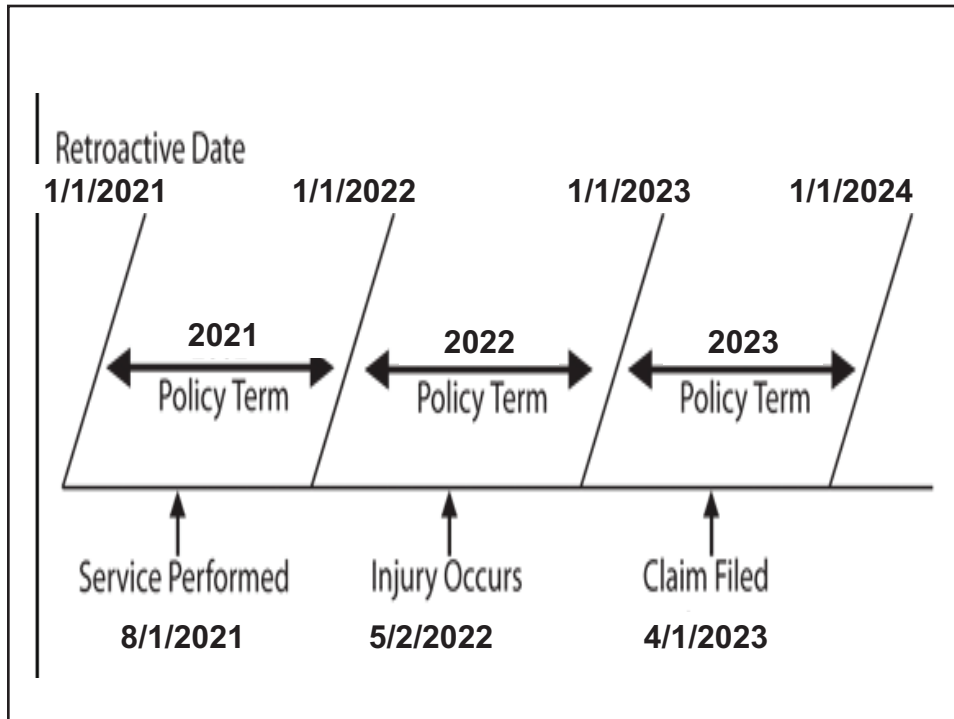
83

## Claims-Made Policies (CG 00 02)

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

- The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."
- Claim must first be made during the policy period (or any extended reporting period), **and**
- Loss/Injury had to happen during the policy period (or on or after the retroactive date).

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## Claims-Made Policies

- Effective 1/1/22-1/1/23, retro date 1/1/16

Covered? Not Covered?

- Claim filed 10/1/22 for loss that occurred 6/1/16
- Claim filed 6/15/22 for loss that occurred 5/15/17
- Claim filed 4/2/23 for loss that occurred 12/1/18
- Claim filed 3/20/22 for loss that occurred 12/3/15
- Claim filed 11/1/23 for loss that occurred 2/14/16

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## Disadvantages / Advantages of a Claims Made Form

### CARRIER

- Better Control
- Better Predictability
- One year protection
- Who is on the loss
- Retention of Insured
- Difficult to Understand

### INSURED

- Lower Premium (initially)
- Less Coverage
- Problems for ongoing operations or retirement
- Better Limits
- Difficult to Understand

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## TWO TYPES OF CLAIMS MADE POLICIES

- PURE CLAIMS MADE (sometimes used with D&O)
- CLAIMS MADE and REPORTED \* (widely used)
- CLAIMS SUSTAINED / "FIRST" MADE (attempt to avoid continuous trigger / stacking)

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Writer's Direct Dial: (212) 480-5290

The Office of General Counsel issued the following opinion on July 31, 2003 representing the position of the New York State Insurance Department.

**Re: Claims Made and Reported Policies**

**Question**

May an insurer issue a liability insurance policy in New York that limits coverage to incidents for which the claims are made and reported during the policy term ("claims made and reported" policies)?

**Conclusion**

A claims-made and reported policy may not be issued in New York except by an unauthorized insurer through an excess line broker.

**Facts**

The inquiry stems from a dispute between the inquirer's client and its employment practices liability insurer. The insurer maintains that is not required to provide coverage on the grounds that the policy in question is a "claims-made and reported" policy and that the claim in question was not made to the insured and reported to the insurer during the same policy period. The inquirer contends that such policies are not permitted under the New York Insurance Law.

**Analysis**

Claims-made policies are governed by New York Insurance Regulation 121, N.Y. Comp. Codes R. & Regs., tit. 11, § 73.0 *et seq.* (1997). A "claims-made policy" is defined therein as follows:

(a) *Claims-made policy* means an insurance policy that covers liability for injury or damage that the insured is legally obligated to pay (including injury or damage occurring prior to the effective date of the policy, but subsequent to the retroactive date, if any), arising out of incidents, acts or omissions, as long as the claim is first made during the policy period or any extended reporting period.

N.Y. Comp. Codes R. & Regs., tit. 11, § 73.1(a)(1997).

This definition leads to the question of the point at which a claim is considered to have been made. The Regulation defines the making of a claim as follows:

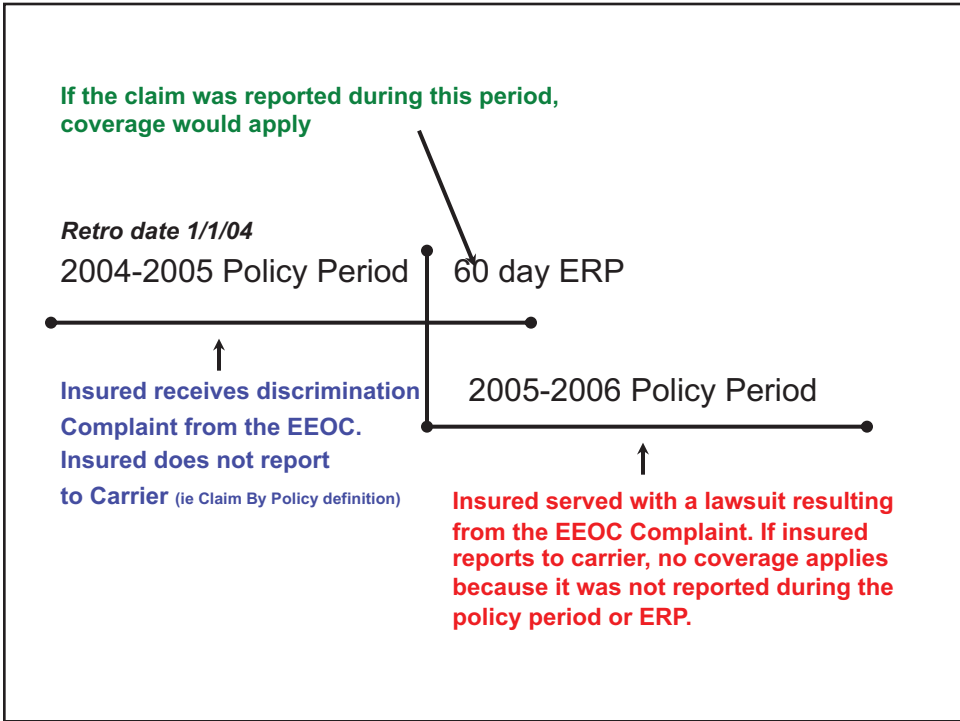
(a) A claim will be deemed first made when the insurer receives written notice of a claim or suit from the insured or a third party, but this shall not preclude an insurer from utilizing written notice of an incident as the trigger of coverage under the policy.

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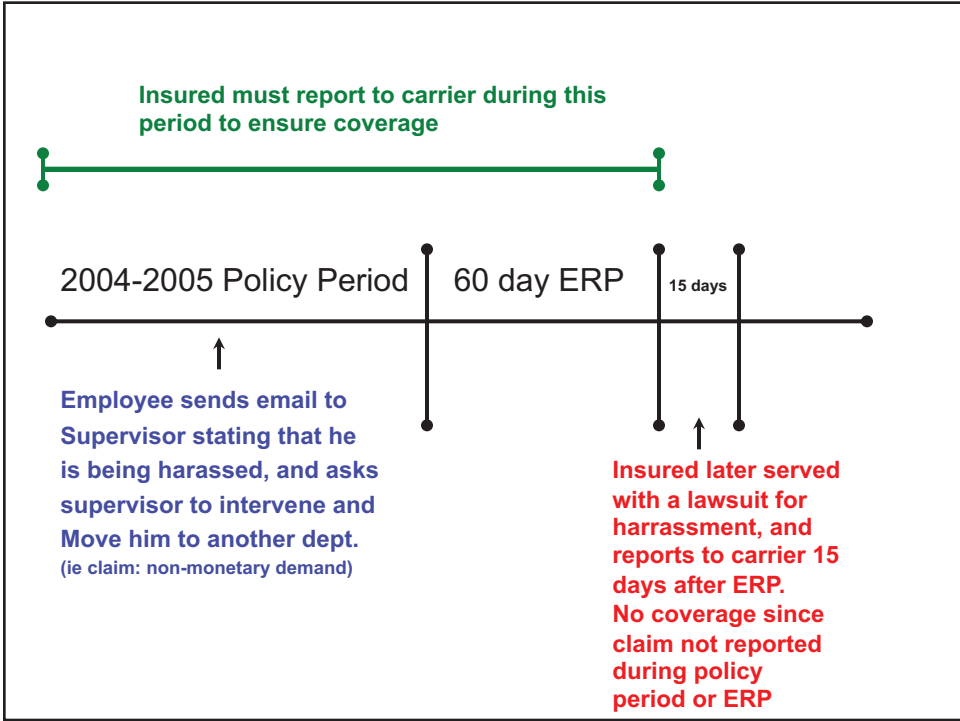
## CLAIMS MADE and REPORTED

- Requires that the claim first be made during the policy period and reported during this same period (or any ERP), of the policy currently in force at the time.
- Loss/Injury/Wrongful Act had to happen during the policy period (or on or after the retroactive date).

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## Example with Reporting Window

“If a Claim is made against any Insured, the Insured shall give written notice thereof to the Underwriter as soon as practicable and in no event later than thirty (30) days after the expiration of the Policy Period, and shall immediately forward to the Underwriter every demand, notice, summons, complaint, or other process received by any Insured or his/her/its representatives. Compliance with this notice requirement is a strict condition precedent to coverage under this Policy.”

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## Example without Reporting Window

“The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as Damages for Claims first made against the insured and reported to the Company in writing during the policy period, arising out of any act, error or omission, or Personal Injury in the rendering or failure to render Professional Services by an Insured covered under this policy.....”

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## Potential Problems with Policies not Containing Reporting Windows

- Claims made late in policy period (no window)
  - December 30<sup>th</sup> summons is delivered to professionals office
  - Professional is on vacation for 2 weeks during Holidays
  - By the time she returns on January 6<sup>th</sup>, she has missed the policies reporting requirement
- Claim filed but not yet Served
  - Lawsuit filed against insured during policy term, but the insured is not served until after policy term
- 30 or 60 day reporting window needed at least [BERP]

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### The Automatic Claim Reporting Extension and Renewal By: Frederick J. Fisher, J.D.

Most brokers expect a "claims made and reported form" to give the insured some limited amount of time following the end of the policy period to report a claim first made during the policy term (most commonly 30 or 60 days). The purpose of this provision was to not penalize an insured who, in good faith, found it next to impossible to comply with the requirement of reporting the claim during the policy period. The preferred language was akin to:

*"...the Insureds shall, as a condition precedent to their rights to payment under this Policy, give to underwriters notice in writing of such Claim as soon as practicable provided all Claims must be reported no later than the end of the Policy Period, in accordance the requirements of the Optional Extension Period (if applicable), or sixty (60) days after the expiration date of the Policy Period."*

While the above policy language is preferred and relatively unrestricted, new language is popping up with unusual and restrictive language; some is even illogical. New policy wording will only allow the reporting extension: *"In the event of cancellation or non renewal of this Policy, by either the 'Named Insured' or the Company..."*

If the policy is renewed, no last minute claims made against the insured are covered unless the claim is reported prior to expiration of policy. Neither will such claim be covered by the renewal policy since the claim wasn't first made in that policy term. This wording almost behooves the insured to renew elsewhere.

There are still some "claims made and reported" policies in use requiring the claim be first made and reported during the policy term - never allowing for a post-expiration claim report.

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**SECTION VIII – EXTENDED REPORTING PERIOD**

1) In the event of cancellation or non renewal of this Policy, by either the “Named Insured” or the Company, for reasons other than non-payment of premium or material misrepresentation in the Application, you shall have the right to an Extended Reporting Period as follows:

(a) Automatic Extended Reporting Period

Coverage as provided under this Policy shall automatically continue for a period of sixty (60) days following the effective date of such cancellation or non renewal, but only with respect to “Claims” and “Wrongful Acts” committed before the effective date of such cancellation or non renewal.

**C. Extended Reporting Period:**

1. If we or you cancel or refuse to renew this policy for reasons other than non-payment of premium; we will provide to you a 60 day Automatic Extension of the coverage granted by this policy, at no additional charge, for any claim first made against you and reported to us during the 60 day extension period but only as respects wrongful acts committed after the Retroactive Date (if any) stated in the Declarations and prior to the date of cancellation or non-renewal.

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The screenshot shows a Lexology article page. At the top is the Lexology logo and a search bar. Below the logo are navigation tabs: Resources, Research, Learn, Experts, and My newsfeed. A 'Home' link is also visible. Below the navigation is a row of utility icons: Back, Save & file, View original, Forward, Print, Share, Follow, Like, and Instruct. The main title of the article is "Multiple Claims" Provisions on Contractor's Professional Liability Policy Creates a Trap for Policyholders. The author is Saxe Doernberger & Vita, P.C. There is a profile picture of a man and the SDV logo. The article is dated USA | May 4 2021. The text of the article discusses a case where a professional liability insurer sued its insured, a construction management firm, for breach of contract claims. The court held that the policy's automatic extended reporting period did not apply to the insured's first claim, and the multiple claims provision barred the second claim because the claims were related. The article concludes that the court's holding creates a potential trap for policyholders who wait to see how a claim develops before reporting it to their insurance carrier.

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**Hunt's Subconsultant and the Owner Brought Separate Claims Against Hunt for Professional Negligence**

Hunt purchased professional liability insurance policies insured by Berkley. The first policy had an effective period from June 15, 2016, to June 15, 2017, later extended to July 15, 2017, and the second policy had an effective period from July 15, 2017, to June 15, 2018. *Id.*, at 374. After the second policy expired, Berkley issued another renewal policy for the period July 15, 2017, to July 15, 2018. Each policy covered claims made and reported during the Policy Period. Each policy also contained a provision stating that multiple related claims would be treated as a single claim and covered under the policy covering the first such claim:

'Claims ... arising out of one or more acts, errors, omissions, incidents, events ... or a series thereof that are related (either causally or logically) will be considered a single Claim' – that is, 'first made on the date the earliest such Claim ... was first made and is covered 'only [by] a Policy providing coverage for the earliest such Claim.'

In 2014, Hunt was hired by South Florida Stadium, LLC (the "Owner") to be the construction manager for the renovation of the Hard Rock Stadium in Miami, Florida. In turn, Hunt hired Alberici Constructors, Inc., d/b/a Hillsdale Fabricators ("Hillsdale"), to perform "design and steel fabrication for the stadium's rooftop canopy structure." *Id.* On October 18, 2016, Hillsdale asserted a claim against Hunt that alleged Hillsdale had incurred additional and unforeseen costs "because Hunt performed design and construction services improperly" *Id.* Hunt and Hillsdale executed a "Memorandum of Understanding" whereby they agreed to complete the project, and deal with the cost increase issues later. Hunt finished the project in July 2016.

The parties failed to reach an agreement on the issues, and The Owner and Hunt sued Hillsdale in Florida state court seeking a declaratory judgment. *Id.* Hillsdale filed a claim, in part, against Hunt in federal court, before voluntarily dismissing that claim, and then, on March 30, 2017, filed a counterclaim against Hunt for, in pertinent part, breach of contract in state court. (Together, these actions constitute the "Hillsdale Claim"). Hunt reported the Hillsdale claim to Berkley two months later, on July 20, 2017. Hunt reported the claim five days into the 2017-2018 Policy period and nine months after Hillsdale first asserted its claim against Hunt.

Then, on May 21, 2018, the Owner demanded that Hunt indemnify and hold it harmless from any damages resulting from Hillsdale's counterclaim against the Owner. (The "Owner's Claim"). *Id.* at 375. Hunt reported the Owner's claim to Berkley two weeks later.

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**Berkley Denied Coverage for Both Claims Based on Hunt's Untimely Notice of the First Claim**

Berkley denied coverage for both claims. Berkley asserted the Hillsdale claim was not covered because the policy period expired before Hunt brought the claim. As for the Owner's claim, Berkley alleged that the Owner's claim was not covered because it was related to the Hillsdale claim, which is not covered.

**The District Court sided with Berkley, Granting its Motion for Summary Judgment**

In granting Berkley's motion for summary judgment, the district court held that "the Hillsdale Claim is not covered by the 2016-2017 Policy, and Berkley has no duty to defend Hunt against it because Hunt failed to report that claim within the time allotted by the policy." The court refused to accept Hunt's argument that the claim, which was made five days after the 2016-2017 policy expired, was made within the sixty-day Automatic Extended Reporting Period. *Id.* at 378. The Court acknowledged that the AERP only applies when Hunt or Berkley terminated or non-renewed the policy. The court also disagreed with Hunt's arguments that the policy is ambiguous. Berkley waived its right to argue that the claim was untimely when it originally only denied the Hillsdale claim on the basis of a Contractual Liability Exclusion; and that Berkley is estopped from asserting its timeliness argument.

The court also sided with Berkley with respect to the Owner's claim – holding it was not covered because it should be considered together with the Hillsdale claim as a single claim. The parties admitted the claims were related, but Hunt disputed "any legal conclusion that the relationship between the Hillsdale Claim" and the Owner's Claim" allow[ed] Berkley to disclaim coverage for both Claims." *Id.* at 383. The court held that because the claims were a single claim made on the date of the earliest claim as per the policy, where the earliest claim was untimely, both claims were untimely and consequently not covered.

The parties reached an agreement before Hunt's appeal<sup>1</sup> could be decided.

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### Implications for Contractors

The court's holding has serious implications for policyholders. By refusing to apply the 60-day AERP when the policy is renewed, or even acknowledging the ambiguity in the language, the court adopts Berkley's position that the policyholder is put in a worse position by paying the insurer more money and renewing the policy than by choosing to purchase insurance from another carrier. There is no question the AERP would have applied to Hunt's claims and required Berkley to cover them if Hunt had not renewed with Berkley.

Second, in adopting Berkley's interpretation of the Multiple Claims provision, the court has approved of Berkley's reliance on a policy allocation provision as a basis to deny coverage for an otherwise covered claim. It was clear in this case that neither Hunt nor Berkley knew at the time of the Hillsdale claim that, almost two years later, the Owner would make a claim against Hunt. Thus, there was no way Hunt could possibly give notice of the Owner's claim any earlier, and Hunt's notice of the Owner's claim was timely. Yet, because the court held that Hunt's notice of the Hillsdale was untimely and that the two claims were "related," Berkley did not have to cover the Owner's claim.

This means that now, when policyholders have a claim, they will not only have to consider coverage for that claim but must also consider that failing to give notice may jeopardize coverage for unknown future claims that may be deemed to be "related." Policyholders can no longer risk waiting to provide notice of a claim or potential claim, even if that claim may fall within a deductible or retention. To preserve coverage for future claims, policyholders must give notice of anything that may qualify as a claim.

Contractors should consider training for project teams to make sure that they understand what may qualify as a claim under their policy to ensure that risk managers and general counsel can make timely notice to insurance carriers.

To view all formatting for this article (eg, tables, footnotes), please access the original [here](#).

Saxe Doernberger & Vita, P.C. - Michael V. Pepe

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## COMMON MISCONCEPTION

- Having continuous coverage with the same CM carrier means everything is OK
- Simply renewing with the same carrier does not circumvent the need to report the claim within the policy term or applicable ERP.
- It is often, incorrectly assumed, that if the insured renews with the same carrier, the reporting requirement continues into the next term.
- Watch CM and Reported Forms !

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## Case Study

- An insurance agent is insured by Carrier A for policy period July 1, 2021 through July 1, 2022. On June 27, 2022, the agent is served with a lawsuit alleging that the agent failed to procure the appropriate coverage for her client. On July 1, 2022 the agent changes carriers and moves her coverage to Carrier B. On August 4, 2022, the agent reports the claim to Carrier A.

### **What is the result?**

- If the agent was insured by Carrier A on a **claims made and reported policy form, there is no coverage**. The claim was made during the policy period but not reported during the same policy period.
- What will Carrier B's position be if its policy is written on a Claims Made and Reported form as well? No coverage. Due to the fact that the claim was made during Carrier A's policy period, the claim was not made and reported during carrier B's policy period.

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## Case Study

- What if the agent had renewed its claims made and reported coverage with Carrier A? No coverage. Claims Made and Reported forms do not typically provide continuous coverage and the reporting requirement is typically strictly enforced (i.e., that the claim be reported during the policy period in which the claim was made).
- If the agent's coverage through Carrier A was provided on a **claims made** basis, the claim is covered. There is coverage under the policy issued by Carrier A because the claim was made during that policy period and, for the purpose of this article, was reported promptly.

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## Case Study

### Lesson learned:

- **While the agent was continuously insured, there is still a gap in coverage under the claims made and reported form. Because of the less onerous reporting requirements under the claims made policy form, the claim can be reported after the policy period has ended without jeopardizing coverage as long as the claim was made within the policy period and reported promptly.**
- The distinctions between Claims Made and Claims Made and Reported policies do make a difference. While a Claims Made and Reported policy may cost less than a Claims Made policy in the short run, it is because the Claims Made and Reported is a more restrictive form of coverage. It's important to keep this in mind the next time you recommend or buy professional liability coverage, as the Claims Made and Reported form could end up costing you in the end.

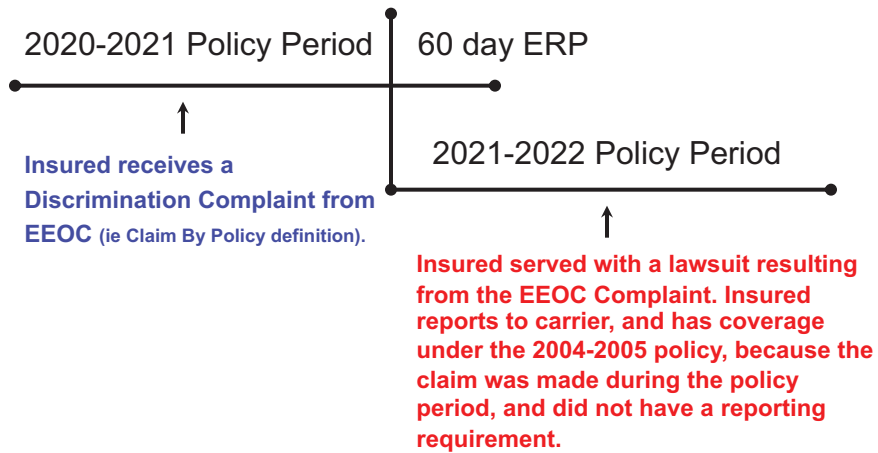
105

## PURE CLAIMS MADE

- Requires that a claim first be made during the policy.
- However, the major distinction between “Pure CM” and “CM and Reported” is that the insured needs only report the claim as soon as practicable or promptly...
- Not necessarily during the policy term, which in essence can be anytime in the future
- Sometimes used with D&O policies

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# PURE CLAIMS MADE



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## NJ Court Rules on timely notice for insurance claims

### Claims Made vs. Occurrence

PIA Reporter  
August 2014  
Lachut

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## **N.J. court rules on timely notice for insurance claims**

*In Templo Fuente De Vida Corp. v. National Union Fire Insurance Co. of Pittsburgh* (N.J. App. Div. June 6, 2014), the New Jersey Appellate Division held that on a claims-made policy when a policyholder reports a late claim, the carrier may deny the claim based on late notice without a showing of prejudice, even if the notice is given during the policy period.

In the case, the policyholder (for whom Templo is serving as a stand in) had a directors and officers policy with National Union. The policyholder received a complaint by Templo on Feb. 21, 2006, but failed to notify National Union of the suit until six months later.

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National Union disclaimed coverage citing the notice provision of the insurance contract that required the policyholder to provide notice as soon as practicable. During the case, Templo conceded that the notice was late, but citing case law argued that National Union was required to show it was prejudiced by the late notice before disclaiming coverage.

The court disagreed relaying on the differences between occurrence policies and claims-made policies. The court stated that though the policy was in effect at the time of notice, an insurer doesn't need to show prejudice on claims-made policies as it would if it was an occurrence policy.

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Given the uncertainty that this case creates, PIA recommends that you advise your clients to notify their carriers of a claim as soon as possible regardless of whether the policy is occurrence or claims made.—*Lachut*

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## Late Notice and Excess Coverage

D&O DIARY  
Kevin LaCroix  
March 16, 2016

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## Background

- During the policy period of October 1, 2010 through October 1, 2011, Ashland Hospital Corporation had a D&O insurance policy program that consisted of a primary \$15 million policy and an excess \$10 million policy. In July 2011, Ashland became involved in a U.S. Department of Justice investigation involving the company's billing practices. The company ultimately paid \$40.9 million to resolve the claim. On December 30, 2011, the final day on which notice of claim was permitted under the primary policy, Ashland provided notice of claim regarding the investigation to the primary carrier. However, Ashland did not provide the excess carrier with notice until June 29, 2012.
- The primary carrier ultimately paid its \$15 million policy limit, but the excess carrier denied coverage for the claim because of the late notice. Ashland filed a lawsuit against the excess carrier. The district court granted the excess carrier's motion for summary judgment. Ashland appealed.

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## February 29, 2016 Opinion

- On appeal, Ashland conceded that notice to the excess insurer was late, but argued coverage was not precluded because the excess insurer had not shown that it was prejudiced by the late notice. Ashland relied on a Kentucky Supreme Court decision in which the court had held — with respect to an occurrence-based insurance policy— that an insurer must show prejudice in order to deny coverage based on late notice of claim.
- On February 29, 2016 unpublished *per curiam* decision, the Sixth Circuit affirmed the district court's ruling. **The appellate court noted that the Kentucky Supreme Court had never addressed the question of whether or not the "notice-prejudice" rule applied to a claims-made insurance policy, like Ashland's excess policy. However, the appellate court concluded that the Kentucky Supreme Court would not extend the notice-prejudice rule to a claims-made policy that contains unambiguous notice requirements as a condition precedent to coverage.**

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## FIRST Made

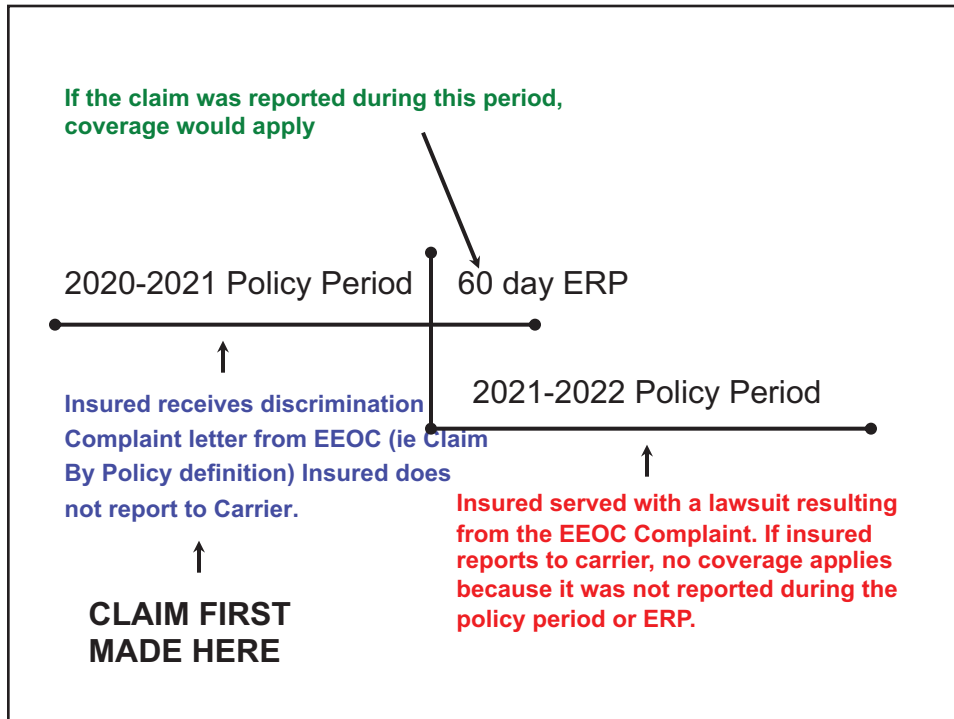
“ The Company shall pay on behalf of each of the Insured Persons, Loss which is not paid or indemnified by the Organization or other source and which the Insured Person becomes legally obligated to pay on account of any Claim **first made** against the Insured Person during the Policy Period, or if exercised, during the Extended Reporting Period, for a Wrongful Act committed, attempted, or allegedly committed or attempted by such Insured Person before or during the Policy Period.

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## Claim must be “First Made”

- Applies to both Pure CM and CM and reported forms
- No coverage under current policy if claim was previously made under prior policy (regardless of whether same carrier or different carrier)
- Implications:
  - Precludes coverage for claims that are rightfully the responsibility of a previous carrier
  - Prevents insured for obtaining coverage under a prior policy written by the same carrier with more favorable terms and conditions or limits.

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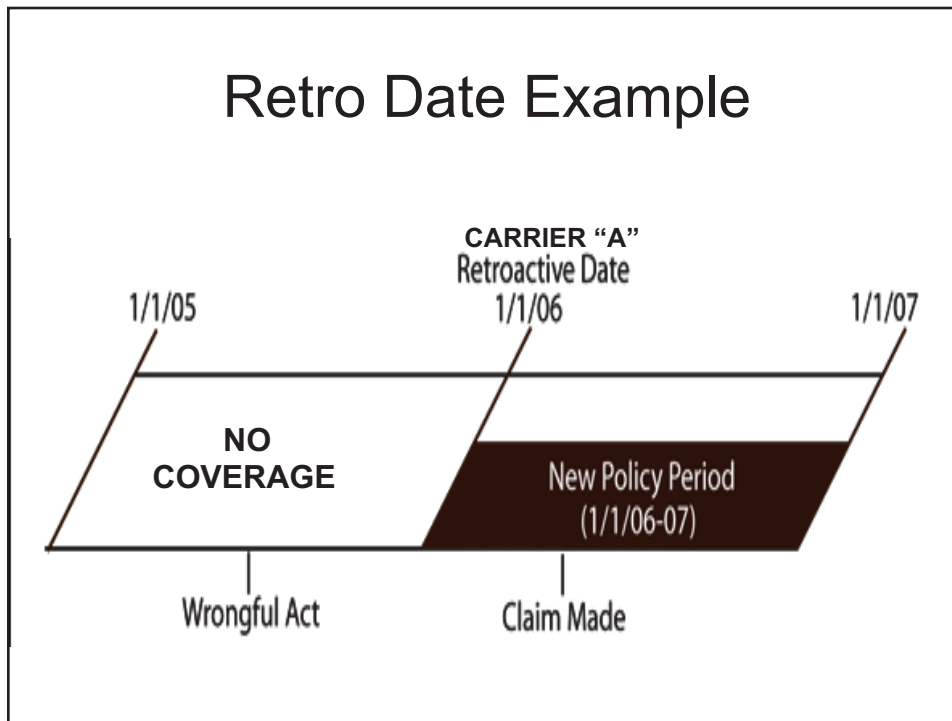
117

## Retroactive Dates

- Wrongful Act, Error or Omission giving rise to the claim must have taken place on or after the policy's Retroactive Date
- Purpose:
  - Eliminate coverage for situations or incidents known to insureds that have the potential to give rise to claims in the future;
  - Preclude coverage for "stale" claims that arise from events far in the past, even if such events were unknown to the insured.
- Retro Date is usually inception date of first policy
- Laser Beam Endorsement in lieu of Retro Date

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## Retro Date Example



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## RETRO DATES

- None – Preferred
- Retro Date should be as early as possible
- Inception of Original policy
- Renewal / Replacement leave as original
- No Retro Date but use Laser End't.
  
- Watch EBL Endt on CGL policy—moving BOP/ CPP from carrier to carrier—please hold original retro date !
- Add EBL CM endt to Occurrence CGL policy- What about umbrella trigger !

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## XI. Mixed Programs- Occur and CM

A. ISO Umbrella Policy is an OCCURRENCE based policy (as are most)

### B. Problems

1. Occurrence over claims made
2. Claims made over occurrence

### C. Solutions

1. Avoidance
2. If it cannot be avoided:
  - a. Try to confine "claims made" policies to upper layers
  - b. If umbrella is "claims made", buy the highest limits you can in the underlying
  - c. Keep all policies in a layer identical when a quota share arrangement exists
  - d. Try to keep retro dates consistent through all layers
  - e. Try to negotiate the guaranteed availability of a "supplemental extended reporting period" in the event of non-renewal.
  - f. Document in writing for all parties

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## Mixed Programs- Occur and CM

3. CU 27 00 – Underlying Claims-Made Coverage
  - Revises parts of the Umbrella form BI,PD,AI and PI insuring agreements, to clarify claims trigger and adds an Extended Reporting Period (CU 27 03)

### D. Potential Causes of Claims Made Gaps

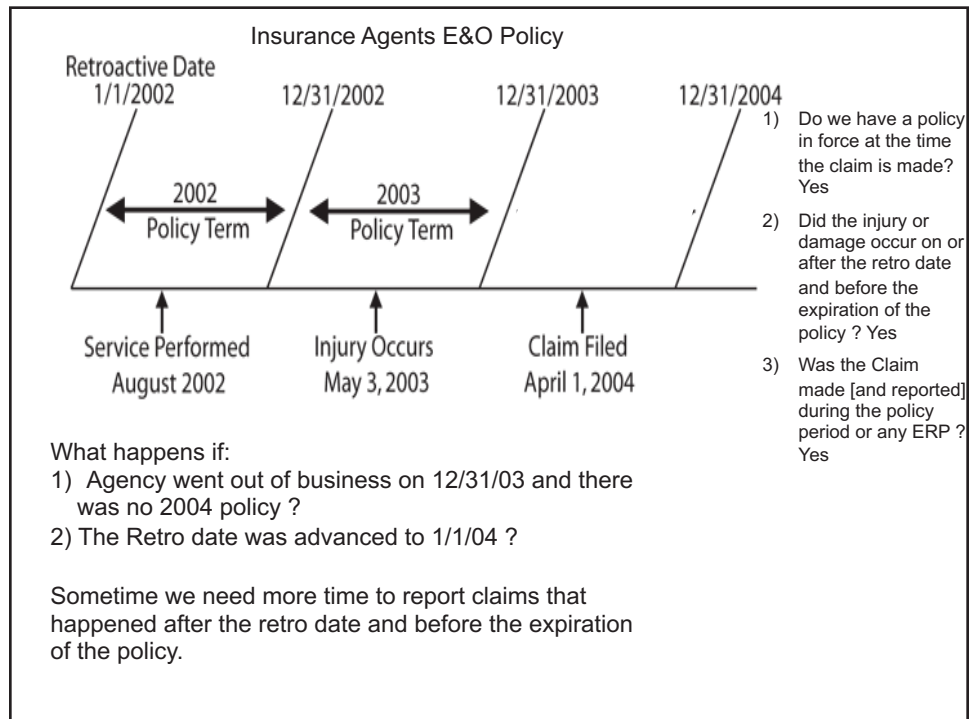
1. Retroactive Date Advancement
2. Cancellation by Insured or Insurer
3. Attachment of a "Laser" exclusions
4. Replacement with an Occurrence Policy

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## Conditions Precedent to Triggering a Claim:

- Retroactive Date Requirement
  - The act giving rise to the claim must have taken place on or after the policy's retro date
  
- Claims-Made Requirement
  - The claim must be first made against the insured prior to the policy's expiration date
  
- Reporting Requirements
  - The claim must be reported to the insurer with the reporting period of the policy.

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## KNOWLEDGE DATE

(one more caveat)

- Even if a Retroactive is used, no claim will be covered if the Insured, prior to purchasing the policy, has knowledge that reasonably could be evidence of a claim.
- The policy will cover **claims** back to the Retroactive date provided that no knowledge of a circumstance or incident exists at the time coverage is placed in force.
- Knowledge Date: 1/1/07. If you have knowledge of a circumstance or incident prior to 1/1/07 no coverage. (contractors professional)

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## Applying Claims-Made Triggers

- Professional Liability policy
  - CM and Reported Form (60 day reporting window)
  - 1/1/2021 – 1/1/2022
  - Retro Date of 1/1/2021
- **For coverage to apply under this policy, the following must occur:**
  - Wrongful Act giving rise to a claim must have taken place on or after 1/1/2021;
  - The claim must have been made against the insured before the policy expired on 1/1/2022; and
  - The claim must be reported to the insurer no later than March 1, 2022 (60 day)
  - The Insured has no prior knowledge of incident
  - The service of the suit must occur **after** the prior and pending litigation date; even if the insured had no knowledge that it is coming. If the "P/P date" is the inception date, this could cause problems. [BERP]

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# Prior and Pending Litigation Directors & Officers Liability Exclusion

September 2014

The D & O Diary

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## D&O Insurance: Prior and Pending Litigation Exclusion Bars Coverage for Lawsuit Filed Years Before But Served During the Current Policy Period

By Kevin LaCroix on September 22, 2014



Under which claims made D&O insurance policy is there coverage for a claim that was filed under seal years ago but not served on the policyholder until the policy period of the current policy? If you find the answer “no policy” as unsatisfying as I do, read on. In a September 15, 2014 opinion (here), a three-judge panel of the Superior Court of Pennsylvania affirmed the trial court’s grant of summary judgment holding that Amerisource Bergen’s D&O insurance policy’s prior and pending litigation exclusion precluded coverage for a False Claims Act lawsuit that was filed under seal in 2006 but not served on the company until 2010. In the discussion section below I try to sort out what happened here.

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## Pending or prior litigation date

- Insurance brokers often confuse the pending or prior litigation exclusion with the prior-acts exclusion. A typical pending or prior litigation exclusion bars coverage for "any prior or pending litigation that is known, including any facts, incidents or circumstances the insured had knowledge of with respect to any 'claims' or 'wrongful acts,' including administrative or regulatory proceedings, prior to the time the policy was written and/or of which any notices were given to any prior insurers."

**It's important to check a policy's definitions of claims and wrongful acts. A claim may or may not include a non-monetary demand, as well as a monetary demand, against the named insured. A claim may include written demands in one policy, or both oral and written in another. The definition usually includes administrative or regulatory proceedings, such as matters involving the Equal Employment Opportunity Commission or the Securities and Exchange Commission. If a complaint is filed against an insured with the EEOC, the insured may not realize the insurer considers this a "claim." More to the point, if the insurer failed to report the complaint to the incumbent insurer, the carrier might not respond to a lawsuit that arises after its policy expires. Meanwhile, the new insurer could deem this to be "pending or prior litigation" and also deny coverage for any subsequent litigation.**

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- The term "wrongful act" also may be given different definitions in different policies. A D&O wrongful act may mean any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duties by a corporation's directors or officers of the corporation. The definition may or may not include "wrongful employment acts." Such an act may be defined as any actual or alleged act of discrimination, harassment, retaliation, wrongful discipline, employment related misrepresentation or wrongful termination committed by the insured entity's directors, officers or employees.

The reason for the pending and prior litigation exclusion date is to ensure that a new insurer does not have to pay a claim arising from active or pending litigation that an insured knew about before the effective date of the new coverage. After all, the insured should have notified the previous insurer of all such litigation or incidents that could lead to claims.

*Ideally, to maintain coverage continuity, a new insurer should agree to use the inception date of the insured's initial D&O or EPL policy as the new policy's pending or prior litigation exclusion date. In practice, however, the great majority of insurers use the date their policies take effect. Depending on the state of the insurance market, a new insurer may agree to keep the expiring policy's pending or prior litigation date, if the insured provides copies of all notices or claims given to previous insurers. Additional underwriting criteria may have to be met as well.*

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## Prior Pending Litigation Date...a/k/a

Prior and pending litigation date is also known as the: "continuity date," "first coverage date," "P/P date" or "administrative proceeding" date - depending on the form and insurer.

Adopting this language into executive liability forms changed coverage requirements. Now:

1. The claim against the insured had to be first made during the policy term;
2. The first notice of litigation or possible litigation, in the form of a service of suit or administrative agency notification, must occur after the specified prior and pending litigation date (often found on the declarations page); and
3. If the policy contained a reporting requirement, the claim must be reported to the insurer during the policy term or any automatic basic extended reporting period.

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## Prior and Pending....

- Company A sues Company B – 1/1/21
- Company B sues Company C – 6/1/21
- Company C sues the insured – 5/2/22
  
- Company C's policy renews with a 1/1/22 PPL date
- Potentially no coverage, since the first two lawsuits were filed before the P&P date.
- **The policy doesn't specify whether the insured has to be named in the original intern-related litigation**

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# Management Liability Policy

Dangerous Notice Provisions

One Beacon

6/5/18

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## VI. NOTICE

- (A) Any notice to the Underwriter with respect to any Coverage Section shall designate the Coverage Section under which notice is being given and shall be treated as notice only under the Coverage Section(s) so designated.
- (B) Notice to the Underwriter of a **Claim** or of circumstances which could give rise to a **Claim** under any **Liability Coverage Section**, or of an **Occurrence** under the **Crime Coverage Section**, shall be given in writing addressed to:

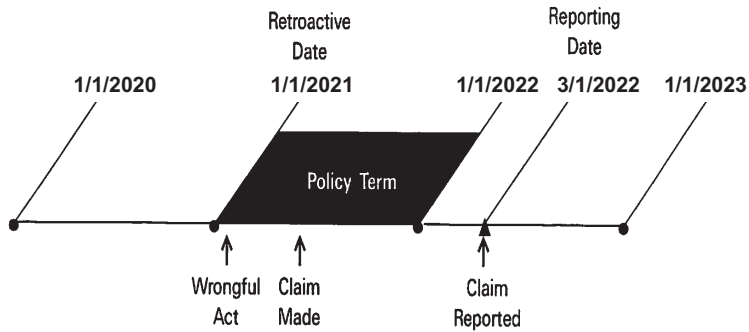
[Chief Claims Officer]  
[OneBeacon Insurance Group]  
[199 Scott Swamp Road]  
[Farmington, CT 06032]  
[obiclaims@onebeacon.com]

- (C) All other notices to the Underwriter shall be given in writing addressed to:

[OneBeacon Insurance Group]  
[199 Scott Swamp Road]  
[Farmington, CT 06032]  
[Attn: Underwriting]

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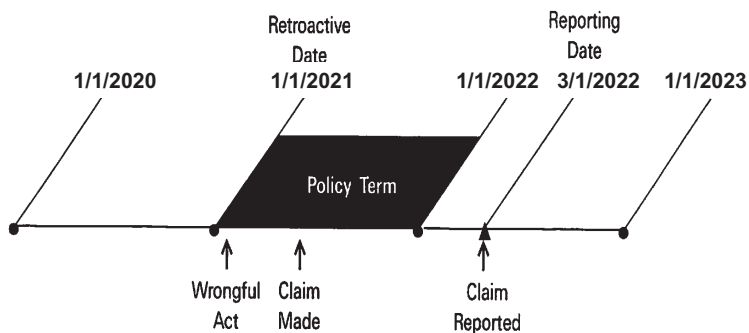
# QUIZ #1



135

# QUIZ # 1

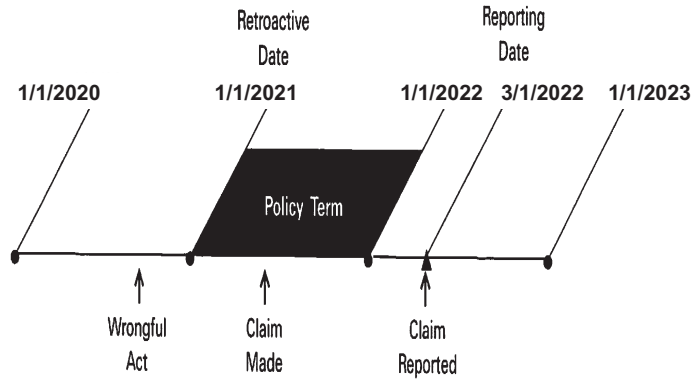
## Case #1 (Coverage Applies)



The claim is covered because the wrongful act took place after the policy's retroactive date, the claim was made against the insured *during* the policy term, and the claim was reported to the insurer *within* 60 days of the policy expiration date.

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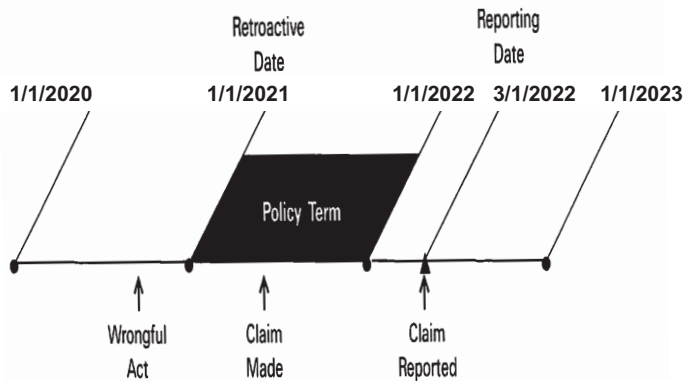
## QUIZ # 2



137

## QUIZ # 2

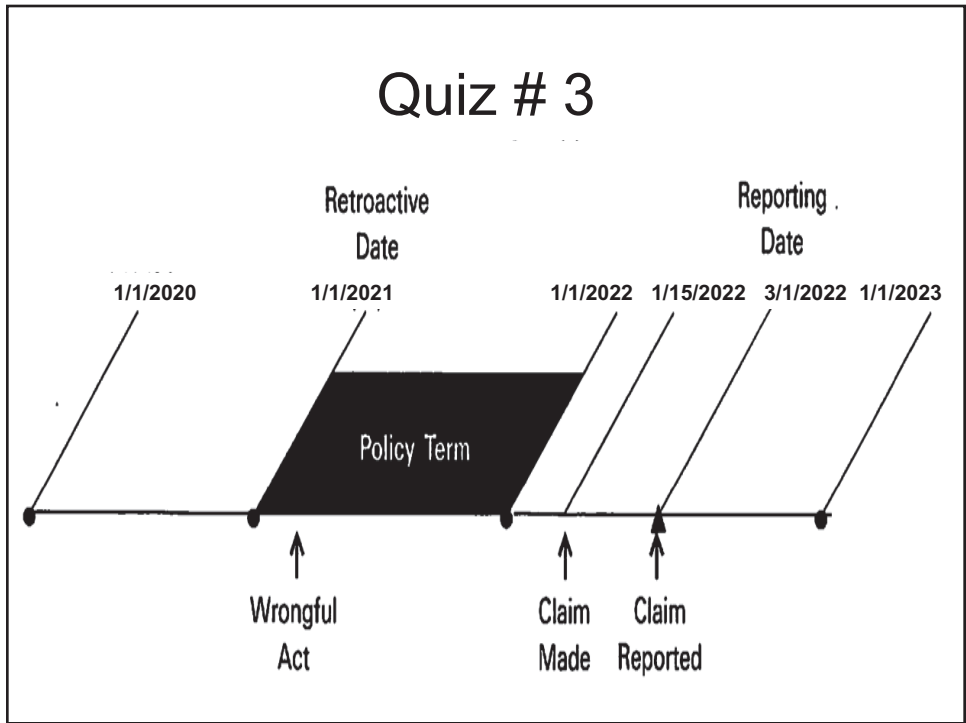
### Case #2 (No Coverage Applies)



The claim is not covered because the wrongful act *took place* prior to the policy's retroactive date.

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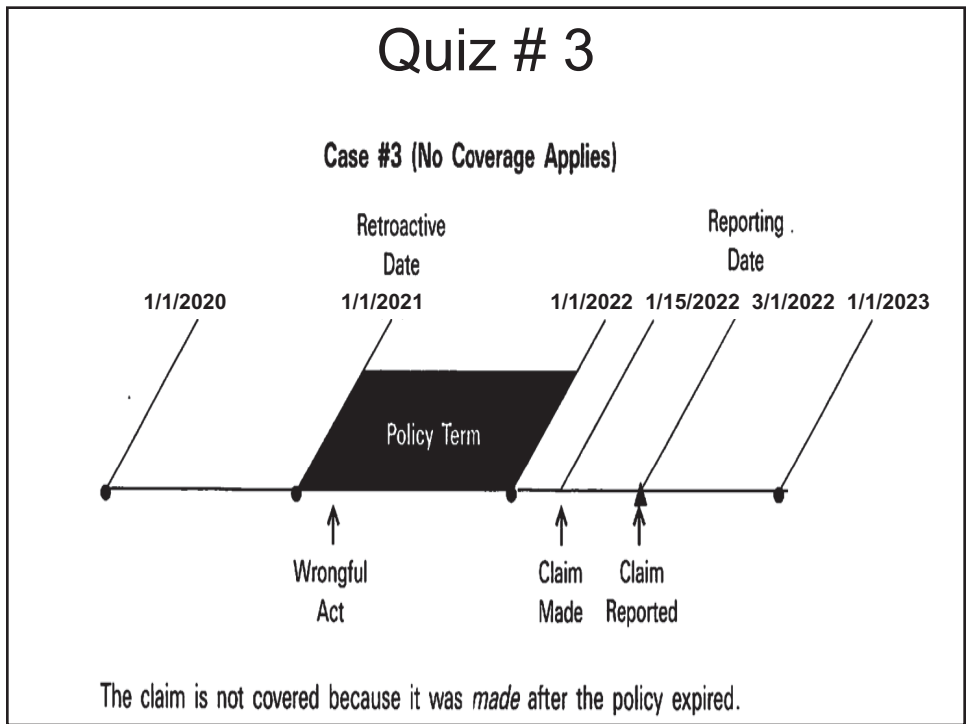
# Quiz # 3



139

# Quiz # 3

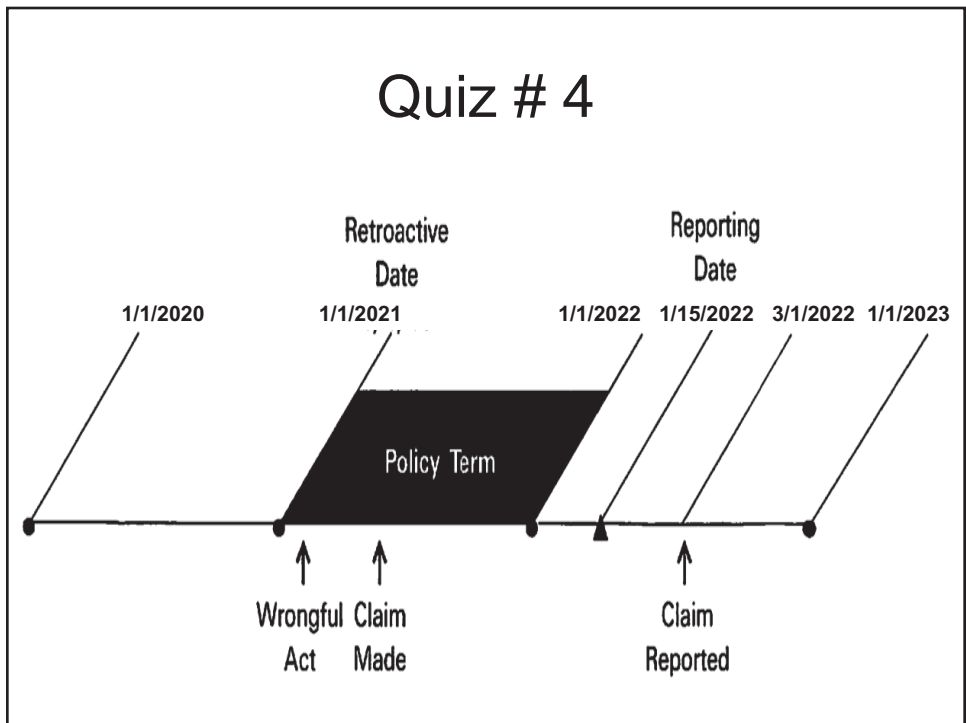
## Case #3 (No Coverage Applies)



The claim is not covered because it was *made* after the policy expired.

140

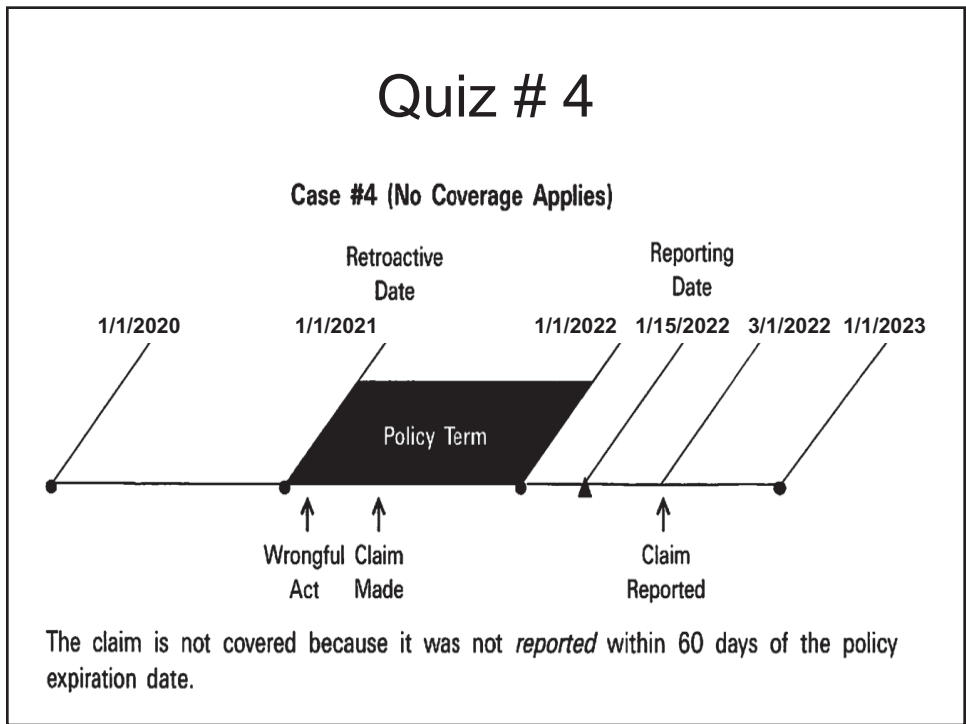
# Quiz # 4



141

# Quiz # 4

## Case #4 (No Coverage Applies)



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## DISCOVERY PROVISION

[awareness provision or notice of potential claim]

- Problem for Insured:
  - Unless claim is made against the insured during the policy period, coverage will not be triggered
  - This is true even though the Wrongful act or error and omission was committed during the policy period, and a claim is virtually certain to result.
  - Most all Professional policies contain Discovery provisions, Awareness provisions, Notice or Potential Claim provisions

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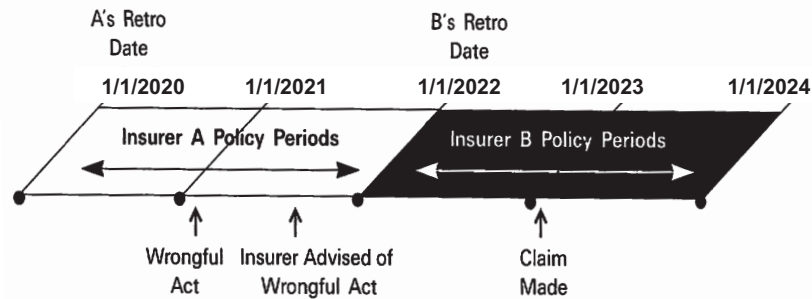
## DISCOVERY PROVISIONS

- These provisions allow insured's to report for incidents or circumstances that may produce claims in the future.
- In effect, these provisions allow the insured to "lock in" coverage for such events so that coverage will apply under the current policy—regardless of how far in the future a claim is eventually made in conjunction with the incident that was reported.
- Notify insurer of any incidents or circumstances that could at some future time result in a claim, when changing carrier (or discontinuing coverage completely) to minimize any gaps.
- Watch trying to "Laundry List"

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# DISCOVERY PROVISIONS



Coverage applies under A's policy because notification of the incident was provided during the January 1, 2021/2022 policy term by means of that policy's discovery provision.

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# WHEN TO USE DISCOVERY PROVISIONS

- Plan to switch insurers at renewal
- Intend to cancel policy mid-term
- Receive notice of cancellation/non-renewal
- Retires from or Sells Business
- Merges with another business
- Discovers an error in his/her work before client becomes aware of the mistake
- Confronts a client who is dissatisfied with your work, but has not yet threatened to sue
- Request from client to provide remedial services without charge, to correct alleged deficiencies in previously performed work

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## Potential Advantages / Disadvantages of Laundry Listing

### Disadvantages

- Higher Renewal Premiums
- Possible Cancellation /Non-Renewal
- Problems with Changing Insurers (must reveal to old and new carriers any incidents)
- Possible admission of Guilt
- Carrier rejects

### Advantages

- Lock in coverage for future claims
- Non-Renewal: Carrier no longer writes coverage (new carrier more understanding of long listing)

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## Two Critical Factors in Claim Made Coverage

- WHEN IS A CLAIM MADE ?
- WHEN DOES THE WRONGFUL ACT TAKE PLACE?

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## WHEN IS A “CLAIM” MADE ?

Three different wordings.....

1. “Claim” is notice to the insurer, by the insured, of an incident that could give rise to a claim in the future
2. **“Claim” is a written demand for money or services**
- 2a. **“Claim” is a written demand for money or services, or non-monetary relief**
3. “Claim” is notification of a criminal, administrative, alternate dispute resolution proceeding, or EEOC proceeding

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## 2. “Claim” is a written demand for money or services

<u>Policy Term</u>	<u>Events</u>
• 1/1/15- 1/1/16	Surgery Performed
• 1/1/16- 1/1/17	Infection Develops
• 1/1/17- 1/1/18	Illness Develops, lawsuit threatened
• <b>1/1/18- 1/1/19</b>	<b>Dr served with Summons &amp; Reports (2)</b>
• 1/1/19- 1/1/20	Settlement Negotiations
• 1/1/20- 1/1/21	Settlement Negotiations
• 1/1/21- 1/1/22	Settlement Negotiations
• 1/1/22- 1/1/23	Claim Settled

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**1. “Claim” is notice to the insurer, by the insured, of an incident that could give rise to a claim in the future.**

<u>Policy Term</u>	<u>Events</u>
• 1/1/15- 1/1/16	<b>Surgery Performed (1)</b>
• 1/1/16- 1/1/17	Infection Develops
• 1/1/17- 1/1/18	Illness Develops, lawsuit threatened
• 1/1/18- 1/1/19	Dr served with Summons
• 1/1/19- 1/1/20	Settlement Negotiations
• 1/1/20- 1/1/21	Settlement Negotiations
• 1/1/21- 1/1/22	Settlement Negotiations
• 1/1/22- 1/1/23	Claim Settled

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**2. “Claim” is a written demand for money or services; or non-monetary relief**

<u>Policy Term</u>	<u>Events</u>
• 1/1/15- 1/1/16	Surgery Performed
• <b>1/1/16- 1/1/17</b>	<b>Infection Develops and insured demands all fees paid be returned (2a)</b>
• 1/1/17- 1/1/18	Illness Develops, lawsuit threatened
• 1/1/18- 1/1/19	Dr served with Summons & Reports
• 1/1/19- 1/1/20	Settlement Negotiations
• 1/1/20- 1/1/21	Settlement Negotiations
• 1/1/21- 1/1/22	Settlement Negotiations
• 1/1/22- 1/1/23	Claim Settled

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## **AGENTS E&O CLAIM REPORTING**

- Contrary to popular belief, a lawsuit is not the only type of claim insurance agents should report to their errors & omissions carriers. Consider the following examples:
- An agent's client files suit against its carrier for declination of coverage. The client does not sue the agent. Either the client or the carrier's lawyer requests, via subpoena, to take the agent's deposition during the course of litigation.
- An agent receives a department of insurance notice to produce a copy of her file to a state regulatory agency.
- An agent procures coverage for his client. After the carrier denies coverage for the underlying loss, the carrier demands that the agent provide it with an oral/written statement regarding how the agent serviced the account.

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## **AGENTS E&O CLAIM REPORTING**

- While no one has directly sued the agent in the instances above, the scenarios nevertheless constitute "claims" under most professional liability insurance policies.
- Agents should read their own errors & omissions policies to better understand how "claim" is specifically defined. It is noteworthy that many policies define "claim":
  - as a request to take a recorded statement;
  - a demand for money or services; and/or
  - service of a summons, a subpoena or any other notice of legal process.
- Hence, many policies define claim in a much broader sense than a mere lawsuit filed against the agency in question.

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## Deer Oaks Office Park Owners Ass'n v. State Farm Lloyds

2012 U.S. Dist. LEXIS 19240  
(W.D. Tex. Feb. 15, 2012),

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- The insured, Office Park, was “an office park condo association which owns, maintains and regulates the 'common areas' between fifteen unconnected office condos” in San Antonio, Texas. In 2007, it sold one of the condominium units to a doctor who intended to convert the unit for use in his medical practice.
- The doctor advised that being able to install an elevator into the unit was an important aspect and condition of his purchase. After the sale, however, the doctor was unable to obtain a permission from building maintenance to install the elevator. He subsequently complained to Office Park, and later commenced a lawsuit in Texas state court.
- Office Park sought coverage for the suit under the directors and officers coverage of its policy with State Farm Lloyds, effective for claims first made during the period January 30, 2010 to January 30, 2011, which encompassed the period in which the doctor commenced suit.

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- The policy’s insuring agreement stated that coverage “applies to ‘wrongful acts’ committed before this optional coverage became effective if the insured had no knowledge of a claim or suit at the effective date of this option and there is no other applicable insurance.”
- State Farm Lloyds denied coverage for the suit on the basis that Office Park had knowledge of the doctor’s claim prior to the policy’s inception. Specifically, State Farm Lloyds relied on a September 23, 2009 letter from the doctor’s attorney that “traced [the doctor’s] multiple complaints about Office Park and attributed monetary losses to Office Park.”
- Office Park argued that the doctor’s letter did not constitute a “claim” or notice of a “claim,” because the letter did not specifically demand any monetary relief. In support of its position, Office Park pointed out that the State Farm Lloyds policy did not contain a definition of the term “claim,” and that as such, under the Fifth Circuit decision in Int’l Ins. Co. v. RSR Corp., 426 F.3d 281 (5th Cir. 2005), the term “claim” must be narrowly construed as “a demand for money, property, or legal remedy.”

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- Office Park contended that because the doctor’s September 23, 2009 letter did not actually seek monetary relief, it could not constitute a “claim” for the purpose of the policy’s “knowledge of a claim or suit” condition to coverage.
- The court disagreed with Office Park’s restrictive reading of RSR Corp., finding that the term “claim” is not limited solely to demands for monetary relief, but instead encompasses any assertion of a legal right. Such an interpretation, the court explained, ordinarily is favorable to the insured, rather than the insurer, “because the construction gives the insured the right to seek coverage without waiting for the filing of a lawsuit.”
- The court went on to conclude that the doctor’s letter qualified as a “claim” because it clearly stated a legal demand for relief and advised of the potential for litigation should an accommodation not be made.

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- As the court explained: The only reasonable interpretation of the letter is that [the doctor] asserted a right to hold Office Park liable for all of the costs [he] had spent and lost because of Office Park's acts. The letter's bottom line was: If you do not comply with my demands, I will sue you. Under any construction, the letter constituted a claim.
- As such, the court concluded that State Farm Lloyd's denial of coverage was correct and that it had no duty to defend or indemnify the doctor in connection with the underlying matter.

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## Why are Claims Reported Late ?

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# Professional Liability Insurance: Two Policies But No Coverage Due to Untimely Notice

By [Kevin LaCroix](#) on January 12, 2015  
Posted in [D & O Insurance](#)

161

## Professional Liability Insurance: Two Policies But No Coverage Due to Untimely Notice

- In a January 9, 2015 opinion ([here](#)), the Eighth Circuit, applying Missouri law, held that there was no coverage under either of two successive professional liability insurance policies issued by the same insurer for a claim against its insured, LSi-Lowry Systems, because the claim was first made before the inception of the second policy and because LSi had not given timely notice of claim under the first policy.
- The appellate court rejected LSi's argument that its email exchange with a dissatisfied customer during the policy period of the first of the two policies did not constitute a claim.

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LSI sold Hodell-Natco Industries business software and software support services. The software went live on March 1, 2007 and software performance issues immediately emerged. In a lengthy series of emails that followed between the two companies, Hodell complained about the performance issues and demanded that LSi remedy the defects. Within days, Hodell threatened legal action. On April 27, 2007, Hodell sent emails asking “who will pay for damages” and advising that the company had retained legal counsel. On June 25, 2007, Hodell demanded that LSi correct the problems “or reimburse Hodell-Natco for the expense.”

On July 24, 2007 Hodell’s lawyer sent LSi a letter stating that the company is “compelled to declare [LSi] in material default of their agreements,” advising that Hodell “will pursue all legal and equitable remedies available to us,” and demanding that LSi have their attorneys contact Hodell’s counsel in order to “discuss an amicable resolution to this matter.” LSi acknowledge receipt of the letter, asking “You are asking for remedies (ie money?) Correct?”

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- On January 23, 2008, Hodell sent LSi an email stating “We are offering you the chance to resolve this situation by refunding the TOTAL funds we’ve paid to LSi,” adding “Don’t you carry professional liability insurance for this type of issue? ...In an effort to avoid a dragged-out lawsuit, we made a proposal to resolve this matter in a manner that gave us a small amount of relief, far short of our total cost.”
- On November 21, 2008, Hodell filed a lawsuit against LSi in the Northern District of Ohio asserting claims for fraud, breach of contract, negligence and negligent misrepresentation arising from the performance issues with the software. On December 8, 2008, LSi first notified its professional liability insurer of the Hodell’s claims.

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## *The January 9 Opinion*

- On January 9, 2014, in an opinion by Judge [Jane Louise Kelly](#) for a unanimous three-judge panel, the Eighth Circuit affirmed the district court, holding that there was no coverage for the claim under either of the two professional liability insurance policies.
- 
- The district court had concluded there was no coverage under the 2007 policy because LSi did not give notice of claim or potential claim to the insurer within the 2007 policy period. The appellate court said “We agree with the district court,” quoting the district court’s statement that “by the plain language of the 2007 policy, there is no coverage.”
- The district court also found that there was no coverage under the 2008 policy because it concluded that the email communications between LSi and Hodell during the period March 2007 and April 23, 2008, when the 2008 policy incepted, constituted a claim. The appellate court said, quoting with approval from the district court opinion, “We agree with the district court that the communications ‘show that Hodell blamed LSi for the functionality problems of the software, requested that LSi fix the issues, and expected LSi to pay the associated costs.’”

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- The appellate court also rejected LSi’s argument that the district court had erred in relying on the definition of “claim” in the 2008 policy – which included “a demand for money or services” – but rather should have analyzed the question using the definition of “claim” in the 2007 policy, which defined a claim solely as “a demand for money.” LSi argued that Hodell did not make a claim against LSi during the 2007 policy period because Hodell did not make a specific demand for money.
- The appellate court said “As an initial matter, we question whether the definition of a claim in the 2007 policy would apply when determining coverage under the 2008 policy.” But, the court added, in any event, the term “claim” in both policies included a “demand for money” within the definition. The court reviewed the various statements in the email communications and concluded that “Regardless of which definition applies, the result is the same: The communications between Hodell and LSi prior to the date coverage began under the 2008 policy constituted a ‘demand for money’ and therefore amounted to a ‘claim.’”

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# Legal Malpractice Insurance: Policy Rescission for Application Misrepresentation Applies Even to Innocent Insured

By Kevin LaCroix on February 24, 2015  
D& O Diary  
Dandodiary.com

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Under the applicable Illinois statute, an insurer may seek to rescind a policy if it was procured by an application misrepresentation if the misrepresentation was “made with the actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company.” *But even if rescission is otherwise warranted, may the insurer rescind the policy even as to an “innocent insured” who was unaware of the Application misrepresentation?*

That was the question raised before the Illinois Supreme Court in *Illinois State Bar Association Mutual Insurance Company v. Law Offices of Tuzzolino and Terpinas*. In a February 20, 2015 opinion (here), the Court rejected the ruling of the intermediate appellate court, which had applied the “innocent insured” doctrine to preserve coverage for a law firm partner who was unaware of the a misrepresentation in the law firm’s legal malpractice insurance renewal application, and held that the insurer was entitled to rescind the policy as to all insured persons, even the innocent insured.

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- The Court rejected the applicability to the innocent insured doctrine to the rescission question in this case. The Court said that coverage cases applying the doctrine “usually involve the enforcement of policy exclusions” adding that “the innocent insured doctrine makes sense in that context because the insured’s innocence is relevant to whether an intentional act invokes an exclusion to coverage. But the innocent insured doctrine appears irrelevant to rescission, a recognized remedy for even innocent misrepresentations.”
- The Court said that “unlike in a rescission case, the innocence of an insured matters a great deal when another insured’s wrongdoing triggers a policy exclusion, and a dispute arises over whether the insured has a duty to defend the innocent insured under a policy that indisputably was in effect.” But the issues of insurance coverage governed by common law rules of policy language interpretation are “significantly different from the question of whether an insurance policy should be enforced in the first place.”

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## Wrongful Act

- Not Defined in many policies, or defines certain acts, but doesn’t help to arrive at the point in time it took place
- Not always easy to determine
  - Attorney cases- multiple conferences over 6 months
- ***Important for Retro Date issues***
- Generally accepted practice dictates using: when the professional service that ultimately causes the loss or damage is actually performed or should have been performed, but was not.
- As opposed to: a) the time at which the service ultimately causes loss or damage, b) when the professional discovers the loss or damage, or c) when the claimant discovers the loss or damage

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## Wrongful Act Determination

- Engineer hired to design a roof structure for an office building
- 1/1/17 the plan for the roof is sealed and submitted
- 1/1/22 the roof collapses, from faulty design work (beams too small for load)
- When did Wrongful Act take place?
- 1/1/17
- Not always that clear cut. Ongoing professional services – insurance agent / attorney

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## Wrongful Act and Non-Cumulation of Policy Limits

- January 1, 2019-2020 retro date 1/1/94 \$1,000,000
- January 1, 2020-2021 retro date 1/1/94 \$2,000,000
- January 1, 2021-2022 retro date 1/1/94 \$3,000,000
- Architect draws plans for a structure and seals the plans on 1/1/95 (WA). Construction is complete 2 years later 1/1/97. On 1/1/99 a portion of the building collapses and injures three people (INJURY), who file suit below:

- Claim #1 made 1/31/19 (CM)
  - Claim #2 made 1/31/20
  - Claim #3 made 1/31/21
- Q: How much is available to pay these claims?**
- A: \$1,000,000** That was the year when the first claim arising from the original wrongful act took place (defective design)

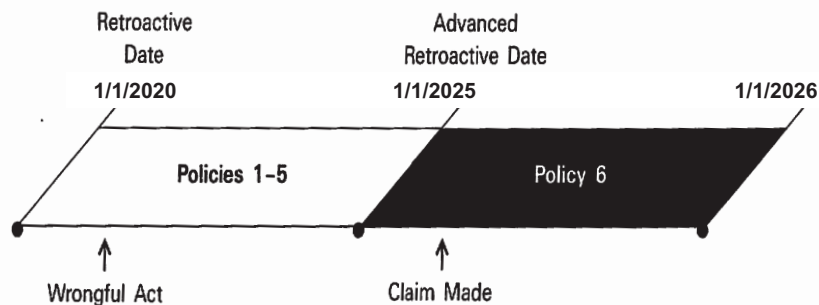
172

## PROBLEM AREAS

- Retro Date advancement
- Cancellation or Non-Renewal by insurer or insured
- Replacement of Claims Made policy with Occurrence Policy

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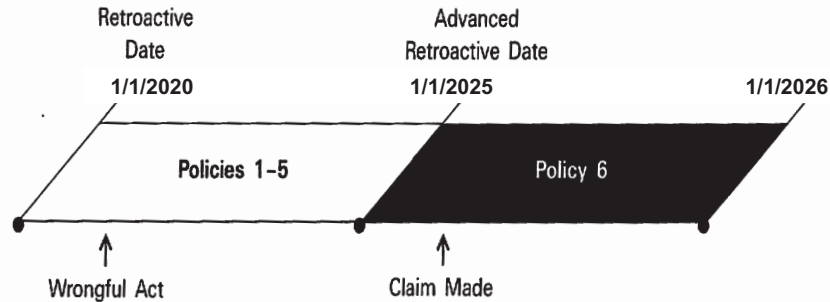
## Retro Date Advancement



An insured had five consecutive, one-year policies written by XYZ insurance company from January 1, 2020 to January 1, 2021. All five of the policies in force during this time contained a January 1, 2020 retroactive date. On January 1, 2025 the insured decides to change insurers. The new insurer offers a policy with a January 1, 2025 to January 1, 2026 term that contains a January 1, 2025 retroactive date. The advanced retroactive date will preclude coverage for claims from wrongful acts that took place before January 1, 2025 (the new retroactive date), if claims produced by those acts are made during the January 1, 2025 to January 1, 2026 policy period.

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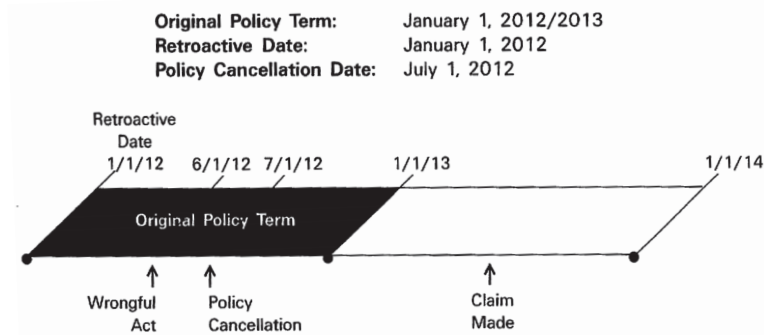
## Retro Date Advancement



On the other hand, had the retroactive date remained at January 1, 2020 claims made during the new January 1, 2025-2026 policy period will be covered.

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## Cancellation of Non-Renewal by insurer or insured



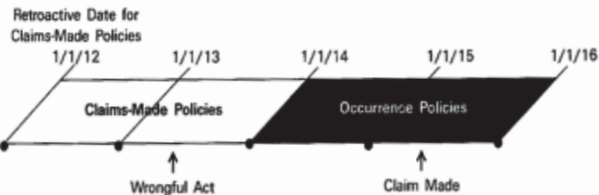
Note that there is no coverage for the claim because, although the wrongful act took place *before* the policy was canceled (and after the retroactive date), the claim was not made until *after* the policy had been canceled.

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## Replacement of CM with Occur.

Policy Date	Retro Date	Coverage Trigger
January 1, 2012–January 1, 2013	January 1, 2012	Claims-made
January 1, 2013–January 1, 2014	January 1, 2012	Claims-made
January 1, 2014–January 1, 2015	N/A	Occurrence
January 1, 2015–January 1, 2016	N/A	Occurrence



None of the four policies noted in Exhibit VIII.D.4 would cover the claim for the following reasons.

- The January 1, 2013/2014 claims-made policy had expired on the date the claim was made. The fact that the wrongful act producing the claim took place during this time period is of no bearing in determining coverage.
- The January 1, 2015/2016 occurrence policy would not cover the claim because the wrongful act giving rise to the claim occurred before the inception of the policy.

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Potential Causes of Claims-Made Coverage Gaps	
Causes of Gaps	Explanation
Retroactive date advancement	This occurs when a policy's retroactive date is moved forward in time when it is renewed or replaced. Although it is rare for an incumbent insurer to offer a renewal policy with an advanced retroactive date, insurers replacing an existing policy sometimes offer a policy with an advanced retroactive date.
Cancellation or nonrenewal by the insurer or insured	If the insurance is not immediately replaced, the gap results because there will be no coverage for claims arising from wrongful acts that took place during the term of the now-expired/canceled policies that are made after the last policy has expired/been canceled.
Change to an occurrence policy	This gap occurs when an insured switches from a claims-made policy to an occurrence policy. This is because there is no coverage for claims that result from wrongful acts or injuries taking place <i>before</i> the inception of the occurrence policy, even though the claims are made <i>during</i> the term of the replacement occurrence policy.

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## Closing Gaps in CM Policies

- TWO OPTIONS:
- Extended Reporting Periods
  - BERP's
  - SERP's
- Prior Acts Coverage
  - Full
  - Partial

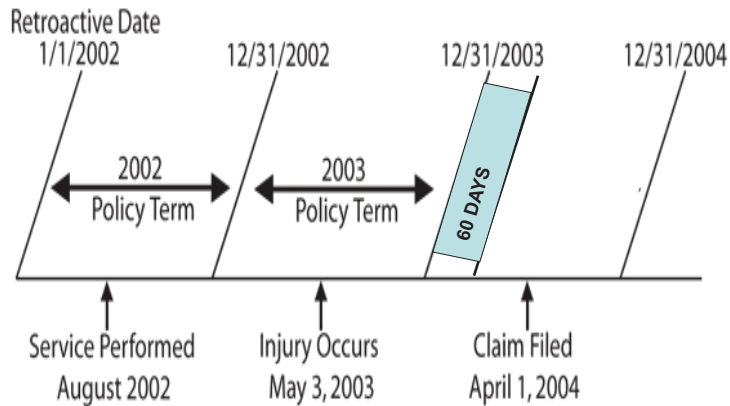
179

## BERP / SERP's

- Extended REPORTING periods only extends the time period in which a claim may be reported. It does NOT provide any additional coverage. *The wrongful act or injury must have occurred during the policy.*
- Basic (BERP)– usually included with policy, 30-60 days / 5 year claim development
- Supplemental (SERP) – 1-5 years / extra premium

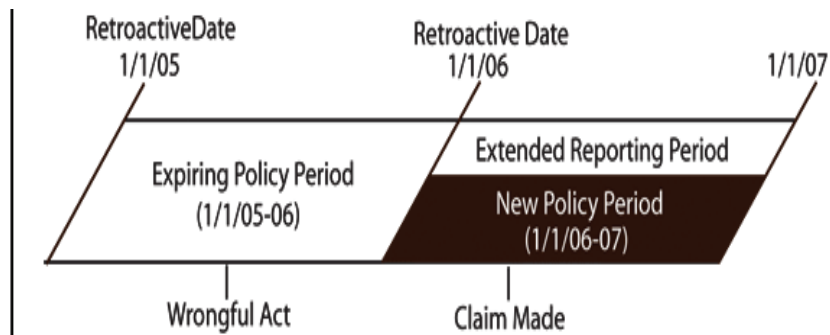
180

# BERP



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# Extended Reporting Period



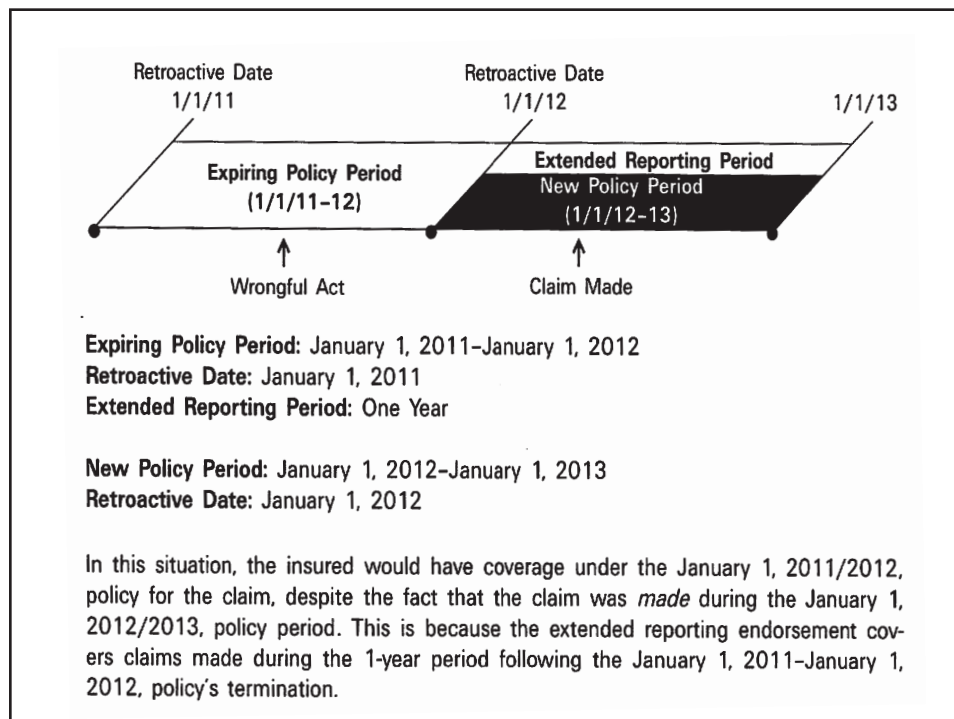
**Expiring Policy Period:** January 1, 2005–January 1, 2006  
**Retroactive Date:** January 1, 2005  
**Extended Reporting Period:** 1 Year  
**New Policy Period:** January 1, 2006–January 1, 2007

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## Important SERP Terms

- The right to purchase an SERP
  - Two way
  - One way
- The duration of the SERP
  - One year
  - Other
- The price
  - Stated / Negotiated
  - TBD by company at the time of purchase
- Time period insured is allowed to purchase SERP
  - 30 days common
  - 60 days
- Reinstatement of Aggregate Limits
- Only extends RERPORTING time
  - Not for claims made during the SERP

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## Awareness Question Warranty Question



Does any Insured have knowledge or information of any act, error, or omission which might give rise to a claim under the proposed policy?



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## The Application

- Be careful...
- Answer ALL questions HONESTLY and to the best of your knowledge
- The application and attachments will become a part of the policy and a warranty
- Carrier can use the information on the application to rescind the policy, if materially misrepresented
- The Awareness question: Think long, think hard and think deep !

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## The Application

- How long will app and attachments be a part of the policy ?
- Do I need to complete a “long form” app on renewal or can we delete the awareness question ?
- If you are changing carriers, increasing limits, broadening coverage you will have to answer the Awareness question
- Who has to be aware of any incident ?

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## Sample Polling Letter

BIG I – Virtual University  
Westport Ins. Co. E&O Policy  
Language

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### Sample Claims Made Policy Polling Letter

⊕  
Named Insured(s): ABC, Inc  
Address: 123 Main St.  
Any Town, USA  
Insurance Carrier: Westport Insurance Corporation  
Coverage Provided: Errors & Omissions Policy  
Policy Number: ABC-EASY-AS-123  
Effective Dates: January 1, 2020 to January 1, 2021

ABC, Inc's Errors and Omissions policy is written on a "claims made" basis. A "claims made" policy responds to defend and/or pay or indemnify only those claims made or filed against the named insured and other insureds during the policy period, subject to all policy's terms and conditions. Any "claim" or "potential claim" known to have been made or received during the policy period but not reported during the policy period or applicable extended reporting may result in severe coverage restrictions or the denial of coverage.

ABC, Inc's Errors and Omissions policy defines a "claim" to mean that: 1. an INSURED has received a summons, a subpoena, or any other notice of legal process; 2. an INSURED has received notice of any SUIT; or 3. an INSURED has received notice of a written demand, or a written demand for money or services.

A "potential claim" is defined to mean that an INSURED has become aware of a proceeding, event, or development, which could in the future result in the institution of a CLAIM against an INSURED.

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### Sample Claims Made Policy Polling Letter

Are you aware of or have you received notification of any "claim" or "potential claim" as defined in ABC, Inc's Errors and Omissions for a "wrongful act" defined in the policy as:

1. any negligent act, error, or omission of an INSURED in rendering PROFESSIONAL SERVICES or OTHER RELATED SERVICES for others;
2. any PERSONAL INJURY or ADVERTISING INJURY in rendering PROFESSIONAL SERVICES or OTHER RELATED SERVICES for others; or
3. any BREACH of PERSONAL DATA arising out of or in connection with the rendering of PROFESSIONAL SERVICES or OTHER RELATED SERVICES, but only if the INSURED has implemented current and commonly accepted technologies and methodologies designed to secure PERSONAL DATA and appropriate to the size and complexity of the agency and indecipherable to unauthorized individuals and which are in place at the time of the BREACH; provided, however, that any such technologies and methodologies



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Sample Claims Made Policy Polling Letter

must comply with privacy regulations found within the Health Insurance Portability and Accountability Act of 1996 or any other federal or state law or regulation, governing any industry in which the INSURED is rendering PROFESSIONAL SERVICES or OTHER RELATED SERVICES.

Yes

No

If "Yes," the carrier must be notified. Please describe: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

The undersigned attests that the above information is true to the best of their knowledge. The undersigned also attests that completion of this document does not replace nor negate the insured's requirements to comply with all responsibilities and duties contained within the insurance policy referenced in this document.

Signed: \_\_\_\_\_

Print Name: \_\_\_\_\_

Position/Title: \_\_\_\_\_

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*(Disclaimer: This is a sample using Westport Insurance policy language and an E&O policy. The language of each form and coverage type differs. This is intended only for an example.)*

**NOTE 1:** This polling letter must be completed and signed by:

- If a Corporation: All officers and directors
- If an LLC: All members and managers
- If a partnership (LLP, GP or Other): All partners
- If a Sole Proprietor: The sole proprietor and any key managers

**NOTE 2:** Attach a copy of the policy definitions for the insured's reference.

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# PRIOR ACTS and TAIL COVERAGE

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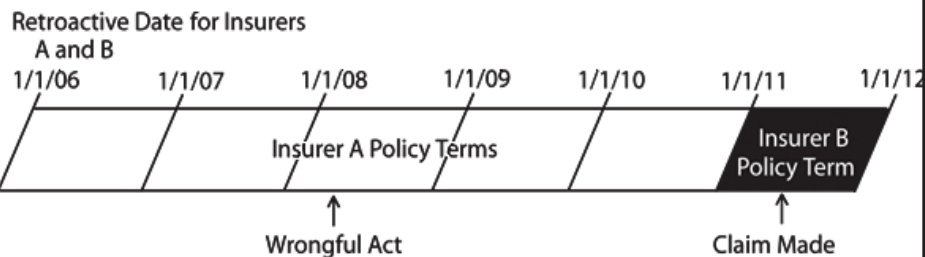
## PRIOR ACTS

Assume that a professional was insured by Insurer A during the following periods:

- January 1, 2006–2007
- January 1, 2007–2008
- January 1, 2008–2009
- January 1, 2009–2010
- January 1, 2010–2011

and that the retroactive date for all five policies was January 1, 2006.

If Insurer B writes a policy with a January 1, 2011–2012, term, containing a January 1, 2006 retroactive date (the same as the policies written by Insurer A), no new coverage gaps are created (although the professional would still be without coverage for claims arising out of acts committed prior to January 1, 2006). This is because any claims arising out of wrongful acts that took place during Insurer A's policy will be covered under Insurer B's policy if they are reported during the January 2011 policy period.



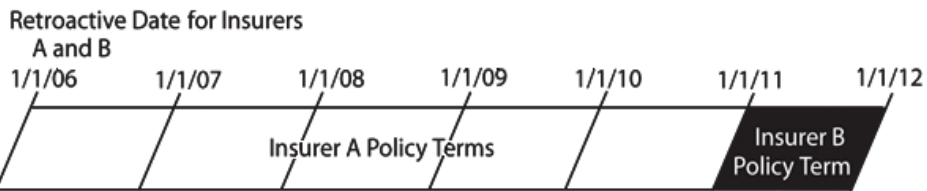
Coverage in this situation applies under B's policy because the wrongful act took place *after* the retroactive date in B's policy *and* the claim was made during the term of that policy as well.

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# INSURER INSOLVENCY

## – OCCURRENCE vs. CLAIMS MADE

- Occurrence has a permanent gap !
- CM can replace policy with prior acts for previous year to pick up insolvent carrier claims



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# DEVELOPMENT of CM RATES

Year Reported	Percent Reported	Cumulative % Reported	CM policy \$	Occur policy \$
2000	30%	30%	\$ 30k	\$100k
2001	25%	55%	\$ 55k	\$100k
2002	15%	70%	\$ 70k	\$100k
2003	10%	80%	\$ 80k	\$100k
2004	10%	90%	\$ 90k	\$100k
2005	5%	95%	\$ 95k	\$100k
2006	5%	100%	\$100k	\$100k
<b>Total</b>			<b>\$520k</b>	<b>\$700k</b>
<b>Retire</b>	<b>Tail</b>	200% of last annual premium	<b>\$200k</b>	<b>\$ -0-</b>

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## Premium Savings ?

- The principle economic benefit of a claims-made policy is that the premium during the first years of coverage is substantially less than a comparable occurrence policy. By switching from an occurrence to a claims-made policy, a physician could save as much as 75% of premium in the first year. Thereafter, claims-made premiums will increase by a fixed percentage in each of the next four years, reaching the same level as an occurrence policy in year five. For example, an occurrence policy that costs \$10,000 annually could be priced on a claims-made basis at \$2,500, \$4,500, \$8,500, \$9,500, and \$10,000 in years one to five. Some companies price the mature claims-made policy below the occurrence even after five years.
- **The savings that a physician can realize from a claims made policy should be invested annually into a "Tail Investment Account"**

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## Limits of Liability

- Occurrence policies give you renewal Continuity and Perpetual protection....
- ....but only for the limits in effect at the time the claim occurred
- Claim occurred in 1960 = \$100,000; but reported in 2007
  
- CM provides the limits in effect at the time the eligible claim is made 2007 = \$1,000,000

200

## Occurrence Forms

- **Occurrence Advantages**
  - The "tail" is covered forever without additional premium charges
  - No added cost to change insurers
- **Occurrence Disadvantages**
  - Limits do not keep up with inflation
  - May be difficult to ascertain the date of occurrence
  - Must keep copies of all policies indefinitely
  - Occurrence carrier goes bankrupt / insolvent – Gaps!

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## Claims Made Forms

- **Claims-Made Disadvantages**
  - Tail coverage may be needed in event of cancellation, nonrenewal, etc.
  - Can be expensive to change insurers
  - Extended reporting period option may be required on specific accidents
- **Claims-Made Advantages**
  - Limits updated with inflation
  - Date of claims easily ascertained
  - Retroactive liability insurance may be provided
  - Initially less expensive
  - Insurer insolvency risk may be reduced

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## The Lowest Bidder

It is unwise to pay too much, but it is worse to pay too little. When you pay too much, you lose a little money—that is all. When you pay too little, you sometimes lose everything, because the thing you bought is incapable of doing what it was bought to do. The common law of business balance prohibits paying a little and getting a lot—it can't be done. If you deal with the lowest bidder, it is well to add something extra for the risk you run. And if you do that, you will have enough to pay for something better”

John Ruskin (1819-1900)





# James K. Ruble Seminar

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

## Section 6

# **Environmental Impairment Liability Advanced Coverages**





**ENVIRONMENTAL IMPAIRMENT LIABILITY  
ADVANCED COVERAGES**

**PAUL W. BURKETT  
JD, CPCU, CIC, CRM, ARM, ALCM  
SNOASPEN INSURANCE GROUP  
January 1, 2023**

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## I. INTRODUCTION

### A. Covered Event or Not?

1. A cement company was sued by a group of homeowners alleging that, during the construction of a nearby airport, the cement company generated large quantities of dust and exhaust fumes.
2. The plaintiffs in the personal injury case claimed that the dust contaminated the homeowner's drinking water and cisterns and caused breathing disorders which led to other "unspecified physical, emotional, and psychological damage."
3. The plaintiffs also alleged that emissions from construction vehicles were causing similar problems.
4. The cement company tendered the plaintiff's complaint to its Commercial General Liability insurance company.
  - a. Has defense been triggered?
  - b. Will the policy pay legally obligated to pay?
  - c. Will there be a reservation of rights?
5. It was agreed by the parties, that the insurance company would defend the insured pursuant to the reservation of rights letter which asserted the right to withdraw from the suit at any future date if it were determined that the homeowner's injuries were outside the scope of the coverage form.
6. The cement company concerned that the claim might not be covered commenced a declaratory judgment action to determine whether the insurer was obligated to defend and indemnify the cement company under the coverage form.
7. The Commercial General Liability Coverage Form defines pollutants as "any solid, liquid, gaseous, or thermal irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste."

## Environmental Impairment Liability Advanced Coverages

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8. The cement company lost in the trial court and appeals the decision.
9. On appeal, the cement company argued that it reasonably believed its coverage form would provide coverage for construction-related harms such as those caused by dust and engine fumes.
10. The cement company urged the appeals court to reverse the trial court decision based upon the doctrine of reasonable expectations.
11. The cement company also argued that the pollution exclusion was meant to exclude coverage for environmental pollution similar to dumping hazardous waste and the exclusion is ambiguous because a particular term of the coverage form is susceptible to multiple interpretations.
12. The appellate court noted that, although it was true that in some states have limited the reach of the pollution exclusion to environmental catastrophes, while other courts have not given it that limitation, this did not demonstrate that the exclusion is ambiguous.

“The trouble with [cement company] approach is that, instead of asking whether the contractual language is clear and then applying the exclusion’s unambiguous meaning, it looks at the effects of the exclusion and concludes that the language must be unclear because it produces in the [cement company] view, bad results. That is an unduly intrusive way to evaluate the relationship between two sophisticated commercial entities bargaining at arm’s length.”

13. The appeals court rendered the decision in favor of the insurance company.
14. The court focused on the portion of the pollution exclusion referencing the “release” of any “solid . . . irritant or contaminant,” including “fumes” and “gaseous contaminants.”
15. The inclusion of such language according to the court placed the allegations in the homeowner’s complaint outside the coverage forms intent.

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16. The court rules that the coverage form “provides no insurance coverage when bodily injury or property damage results from airborne solids and fumes such as the dust clouds and the engine exhaust” in the complaint.
17. This decision rejects case decisions in California, Illinois, Kentucky, and New Jersey that had previously found the breadth of the exclusion must have been intended to apply more narrowly or only to environmental catastrophes.
18. SOLUTION: The cement company should have purchased a contractor’s pollution liability policy.
19. *Devcon Int’l Corp. v. Reliance Ins. Co.*, 609 F.3d 214 (3d Cir.2010)
20. Please remember, if the substance involved is not a pollutant, then the Commercial General Liability Coverage Form or Commercial Auto Coverage Form provides defense and pays what the client is legally obligated to pay.
21. ISO Common Pollutant Definition  
  
"Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned, or reclaimed."

### **B. Current Events That Could Impact Risk Finance Decisions**

1. Courts have been interpreting the Commercial General Liability Coverage Form definition of Pollutants since 1986 and the courts have added the following substances to the definition.
  - a. Asbestos - *R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 2019 Conn. LEXIS 266 (Oct. 1, 2019) Connecticut's high court delivered a significant decision favoring policyholder in coverage litigation surrounding thousands of asbestos claims. The high court ruled that (1) a continuous trigger theory of coverage applies to asbestos-related disease claims; (2) the expert opinion attempting to establish the

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timing of the asbestos injury was inadmissible; (3) the "unavailability of insurance" exception applied; and (4) the standard pollution exclusions in CGL policies do not bar coverage for asbestos-related disease claims. However, the court did provide a small victory to a few insurance companies involved. Specifically, the high court ruled that occupational disease exclusions "bar coverage for occupational disease claims brought not only by employees of Vanderbilt but also by individuals who contracted an occupational disease in the course of their work for other employers."

- b. Asbestos - A-One Oil, Inc. v. Massachusetts Bay Ins. Co., 250 A.D.2d 633, 672 N.Y.S.2d 423 (App. Div. 2d Dep't 1998) (asbestos is a type of irritant or contaminant encompassed by the policy's definition of "pollutant")
- c. Sewage - Blackhawk-Cent. City Sanitation Dist. v. American Guar. & Liab. Ins. Co., 214 F.3d 1183 (10th Cir. 2000) (applying CO Law) (suspended solids, fecal coliform bacteria, ammonia, and residual chlorine in sewage discharged into a river qualified as "waste material" and "contaminants" within the broad definition of "pollutants").
- d. Lead Paint - Auto Owners Ins. Co. v. City of Tampa Housing Auth., 231 F.3d 1298 (11th Cir. 2000) (applying FL law) (lead additive in lead paint is a "chemical" in the definition of "pollutant").
- e. Lead Paint - Georgia Farm Bureau Mut. Ins. Co. v. Smith, 2016 Ga. LEXIS 245 (Ga. March 21, 2016) ("the GFBM case"), the Georgia Supreme Court held that lead paint unambiguously qualified as a "pollutant" and that the absolute pollution exclusion barred coverage for a child's bodily injury claims allegedly caused by ingesting lead paint. Interestingly, in March 2015, the Georgia Court of Appeals issued its decision in the exact same case and declined to apply the absolute pollution exclusion to bar coverage for the underlying claim.

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- f. Gasoline - Crescent Oil Co. v. Federated Mut. Ins. Co., 20 Kan. App. 2d 428, 888 P.2d 869 (Ct. App. 1995) - gasoline that leaked from an underground storage tank into the basement of a neighboring property was a "contaminant" within the meaning of a total pollution exclusion in CGL policy issued to gas station owner.
- g. Smoke - Indiana Lumbermens Mut. Ins. Co. v. West Oregon Wood Products, 268 F.3d 639 (9th Cir. 2001) (applying OR law) - absolute pollution exclusion barred coverage for complaint against the insured for "operation of its factory so that ... gases, smoke and particulates ... are emitted into the atmosphere".
- h. Pepper Spray - Endurance Am. Specialty Ins. CO. v. Savits-Daniel Travel Ctrs., Inc., 2014 U.S. Dist. LEXIS 80370 (S.D. Fla. May 12, 2014) - pepper spray dispersed by an individual into a crowd at a bar qualified as a "pollutant," and the pollution exclusion barred coverage for the underlying wrongful death claim.
- i. Carbon Dioxide - Maxum Indem. Co. v. Florida Constr. Servs., 59 F. Supp. 3d 1382 (M.D. Fla. 2014) - CGL policy's total pollution exclusion barred coverage for wrongful death claim after tenant died in her sleep when she inhaled carbon monoxide fumes that penetrated the common tenant separation wall between her bedroom and her neighbor's garage.
- j. Chinese Drywall - CDC Builders, Inc. v. Amerisure Mut. Ins. Co., 2011 U.S. Dist. LEXIS 114509 (S.D. Fla. Aug. 16, 2011) - CGL policy's total pollution exclusion barred coverage for underlying claims alleging that sulfide gases and other chemicals emitted from Chinese drywall installed by insured home builder caused condominium owners' damages.
- k. Chinese Drywall - General Fid. Ins. Co. v. Foster, 808 F. Supp. 2d 1315 (S.D. Fla. 2011) - total pollution exclusion in CGL policies barred coverage for underlying claim alleging that sulfide gases and other chemicals emitted from Chinese drywall installed by insured home builder caused homeowner's bodily injury and property damage.

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2. Some substances according to the Courts do not qualify as a "Pollutant".
  - a. Waterborne Bacteria - Keggi v. Northbrook Prop. & Cas. Ins. Co., 13 P.3d 785 (Ariz. Ct. App. 2000)
    - 1) A professional golfer claimed that she was injured by drinking water at the insured golf course that was contaminated with fecal coliform bacteria.
    - 2) The court held that living, waterborne bacteria do not "fit neatly" into the policy definition as "solid" or "liquid" contaminants.
    - 3) Therefore, the court held that the absolute pollution exclusion did not apply.
  - b. Clean Floodwater - State Auto Prop. & Cas. Ins. v. Gorsuch, 323 F. Supp. 2d 746 (W.D. Va. 2004) (applying VA law)
    - 1) The insured installed culverts along a natural stream on the insured premises, which were insufficient to handle heavy rains, and which caused flooding on an upstream property.
    - 2) The court held that ordinary, uncontaminated floodwater is not a "liquid ... irritant or contaminant" or a "pollutant" under these circumstances.
  - c. Excessive Noise and Light - Titan Holdings Syndicate, Inc. v. Keene, 898 F.2d 265 (1st Cir. 1990) (applying NH law)
    - 1) A resident sued the insured municipality for operating a sewage treatment plant next to his property.
    - 2) In part, the resident complained about "loud and disturbing noises during the night" and "unduly bright night lighting."

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- 3) The First Circuit held that, although excessive noise and light may be "irritants," they are not "solid, liquid, gaseous or thermal."
  - 4) Further, the court held that noise and light are not generally thought of as similar to "smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste" within the meaning of the policy definition of "pollutants."
- d. Clean Foundry Sand - West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc., 503 N.W.2d 596 (Iowa 1993)
- 1) The Iowa Department of Natural Resources brought an action against the insured for unauthorized disposal of "foundry sand," which the insured had delivered to a third party for use in filling and landscaping the site of an old quarry.
  - 2) The court essentially held that foundry sand, which was apparently clean, and which apparently did not contaminate the quarry where it was used as a filler, did not clearly meet the definition of a "solid ... contaminant ... including waste."
- e. But absent a weird fact pattern, courts are very likely to find that a particular substance meets the literal terms of the policy definition of "pollutants" under post-1986 exclusion.
3. Three Pollution Risk Factors Considered by the Courts
- a. Although the courts do not precisely explain how they are determining if a given claim scenario is similar to "traditional environmental pollution," it appears as if they are impliedly assessing three pollution risk factors:
  - b. First, the "operational frequency," which is the frequency with which the insured's operations involve the pollutant at issue;



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- c. Second, the "expected toxicity" of the particular substance causing injury to the claimant or contaminating the environment; and
  - d. Third, the "geographic severity," or the potential for wide-scale harm as a result of the activity giving rise to the claim.
  - e. When a value is assigned to each factor (i.e., "very high," "high," "medium," "low," or "very low"), they establish a "pollution risk profile" for the claim, which courts appear to be subconsciously using to determine whether a post-1986 pollution exclusion should apply.
4. Hundreds of everyday products are made with highly toxic fluorinated chemicals called PFAS.
  5. PFAS chemicals build up in our bodies and never break down in the environment.
  6. Very small doses of PFAS have been linked to cancer, reproductive and immune system harm, and other diseases.
  7. For decades, chemical companies covered up evidence of PFAS' health hazards.
  8. Today nearly all Americans, including newborn babies, have PFAS in their blood, and **more than 200 million people may be drinking PFAS-tainted water.**
  9. What began as a **"miracle of modern chemistry"** is now a national crisis. Think Teflon everyone.
  10. Numerous studies link these and closely related PFAS chemicals to: Testicular, kidney, liver and pancreatic cancer, Reproductive problems, Weakened childhood immunity, Low birth weight, Endocrine disruption, Increased cholesterol, Weight gain in children and dieting adults.
  11. PFOA, PFOS and the related phased-out compounds are called "long chain" chemicals because they contain eight carbon atoms,

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12. Since these chemicals have been phased out, the EPA and the **Food and Drug Administration** have recklessly allowed the introduction of scores of “short chain” replacements, with six carbon atoms.
13. Although the original PFAS chemical used to make Teflon has been taken off the market, Teflon and other brands of nonstick cookware are still produced with new PFAS that may be no safer.
14. PFAS chemicals are widely used to coat paper and cardboard **wrappers for fast food and bakery goods**.
15. PFAS chemicals lurk in **stain-resistant furniture and carpets** treated with Scotchgard, Stainmaster and other fabric treatments.
16. **Clothes** labeled stain- or water-repellent, such as Gore-Tex jackets, usually contain PFAS chemicals.
17. PFAS are even in **personal care products and cosmetics**.
18. Under the **Safe Drinking Water Act**, EPA has the authority to set enforceable National Primary Drinking Water Regulations (NPDWRs) for drinking water contaminants and require monitoring of public water systems.
19. On August 26, 2022, EPA issued a proposal to designate two (PFOA & PFOS) of the most widely used PFAS as hazardous substances under CERCLA, or Superfund.
20. This rulemaking would increase transparency around releases of these harmful chemicals and help to hold polluters accountable for cleaning up their contamination and changes pollution insurance coverages and complexity in marketing.
21. In addition, current Pollution Liability Insurance Coverage Forms have not excluded or restricted coverage for climate change – related losses. {ESG Issues]

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22. This could change in the future for the auto, steel, utility and paper industries because their operations or products' create greenhouse gas emissions.
23. Directors and Officers Liability policies will soon have further exclusions or limitations added to the Coverage Forms concerning Climate-Change related claims and PFAS chemicals.

### C. Learning Objectives

1. What do you want to accomplish by this seminar? What questions do you want answered over the next four hours?
2. To identify the areas of environmental exposure for businesses and organizations.
3. To identify and explain the legal concepts and remedies those are related to environmental legal liability of persons or organizations.
4. To identify and explain sources of environmental liability based upon important Federal Environmental Statutes.
5. To explain pollution exclusions found in the Commercial General Liability Coverage Form.
6. To review mold and its relation to pollution coverages.
7. To identify and explain the types of environmental insurance coverages that are available to fill gaps left by pollution exclusions in standard liability policies.

## II. OVERVIEW AND RISK MANAGEMENT ISSUES

### A. Environmental Impairment and Pollution Defined [ESG]

1. Developing an Environmental Management Strategy (EMS)
  - a. In order to be competitive, your clients need to be green, sustainable, transparent, and carbon neutral and friendly to the environment.

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- b. An Environmental Management Strategy (EMS) assist your clients in managing the environmental demands placed on them by customers, clients, employees, government, and not-for profit organizations designed to protect the environment.
  - c. Your client must first understand its Environmental footprint.
2. Your client must address and respond to the following questions to determine its Environmental Footprint.
- a. Does your client or is your client required to meet local, state or federal government reporting requirements?
  - b. Is your client impacted by SOX, FAS 5, FIN 14, SAB 92 Ruling, FIN 47 or GASB 49?
    - 1) Sarbanes Oxley Financial and Accounting Disclosure Information [www.sarbanes-oxley.com](http://www.sarbanes-oxley.com)
    - 2) FAS 5 rules require companies to disclose environmental contingencies if the liabilities are material to the financial condition of the company; companies must then accrue the estimated cost of the liabilities with a charge to income.
    - 3) FASB requires corporations to accrue for the future liabilities only if the cost can be reasonably estimated and the liability is probable. In cases in which the liability is probable but cannot be estimated, the company needs to disclose only the nature of the liability.
    - 4) FIN 14 pushes for more disclosure. It states that even if a company has only enough information to work up a range of estimates, it's required to disclose that range.

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- 5) Under FIN 14, corporate accountants must accrue either the best estimate in the range, or if that can't be determined, the minimum amount.
- 6) SEC decided more guidance was needed and issued Staff Accounting Bulletin 92. The rule warned companies that the cost of environmental remediation was "unlikely" to be zero and that a "known minimum" estimate was required, but SAB 92 did not make it illegal to report zero or a relatively low estimate.
- 7) FASB Interpretation Number 47 – Concerning the Accounting for Conditional Asset Retirement Obligations addresses the sale or purchase of environmentally impacted properties.
- 8) FIN 47 states that the fair value of a liability for the conditional asset retirement obligation should be recognized when incurred – generally upon acquisition, construction, or development and (or) through the normal operation of the asset.
- 9) Under FIN 47, the uncertainty about the timing and (or) method of settlement of a conditional asset retirement obligation should be factored into the measurement of the liability when sufficient information exists.
- 10) GASB Statement 49, *Accounting and Financial Reporting for Pollution Remediation Obligations*, identifies the circumstances under which a governmental entity would be required to report a liability related to pollution remediation.
- 11) According to the GASB 49 standard, a government would have to estimate its expected outlays for pollution remediation if it knows a site is polluted and any of the following recognition triggers occur:

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- a) Pollution poses an imminent danger to the public or environment and a government has little or no discretion to avoid fixing the problem
  - b) A government has violated a pollution prevention-related permit or license
  - c) A regulator has identified (or evidence indicates it will identify) a government as responsible (or potentially responsible) for cleaning up pollution, or for paying all or some of the cost of the clean up
  - d) A government is named (or evidence indicates that it will be named) in a lawsuit to compel it to address the pollution
  - e) A government begins or legally obligates itself to begin cleanup or post-cleanup activities.
  - f) Generally limited to amounts the government is legally required to complete.
- c. Does your client generate a waste stream, air emissions, or storm sewer runoff?
- d. **ESG** stands for **E**nvironmental, **S**ocial, **G**overnance and is used as an investment strategy to “encourage” organizations to “act responsibly.”
- e. ESG works by analyzing organizations across three criteria — their environmental footprint, their stance on social issues, and internal corporate governance.
- f. The Environmental component is generally about climate change and carbon emissions but it does include - Air and water pollution, Biodiversity, Deforestation, Energy efficiency, Waste management, and Water scarcity.

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- g. Does your client use Toxic Release Inventory Chemicals?
  - h. Should your client get an ISO 14000 certification?
    - 1) The ISO 14000 environmental management standards exist to help organizations minimize how their operations negatively affect the environment (cause adverse changes to air, water, or land) and comply with applicable laws and regulations.
    - 2) ISO 14001 is the international specification for an environmental management system (EMS). It specifies requirements for establishing an environmental policy, determining environmental aspects and impacts of products, activities or services, planning environmental objectives and measurable targets, implementation and operation of programs to meet objectives and targets, checking and corrective action, and management review.
  - i. Is your client planning on going Carbon Neutral?
  - j. Does your client have a neighbor that is contaminating their property?
  - k. Does your client have underground or above ground storage tanks?
  - l. Does your client understand the numerous definitions of Environmental Impairment, Pollution and Pollutants that may impact his or her environmental risk management program?
  - m. Have you as the Agent/Broker disclosed all of the coverage limitations in the standard ISO policies provided to the Client?
3. What is Pollution or Environmental Impairment according to Black's Law Dictionary?

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Contamination of the environment by a variety of sources including but not limited to hazardous substances, organic wastes and toxic chemicals. Pollution is legally controlled and enforced through various federal and state laws and agencies, including common law nuisance laws.

4. EPA Final Endangerment Finding - The document issued by EPA on December 7, 2009, was its final "endangerment" and "cause or contribute" findings. In it, EPA made the following rulings:
  - a. Six long-lived GHGs—carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>)—qualify as "air pollution" under the Clean Air Act.
  - b. The accumulated scientific evidence compels the conclusion that GHGs are causing global warming, which, in turn, threatens public health and welfare.
  - c. Section 202(a) transportation sources—passenger cars, light duty trucks, other trucks, buses, motorcycles, and commercial refrigeration equipment—are responsible for 23 percent of total GHG emissions in the United States and therefore "contribute to" the global warming problem.
  - d. The Clean Air Act therefore requires EPA to establish GHG emission standards for new cars and trucks. EPA has no discretion to avoid or delay this action for policy reasons.
5. What is the Insurance Services Office Definition of Pollutants in the Commercial General Liability Coverage Form and Commercial Auto Coverage Form?

**15.** "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

6. What is the Environmental Protection Agency definition of a pollutant?



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Generally, any substance introduced into the environment that adversely affects the usefulness of a resource.

- a. The EPA under 42 U.S.C. §11023(j) must maintain a national toxic chemical inventory, as well as records on the annual amounts of chemicals transported to, produced at, consumed at, accumulated at, released from, and transported from facilities.
- b. The EPA may add to the list if a chemical is known to cause or can be reasonably anticipated to cause A significant acute human health effects at concentration levels that are reasonably likely to exist beyond facility site boundaries as a result of continuous or frequently recurring releases.  
42U.S.C. § 11023(d) (2)
- c. "Any person", which includes state governors, may petition the EPA to list chemical on the Agency's Toxic Chemical List. The EPA must respond to the petition either by commencing rule making preliminary to the listing of the chemical or by explaining why the petition is denied. 42 U.S.C. § 11023(e)

### **B. Scope of the Pollution Problem - Cost of Cleaning up America**

1. U. S. G.A.O. estimates that there are some 85,000 contaminated sites covering hundreds of thousands of acres in the country.
2. United States General Accounting Office estimates that there are over 150,000 acres of abandoned industrial land that is contaminated.
3. United States General Accounting office estimates that identified cleanup sites under CERCLA will cost between \$75 billion to \$650 billion to clean up.

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4. It is estimated that approximately 750,000 commercial buildings contain asbestos. Of those buildings, 300,000 have a present exposure that need present attention.
5. Underground Storage Tanks - Threat to nations water supply.
  - a. Removal Cost is \$10,000 a tank
  - b. Estimate number of underground storage tanks that contain petroleum or toxic chemicals is between 1,500,000 to 2,000,000.
  - c. EPA estimates that at least 25% are leaking.
  - d. Cleanup costs are 25% of 2,000,000 times \$10,000 = \$5 billion
6. U.S. Congress states that the United States of America annually produces millions of tons of pollution and spends tens of billions of dollars per year controlling this pollution.

### Policy Statement

The Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.

### C. Loss Exposure

**Learning Objective 1: To identify the areas of environmental exposure for businesses and organizations.**

1. Assessing Environmental Risk is the foundation of an Environmental Management System (EMS).

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2. The Environmental Efficiency Evaluation (EEE) becomes the foundation upon which your client assesses their environmental exposures.
  - a. The EEE assists in identifying direct and indirect environmental issues affecting a client.
  - b. The EEE focuses on four key questions to provide an environmental base line for developing a sound Risk Management Program that includes appropriate Risk Transfer tools.
  
3. What is coming in the Front Door of your Client's Operations?
  - a. Evaluate raw materials, suppliers, business vendors, salespeople, tenants, students, products, etc.
  - b. What is your client's strategy if a vendor has an environmental loss that impedes the ability to deliver goods and services or that may generate a lawsuit for your client? [Dependent Property Time Element Exposure or Supply Chain Disruption Coverage to include Environmental Impairment Coverage Triggers]
  - c. Remember that clients and vendors can create direct and indirect environmental liabilities though contracts, Broad Form Vendor Additional Insured Endorsements, and product delivery operations.

Excelsior, Inc. hired a transportation company (Contract Carrier) to bring in a liquid solvent used in making detergents and paints.

When the truck carrying the shipment veered off the road and tumbled into the river below, the tank trailer ruptured upon impact, leaking its contents.

A cloud of toxic vapor settled over the area, causing the evacuation of 8,000 people in neighboring towns, Hundreds of gallons of the chemical traveled down-stream polluting a nearby lake and destroying vegetation and thousands of fish.

The cause of the accident was because of poor vehicle maintenance and the total claims cost was \$3,000,000. Excelsior was named in the lawsuit because it owned the pollutant, and the transportation company had no pollution insurance for this loss.

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d. Possible solutions to protect Excelsior:

- 1) Excelsior should purchase their raw materials FOB point of delivery, so they do not own the materials until they are off loaded on their property.
- 2) Excelsior could write a contract that transfers the environmental liability to the transporter until the purchased material is delivered and off-loaded.
- 3) Excelsior could only use transporters that carry pollution liability insurance with adequate limits of coverage.
- 4) Excelsior could purchase third party transportation pollution liability insurance to cover their exposure while third parties are transporting their goods.
- 5) PLEASE REMEMBER THAT EXCELSIOR HAS RESPONSIBILITY FOR THE GOODS ON A BASIS OF CRADLE TO GRAVE.
- 6) The best solution would be to have Excelsior purchase the Third-Party Transportation Pollution Liability Insurance.
- 7) PLEASE remember – Transporters subject to the Federal Motor Carrier Safety Administration (FMCSA) and the requirement for a MCS 90 Form.
- 8) Since March 31, 2003, transporters are subject to a civil penalty of no more than \$11,000 for each violation for carriers and \$2,750 in fines for failure to comply.

4. What is going on in and around your client's corporate or operational walls?

- a. How does your client store, handle, treat, and dispose of raw materials, supplies, waste, etc.?

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- b. Is your client subject to any environmental laws or regulations?
- c. What vendor services are going on inside your client's corporate or operational walls?
- d. Vapor intrusion from contaminated soil and groundwater into structures can potentially create significant liability and will have a material impact on property values.
  - 1) ASTM approved a New Standard E 26000 – Practice for Assessment of Vapor Intrusion into Structures on Property Involved in Real Estate Transactions.
  - 2) “The specific intent was to establish a methodology to determine whether or not there is a reasonable probability that vapor intrusion could present an environmental risk and liability.”
  - 3) The evaluation process consists of four tiers.
    - a) The first two screening tiers are used to assess the potential for a vapor intrusion issue to exist, so that properties with a low risk can be screened quickly and inexpensively.
    - b) The third tier provides for more site specific and comprehensive investigations if the potential for vapor intrusion cannot reasonably be eliminated at the tier 1 or tier 2 levels.
    - c) Tier 4 addresses mitigation alternatives.

Harvey Tool Manufacturing, Inc. stored bag house dust containing heavy metals in an uncovered dumpster behind its manufacturing facility. Whenever it rained, storm water mixed with the dusts, forming slurry, which ran off site.

Soil testing of a nearby stream showed high levels of lead, cadmium, and mercury. The contaminant source was determined to be the dumpster runoff. Harvey was responsible for cleanup costs that exceeded \$250,000.

- e. Possible solutions to protect Harvey Tool Manufacturing, Inc.

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- 1) Purchase Financial Institution Environmental Liability Insurance by the banks that provide lines of credit or loans to Harvey Tool to protect their ownership interest in the properties.
  - 2) Purchase Underground Storage Tank Liability Insurance by Harvey.
  - 3) Purchase Pollution Legal Liability or Environmental Impairment Liability Insurance by Harvey.
  - 4) Develop an EMS team to respond to the issues determined from the EEE questionnaire that takes all areas of the enterprise into account, assesses and prioritizes the company's environmental risks, and blends them into a business platform.
5. What is going out your client's back door?
- a. This analysis involves an evaluation of finished products, equipment or services, recyclables, waste materials, vendor services, transportation and delivery, temporary storage of products, etc.
  - b. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as Superfund, is based upon joint, strict and several liabilities.
  - c. CERCLA states you own your waste from CRADLE TO GRAVE.
  - d. If your client reduces their waste stream and this act will reduce their potential liabilities.

Johnson Service Station, LLC provides vehicle repair services and the pumping of gasoline. Johnson's waste hauler transporting Johnson's used motor oil overturned and spilled its load into a nearby stream. Under CERCLA, Johnson owns the waste from cradle to grave and Johnson had to contribute its apportionment of the load for cleanup costs. Cost to settle the claim for Johnson was \$600,000.

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- e. Possible solutions for Johnson.
  - 1) Johnson could purchase third party transportation pollution liability insurance to cover their exposure while third parties are transporting their waste.
  - 2) Purchase Underground Storage Tank Liability Insurance by Johnson.
  - 3) Purchase Pollution Legal Liability or Environmental Impairment Liability Insurance by Johnson.
  - 4) Develop an EMS team to respond to the issues determined from the EEE questionnaire that takes all areas of the enterprise into account, assesses and prioritizes the company's environmental risks, and blends them into a business platform.

6. Who are your client's neighbors?

- a. Your client can be executing a solid EMS plan but they still can experience an indirect environmental impact from one of the client's neighbors.
- b. The EEE needs to evaluate the neighbors and your client must determine what potential environmental liabilities can they create?
- c. Do not forget the Vapor Intrusion issues from the neighbor as well.
- d. Governmental operations as well as other private enterprises can create exposures that need evaluation – transformers, detention ponds, storage tanks, etc.

Eagle Vista County wastewater treatment plant accidentally released chlorine into the air which created a toxic air emission. Area residents and businesses were evacuated for the better part of a day including your client Acme Tool and Die, Inc. Several of Acme's employees were overcome with the toxic air emissions and were hospitalized for inhalation damage.

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Acme's employees suffer Bodily Injury and worker's compensation claims amounting to \$70,000 and Acme suffered a business income loss of \$120,000 from the Civil Authority Action.

The business income coverage was not covered by Acme's Business Income policy because a pollution event is not a covered peril. In addition, Eagle Vista County is subject to Governmental Immunity and as such only \$150,000 was available for all claims by all residents and businesses.

- e. Possible solutions for your client Acme.
  - 1) Remember that Pollution Legal Liability or Environmental Impairment Liability is for third party losses only. This Coverage Form provides no coverage for this claim's loss exposure.
  - 2) Acme can only pursue recovery from the county in a negligence action for both the workers compensation payments and the business income loss.
- 7. Environmental Efficiency Evaluation (EEE) need to review all First Party Damages to Owned Property.
  - a. Site Remediation or cleanup
    - 1) Immediate cleanup from a specific event requiring approval for the removal and cleanup.
    - 2) Under CERCLA, property owners are strictly liable for cleanup of contamination on their property.
    - 3) Brownfields versus Greenfields - The amount of cleanup required:
      - a) Brownfields Definition

Brownfields are abandoned, idled, or under-used industrial and commercial facilities where expansion or re-development is complicated by real or perceived environmental contamination. These properties, however are not so contaminated as to qualify as superfund sites.



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### b) Greenfields Definition

Greenfields are pristine or totally remediated sites which under CERCLA are very costly and sometimes ineffective strategy for some sites.

- c) Cleaning up a parcel may cost more than it's worth, which may lead to abandonment.
- d) The market value of contaminated property remains perpetually uncertain, but certainly less than its economic value if redeveloped.
- e) Banks are unwilling to extend loans secured by contaminated property which precludes economic development of the land.
- f) Many states have real property disclosure of known contamination or even an inspection for pollution prior to conveyance of title which discourages owners of sites from either inspecting or selling leaving the sites virtually abandoned.

### b. Loss of Income (Business Income and Extra Expense)

- 1) Clean-up costs are not part of the economic costs of production.
- 2) These are usually sunk costs with no return to the profit and loss statement of a company.

### c. Evacuation and Relocation

- 1) In 1986, CERCLA was amended to add the Emergency Planning and Community Right to Know Act (EPCRA)
- 2) This Act requires disclosure of storage of hazardous substances, response actions in the event of a toxic release and notification to the public.

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- 3) This Act works with local ordinances and state laws to ensure accurate, reliable information on the presence and release of toxic and hazardous chemicals in a community.
- 4) Suits by State and Local Authorities Allowed
  - a) Suit in Federal Court against the property owner for failure to do any of the following.
  - b) Failure to provide notification to the emergency response commission.
  - c) Failure to submit Material Safety Data Sheets and required lists and inventory forms of hazardous chemicals.
  - d) Make Material Safety Data Sheets available to the public upon request.
  - e) Sue for failure to provide emergency response plans.

### **Local Community Emergency Response Plan**

1. Must identify every facility within the emergency planning district subject to EPCRA
2. Must specify the plan of action for facilities, emergency and medical personnel
3. Designate the community and facility emergency coordinators who will make decisions regarding implemental
4. Establish procedures to notify emergency personnel and the public of the release
5. Establish methods for determining when and where a release occurred and its extent
6. Identify and locate emergency equipment and responsible personnel

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7. Draft Evacuation plans
8. Provide for training programs

8. Environmental Efficiency Evaluation (EEE) need to review all Third Party Potential Damages
  - a. Bodily injury to third parties.

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 of "bodily injury" does not specify that the cause must be sudden for there to be coverage; thus, sickness caused by repeated exposure would be covered even though the sickness developed over a long period of time.
- 2) Slowly developing illness can raise questions as to when the "bodily injury" occurred.
- 3) Which coverage form responds? [Claims Made or Occurrence Trigger]

- b. Property Damage to third parties

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

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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.

- 1) The definition of "property damage" specifies what types of damage to property are intended to be covered under Coverage A of the policy.
- 2) Covered property damage includes physical injury to property, resulting loss of use of damaged property, and loss of use of undamaged property if the loss of use is the result of a covered occurrence.
- 3) Denial of access to property because of a pollution event can become property damage.
- 4). Generally, this definitional coverage is later excluded by the Pollution Exclusion.
- 5) Does the definition of property damage respond to the response costs under CERCLA qualify as "damages" under a CGL policy?
  - a) **Covered.** The vast majority of state courts that have considered this issue have rejected the technical, legal distinction between actions for legal "damages" (i.e., a money judgment) and actions for equitable remedies. Instead, the courts in the majority apply the "ordinary meaning" of the term "damages" as including any and all moneys the insured is required to expend to fulfill a legal obligation. Under this reading, costs an insured incurs to clean up environmental pollution at the directive of the U.S. Environmental Protection Agency or a comparable state agency would be covered.

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- b) **Not Covered.** A tiny minority of states apply the technical, legal meaning of the term "damages" as only covering money judgments and would exclude CERCLA response costs from coverage.
- c) **Haggling Permitted.** A growing number of states have taken an intermediate approach, generally finding coverage for response costs, but allowing insurers to haggle over coverage for certain discrete expenses, such as for prophylactic costs to prevent future pollution, site investigation costs, actions taken during a site investigation that the insured would normally have taken in the ordinary course of its business, penalties and fines, etc.

### c. Suits

- 1) The development of environmental regulations and statutes, and their enforcement by means of a wide array of court actions against Commercial General Liability insured entities, raised interpretation issues.
- 2) What is a "suit" according to the courts?
- 3) These issues had become so contentious by the mid-1980s that a definition of the term suit was included in the 1986 edition of the commercial general liability coverage form.

**18.** "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages is claimed and to which the insured submits with our consent.

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- 4) Does a Potentially Responsible Person (“PRP”) letter and/or an administrative or consent order under federal or state environmental cleanup laws qualify as a "suit" to trigger the insurer's duty to defend?
  - a) **Always Defend.** Most states that have considered this issue rule in favor of policyholders and require insurers to assume the defense of an administrative proceeding to enforce federal or state environmental laws.
  - b) **Never Defend.** Some states favor the insurer, holding there is no duty to defend environmental administrative proceedings.
  - c) **Sometimes Defend.** A few states have taken an intermediate approach that does not strictly favor either the policyholder or the insurer, holding that a duty to defend may arise based on the unique facts and circumstances of a particular case.
  
9. Environmental Efficiency Evaluation (EEE) needs to review the potential impacts concerning the Devaluation of Property.
  - a. First Party situations as per the Brownfield discussion above.
  - b. Third Party because of the pollution event.
    - 1) Tainted land or suspected tainted land.
    - 2) Even if known hazardous substances are removed from the property, residues of waste not yet recognized as hazardous may lawfully remain as time bombs.
    - 3) This leaves many industrial properties, even if cleaned up, unmarketable in the absence of total, but often prohibitively expensive cleanup.

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10. Environmental Efficiency Evaluation (EEE) needs to review the client's exposures to state and federal statutes [Compliance Issues]
  - a. Cost of site assessment, testing, monitoring.
  - b. Cost of upgrading facilities.
  - c. Cost of on-site cleanup or remediation.
  - d. Cost of off premises cleanup.
  - e. Cost of paying fines and penalties.
  - f. Cost of compliance orders
  - g. Costs may also be awarded to prevailing plaintiffs which can be the government or citizen-based actions.
  
11. Environmental Efficiency Evaluation (EEE) needs to review the Potential Types of Clients with Environmental Exposures that may incorporate your client in an action.
  - a. Property owners.
  - b. Contractors.
  - c. Refineries, oil jobbers, gas distributors, service stations, etc.
  - d. Wholesalers and retailers.
  - e. Restaurants.
  - f. Waste disposal operations.
  - g. Truckers.

### III. LEGAL CONCEPTS RELATED TO POLLUTION LIABILITY

**Learning Objective # 2: To identify and explain the legal concepts those are related to environmental legal liability of persons or organizations.**

#### A. Tort Liability (Common Law Remedies)

1. Environmental law, while largely implemented by statutes conferring regulatory jurisdiction on administrative agencies has its roots in a variety of common law causes of action.
2. There are three torts that can apply
  - a. Intentional Torts (Trespass)
  - b. Strict Liability (Products and Completed Operations and activities representing environmental hazards)
  - c. Negligence
3. Public and Private Nuisance Tort Actions (State and Federal Level)
  - a. Public nuisance is an unreasonable interference with the rights held by the public in general.
  - b. Private nuisance is an unreasonable interference with the rights of one with possessory interest in land.
  - c. Both give rise to a suit for damages as well as an injunction abating the nuisance. (An unusual remedy for tort)
  - d. A plaintiff in a public nuisance case must prove the defendant's conduct to be an unreasonable interference with public rights.
  - e. This action is usually brought by the state acting through its attorney general or a significant number of private plaintiffs.



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- f. A plaintiff in a private nuisance case must have a possessory interest in land as an owner or tenant and must show an unreasonable interference with the plaintiff's private rights of enjoyment of the land.
- g. Damages for nuisance vary with regard to whether the nuisance is permanent or temporary in nature.
- h. Compensatory damages for permanent nuisance are based on reduction in the market value of the plaintiff's property caused by the nuisance, together with any special damages such as medical expenses or costs of shielding the plaintiff's property from the nuisance.
- i. Punitive damages are available in nuisance actions when the defendant has acted maliciously or recklessly.

#### 4. Intentional Tort of Trespass

- a. A physical invasion of the plaintiff's property must exist.
- b. Generally, the causing or permitting pollutants to escape their intended boundaries and encroaching on another property is the intentional tort.
- c. Noise does not constitute a trespass unless some actual physical invasion takes place.
- d. The tort of trespass is a strict liability cause of action.
- e. Plaintiffs need not prove negligence on the part of the defendant and the concept of res ipsa loquitur applies.
- f. The plaintiff must be the current owner of the property to bring a trespass action.

#### 5. Strict Liability in Tort

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- a. Strict liability has been held to apply to inherently dangerous activities.
  - b. Inherently dangerous activities such as blasting, drilling, fracking, and mining are activities that represent environmental hazards and it include the storage or transport of hazardous waste from these operations.
  - c. A plaintiff injured as a result of a defendant's abnormally dangerous activities need not prove the defendant at fault that is negligent or acting intentionally to recover damages.
  - d. Plaintiff's contributory negligence is not allowed as a defense for the defendant.
6. Negligence (Toxic Tort Actions)
- a. Negligent conduct forms a basis for much of the law of toxic torts.
  - b. Toxic torts typically concern exposure to substance causing or claimed to cause, disease with a long latency period.
  - c. Strict Liability may apply based on what dangerous activity occurred and how frequent is the activity in a given area.
  - d. Product Liability and failure to warn actions.
    - 1) Failure to warn actions have arisen in toxic tort actions based on the ingestion of foods exposed to pesticide residue as well as the exposures to asbestos and many other hazardous substances.
    - 2) Failure to warn is a strict liability action.
  - e. Pure negligence actions
    - 1) Duty of care can be established under the reasonable prudent person standard or foreseeable plaintiff standard.

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- 2) Breach of Duty must be proven by the plaintiff by a preponderance of the evidence.
- 3) The actual cause and the proximate cause of the damages was the direct result of the breach of duties established by the plaintiff.
- 4) Damages can be compensatory and punitive in toxic tort litigation and in some cases medical monitoring costs are also available.

Washington Stated Supreme Court Ruling in *Xia v. ProBuilders Specialty Insurance Company*, No 92436-8 (Wash Apr. 27, 2017)

Ruled that carbon monoxide, released from a negligently installed vent, attached to a hot water heater, was a “pollutant”. At issue were claims for bodily injury by homeowner against the home builder. So far this it a routine case. Lots of courts would have reached the same decision.

However, the Washington Supreme Court held that the POLLUTION EXCLUSION did not apply. The court got to this result by adopting the “Efficient proximate cause” rule, which provides that coverage is owed if a covered peril sets in motion a causal chain, the last link of which is an uncovered peril. This is usually seen in property policies as concurrent causation perils. However, the Washington Court noted that there was nothing to say it couldn’t apply to any type of an insurance contract.

Applying the “efficient proximate cause” rule the court held that the pollution exclusion did not apply. The court determined that the efficient proximate cause of the injures was the negligent installation of the hot water heater. Because this was a covered occurrence, that set-in motion a causal claim that led to the discharging toxic carbon monoxide levels, being an excluded peril, the pollution exclusion was not applicable. **In other words, the pollution exclusion did not apply because two or more perils combined in sequence to cause a loss – one covered and one not – and a covered peril was the predominant or efficient cause of the loss.**

**This could disrupt three decades of court decisions on the absolute pollution exclusion. This trend will need to be watched.**

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- f. On April 6, 2020, after over thirty years of insurance coverage litigation, the California Supreme Court handed down its long-awaited decision in favor of the insured, pesticide manufacturer Montrose Chemical Corporation, that it is not obligated to deplete all its lower-level insurance policies before it can access excess policies to cover environmental damage claims. [*Montrose Chemical Corp. of California v. Superior Court of Los Angeles County*, Case No. S244737]
- g. Horizontal Exhaustion not necessary before going to Vertical Excess Coverages.

### 7. Riparian Rights

Riparian rights are the rights of the owners of lands on the banks of watercourses, relating to the water, its use, ownership of soil under the stream, accretions, etc. The term is generally defined as the right which every person through whose land a natural watercourse runs has a benefit of the stream as it passes through his or her land for all useful purposes to which it may be applied. Such rights include those such as hunting, fishing, boating, sailing, irrigating, and growing and harvesting wild rice, which rights extend over lakes and wetlands.

- a. Courts have held that there is no riparian right to pollute and cause damage downstream.
- b. Rights to groundwater that is water pumped from wells as distinguished from surface water are governed by legal doctrines closely analogous to riparian rights and prior appropriation law.
- c. Public Trust Doctrine - Public has right to underwater lands
  - 1) Since any member of the public is a beneficiary of the public trust doctrine, any citizen of the state in question has standing to challenge an asserted violation of the safety of riparian waters.
  - 2) Subsequent statutes were needed to deal with the pollution of these waters to clarify rights and damages.

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### B. Statutory Pollution Liability

1. Absolute or strict liability is now stated in statutes for certain actions.
2. Most statutes are retroactive and may impact past pollution events.
3. Most statutes establish that the liability is joint and several.

#### **Joint and Several Liability**

One or more parties may be held responsible separately or all the parties together may be held responsible. If one party cannot pay the damages, the other party or parties are held responsible for 100% payment of the damages with no discount for the non-paying party.

### C. Legal Concepts that May Eliminate Pollution from Insurance Coverages

1. Fortuity or Fortuitous Event and Sudden and Accidental
  - a. Essential for a loss being subject to the insurance coverage.
  - b. Must be an event that happens by chance or accident.
  - c. It is an event which happens by chance, unexpectedly, or without known cause; one which is un-designed or unplanned.
  - d. The phrase "sudden and accidental" in the exception to the 1973 pollution exclusion was limited to situations where pollutants are discharged rapidly over a short period of time.
  - e. Can that phrase be read expansively to also cover situations where pollutants are discharged gradually over a long period of time. What do the courts think?
    - 1) **Always Covered.** States favoring the policyholder generally hold that there is no coverage for gradual pollution caused by deliberate behavior or deliberate indifference on the part of the insured, but there is

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coverage for gradual pollution resulting from accidental or nondeliberate releases of pollutants over time.

- (2) **Not Covered.** States favoring the insurer hold that there is no coverage for any gradual pollution, no matter if the insured intended to pollute or if the gradual pollution resulted from accidents.
- (3) **Sometimes Covered.** A third group of states takes an intermediate approach that does not strictly favor the policyholder or the insurer on this issue. States in the intermediate camp hold that there may be coverage for gradual pollution caused by deliberate behavior/indifference and generally hold that there is no coverage for gradual pollution resulting from accidents, but that there may be coverage for some instances of gradual accidental pollution, depending on the facts and circumstances of the individual case.

### 2. Known Loss (Risk) Doctrine and Loss In Progress Doctrine

- a. Insured knew or should have known that there was a substantial potential for loss when policy was purchased.
- b. The known loss and loss in progress doctrines were originally developed in the context of first-party property insurance.
  - 1) The classic statement of the doctrines was that a party cannot buy insurance on a house that has already burned down.
  - 2) "If [an insured] applies for and obtains an antedated policy knowing that a loss has already occurred during the policy period, his failure to disclose the facts constitutes fraud that would enable the insurer to set aside the contract."  
*Burch v. Commonwealth County Mut. Ins. Co.*, 450 S.W.2d 838, 840 (Tex. 1970).
- c. Third-party known loss and loss in progress doctrines are determined by courts and they generally agree that known

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loss and loss in progress doctrines can apply in the third-party liability context.

- 1) But instead of assessing whether the insured knew about damage to his or her own property (as in first-party cases), courts must assess whether the insured knew about his or her legal obligation to pay the third party. As explained in UTI Corp. v. Fireman's Fund Ins. Co., 896 F. Supp. 362, 377 (D.N.J. 1995):
  - 2) “[I]n the context of first party insurance policies, once the unfortunate event occurs, there remains no statistical uncertainty of risk to be appropriately insured against. By contrast, however, the occurrence of the event does not destroy the requisite element of statistical uncertainty in the third party liability context, as [several issues] remain to be determined, including: is there any harm to offsite locations; will claims be filed at all; what number of claims will be filed; what sums of money will the claims demand.”
  - 3) “In other words, [the policyholder] did not purchase liability insurance to compensate it for all property damage, but rather to compensate it for all sums for which it is held liable as a result of claims in which damage to property of third parties is alleged. The relevant "loss" to [the policyholder] is not the property damage itself, but rather the [policyholder]'s legal liability arising therefrom.”
- d. How are courts applying the common law "known loss" or "loss in progress" doctrines in the context of third-party liability claims.
- (1) **Actual Liability.** The states favoring the policyholder take a very narrow view of those doctrines and will permit the insurer to avoid coverage only where the insured has already been held legally liable for a loss by the time an insurance policy becomes effective.

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- (2) **Objective Standard.** States favoring the insurer apply a much broader view of those doctrines and will deny coverage anytime the insured knew, or by applying an objective standard had reason to know, that a liability loss was sufficiently probable at the time an insurance policy becomes effective. Using an objective standard of proof arguably makes these courts more willing to decide the application of these doctrines as a matter of law.
- (3) **Subjective Standard.** States taking an intermediate approach also apply the "known loss" or "loss in progress" doctrines in situations where the insured has not yet been held actually liable, but these courts require that the insurer use a subjective standard to prove the insured had actual knowledge that a liability loss was sufficiently probable. Using a subjective, as opposed to objective, standard of proof leads the courts in the intermediate camp to find more triable questions of material fact as to the application of these doctrines.

- e. The Known Risk Doctrine concept was the basis for summary judgments in the insurance company's favor in the following case:

### **Outboard Marine v Liberty Mut. Ins., 607 NE2d 1204 (Ill 1992)**

By its very nature, insurance is fundamentally based on contingent risks that may or may not occur. . . . If the insured knows or has reason to know, when it purchases a CGL policy, that there is a substantial probability that it will suffer or has already suffered a loss, the risk ceases to be contingent and becomes a probable or known loss. ... Where the insured has evidence of a probable loss when it purchases a CGL policy, the loss is uninsurable under that policy. . . .

In the instant case, the insurers contend that the PCB contamination that occasioned the underlying actions constitutes a known loss because, they assert, OMC [Outboard Marine Co.] knew it was releasing waste material into the environment as early as 1959. (at 1210)



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- f. This Known Risk Doctrine concept was not upheld in the following case by the courts.

### **City of Johnstown v Bankers Standard Ins., 877 F2d 1146 (2nd Cir 1989)**

However, the instant case is not one where any such fraudulent misrepresentation or concealment has been charged. On their motion for summary judgment, the insurers did not attempt to avoid coverage on the ground that the policies, by their own terms, were void because the city had fraudulently misrepresented or concealed a material fact at the inception of the contract of insurance. Instead, the insurers argued that the damages alleged in the CERCLA action was a "known risk," and that hence the city was entitled to no coverage. However, appellees have failed to cite support in New York law for this broader proposition that a risk, once "known," is uninsurable; nor have we found any such case law. In the absence of any support in New York law, we decline ... to announce a novel "known risk" doctrine in New York's insurance law. . . . We find no basis for concluding that the New York courts would embrace the "known risk" theory urged upon us by appellees.

In our view, to do so might well swallow up the more narrow doctrines regarding (1) concealment and misrepresentation, and (2) damages that are "expected" or "intended" by the insured. To the extent, then, that the district court's grant of summary judgment rested on the "known risk" argument ... we also reject that determination.

- g. This Known Risk Doctrine concept was not upheld in the following case by the courts.

### **Polaroid Corp. v Travelers, 610 NE2d 912 (Mass 1993)**

The record establishes that the releases of pollutants were not sudden and accidental ... [T]he uncontroverted affidavit of a hydro geologist, based on his review of numerous reports, evaluations, and other data, states that at each of the ... sites "the discharge of pollutants into the environment happened gradually, over a lengthy period of time." He added that he found "no evidence of a sudden (abrupt) discharge of pollutants at any of the four sites." (at 915)

If a discharge was intentional or not sudden, the pollution exclusion denies coverage. The policy language does not call for the assessment of "accidental" or "sudden" from the insured's perspective. Policy language does, however, define an "occurrence" by

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referring to "property damage neither expected nor intended from the standpoint of the insured."

The distinctive absence from the pollution exclusion of the words "from the standpoint of the insured" is significant for our purposes ... If a third person who discharged a pollutant did so intentionally, the pollution exclusion denies coverage, even to an innocent insured, for any resulting property damage. The point of view of the insured is immaterial.

3. Loss in Progress Doctrine Continued:
  - a. Applies when a loss has commenced and is known to the insured prior to the inception date of the policy.
  - b. Reasonable and foreseeable knowledge.

### **Inland Waters Pollution v National Union, 997 F2d 172 (6th Cir 1993)**

#### Facts

The Stricker complaint alleged that when Inland Waters crushed the drums on Stricker's property it "allowed the waste paint materials in the drums to escape into the underlying soil, with the result that there has been and continues to be contamination of Stricker's property and the environment." The complaint also alleged that due to fraudulent concealment on the part of Inland Waters regarding the adequacy of remedial action taken, "Stricker did not know, nor did it have reason to know, of the contamination . . . until early 1987."

#### Factual Analysis

Under the injury in fact trigger theory, which we have concluded the Supreme Court of Michigan would apply in this case, damage to Stricker's soil first occurred in January or February 1981 when Inland Waters allowed liquid waste to escape into the soil underlying the drums. Therefore, there was no coverage for the contamination of Stricker's soil under the occurrence policies which were first issued in August 1981, and we hold that under Michigan law National Union did not breach its duty to defend Inland Waters as to Stricker's claim for property damage.

#### Holding

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...[T]he "loss in progress" doctrine . . . operates only where the insured is aware of a threat of loss so immediate that it might fairly be said that the loss was in progress and that the insured knew it at the time the policy was issued or applied for. . . . Because the "loss in progress" doctrine also requires foreknowledge of loss or an awareness of an immediate threat of loss on the part of the insured, the district court erred in granting summary judgment when the material issue of the scope of Inland Waters' foreknowledge of the eventual loss remained unresolved.

4. Duty to Defend may provide some defense or may not provide defense
  - a. Remember that standard Commercial General Liability Coverage Forms provide that the insurer must both indemnify and defend insured clients against claims within the scope of the coverage form.
  - b. The insurance company's duty to defend is broader than its duty to indemnify.
  - c. The duty to indemnify runs only to claims that are actually covered by the coverage form, while the duty to defend extends to claims that are potentially covered in the coverage form.
  - e. Under the Montrose decision, "[t]he [insurer's] duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded or until it has been shown that there is not potential for coverage ..." Montrose Chemical Corp. v. Superior Court (1993) 6 Cal 4<sup>th</sup> 287, 295.
  - e. Reservations of rights letters are quite common concerning defense and potential coverage under current ISO forms.

### **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" to which this insurance

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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.

5. Common Law Coverage Triggers for long tail pollution liability under the CGL contract.
  - a. **Exposure Trigger.** A few states employ an "exposure" trigger and hold that every CGL policy on the risk during the time the environment was exposed to physically threatening conditions is triggered without requiring the policyholder to produce any evidence whatsoever that actual contamination in fact occurred.
  - b. **Injury-In-Fact Trigger.** Many states employ an "injury-in-fact" trigger and hold that a CGL policy is triggered only if the policyholder can establish a preponderance of the evidence that actual contamination more likely than not had in fact taken place during the policy term.
  - c. **Continuous Trigger.** A similar number of states employ a "continuous" trigger, which, in environmental cases, has come to mean that the court will presume that contamination took place, as long as (1) the policyholder proves the start date of an "injurious process" putting the environment at risk, (2) the injurious process continued during the relevant policy periods, and (3) the facts of the case are amenable to the analogy of a progressive disease.

### IV. IMPORTANT FEDERAL, STATE AND LOCAL ENVIRONMENTAL STATUTES

**Learning Objective # 3: To identify and explain sources of environmental liability based upon important Federal, State and Local Environmental Statutes.**

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### A. Water Pollution Acts:

1. Federal Water Pollution Control Act of 1948 - This act focused on using Congressional purse strings to encourage the construction of municipal sewage treatment plants rather than establish a national water quality standard.
2. Water Quality Improvement Act of 1965 - Congress required states to adopt water quality standards for interstate navigable waters. Not a very effective statute.
3. State Water Quality Standards
4. Federal Water Pollution Control Act of 1972 and amendments
  - a. As amended in 1977, this law became commonly known as the Clean Water Act. The Act established the basic structure for regulating discharges of pollutants into the waters of the United States.
  - b. It gave EPA the authority to implement pollution control programs such as setting wastewater standards for industry.
  - c. One section deals with oil and hazardous substance discharge and requires reporting in the event of harmful discharge of harmful quantities.
  - d. The Clean Water Act also continued requirements to set water quality standards for all contaminants in surface waters.

Clean water act defines pollutant as dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water. 33 U.S.C. 1362(6)

Ortega Rock Quarry v. Golden Eagle Insurance Corp., 141 Cal. App 4<sup>th</sup> 969.

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- e. Over the years, many other laws have changed parts of the Clean Water Act. Title I of the Great Lakes Critical Programs Act of 1990, for example, put into place parts of the Great Lakes Water Quality Agreement of 1978, signed by the U.S. and Canada, where the two nations agreed to reduce certain toxic pollutants in the Great Lakes.
  - f. That law required EPA to establish water quality criteria for the Great Lakes addressing 29 toxic pollutants with maximum levels that are safe for humans, wildlife, and aquatic life.
  - g. It also required EPA to help the States implement the criteria on a specific schedule.
  - h. The Clean Water Act does not regulate ground water.
5. Ground Water pollution regulations
- a. Regulated under certain provisions of the Resource Conservation and Recovery Act (RCRA) for underground petroleum storage tanks and impact to ground water.
  - b. Safe Drinking Water Act
    - 1) Requires water purity with a water system itself
    - 2) Imposes general land use requirements affecting ground water.
    - 3) 1986 Amendments prohibit the use of lead pipes, solder, or flux in any public water system or in any plumbing associated with drinking water derived from public water systems.
  - c. Surface Mining Control and Reclamation Act
  - d. Toxic Substance Control Act (TSCA) indirectly regulates ground water.

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- e. Insecticide, Fungicide and Rodenticide Act indirectly regulate ground water.
  - f. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) mandate cleanups of hazardous substances and provide a cost recovery scheme for ground water contamination not involving petroleum products.
6. Marine Protection (Oceans)
- a. The Clean Water Act Section 403 governs discharges of pollutants from point of sources on land into the ocean, the territorial seas, or the contiguous zone.
  - b. The Marine Protection, Research, and Sanctuaries Act or the Ocean Dumping Act governs ocean dumping.
  - c. Deep Water Port Act.
  - d. The Prevention of Pollution from Ships Act.
  - e. The Public Vessel Medical Waste Anti-Dumping Act of 1988.
  - f. The Shore Protection Act of 1988.
  - g. The Fishery Coastal Zone Management Act.
  - h. The Ports and Waterways Safety Act - Oil Tanker design and traffic in ports.
  - i. London Dumping Convention of 1975.
  - j. The Oil Pollution Act of 1990.
  - k. River and Harbors Act.
  - l. The Outer Continental Shelf Lands Act - Requires that operations in the outer continental shelf should be conducted in a safe manner by well trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires,

# Environmental Impairment Liability Advanced Coverages

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spillages, physical obstruction to other users of the waters or subsoil, or other occurrence which may cause damage to the environment or to property or endanger life or health.

## **B. Solid and Hazardous Wastes Regulations**

1. Resource Conservation and Recovery Act (RCRA) 1976.
  - a. First comprehensive federal program to regulate essentially all hazardous waste from beginning to end (Cradle to Grave Concept) Sets standards for all solid waste management and disposal, especially landfills, in its subtitle D regulations in §§ 7.02, 7.03 and 7.04.
  - b. Regulates both solid waste and hazardous waste.
2. RCRA REGULATION OF LANDFILLS
  - a. RCRA focuses only on active and future facilities and does not address abandoned or historical sites (see CERCLA).
  - b. HSWA - The Federal Hazardous and Solid Waste Amendments are the 1984 amendments to RCRA that required phasing out land disposal of hazardous waste.
3. RCRA REGULATION OF HAZARDOUS WASTE MANAGEMENT
  - a. Has become a major part of the regulatory web governing hazardous wastes.
  - b. Regulates generators and transporters of hazardous wastes, as well as the facilities that treat, store, and dispose of hazardous waste.
  - c. Small generators of less than 100 kilograms of hazardous waste per month are exempt from the regulations unless the waste is acutely hazardous.
  - d. The monthly threshold for regulation is one kilogram of waste per month.



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e. Hazardous Waste Definition.

A hazardous waste is a waste (which actually may be solid, liquid or gaseous) and is hazardous if it may cause or contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, or poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of otherwise managed. 42 U.S.C. § 6903(5)

f. Financial Requirements under RCRA

- 1) Manufacturing, refineries, service stations, and butane/propane distributors:

\$1,000,000 per Occurrence and \$2,000,000 Aggregate for sudden and accidental pollution liability

- (2) Surface impoundments, landfills and land treatment facilities

\$1,000,000 per Occurrence and \$2,000,000 Aggregate for sudden and accidental pollution liability \$3,000,000 per Occurrence and \$6,000,000 Aggregate for non-sudden pollution liability

4. RCRA REGULATIONS FOR UNDERGROUND STORAGE TANKS (UST)

- a. Regulation was provided under the 1984 Amendments to RCRA
- b. The LUST program closes the gap created by CERCLA by providing for cleanups of petroleum leakages from UST's.
- d. Regulations

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Type of Tank & Piping	Leak Detection	Corrosion Detection	Spill/Overfill Prevention
<b>New Tanks &amp; Piping</b>	<b>At Installation</b>	<b>At Installation</b>	<b>At Installation</b>
<b>Existing Tanks</b>			
<b>Installed Before 1965 or unknown</b>	<b>1989</b>	<b>1998</b>	<b>1998</b>
<b>1965 to 1969</b>	<b>1990</b>	<b>1998</b>	<b>1998</b>
<b>1970 to 1974</b>	<b>1991</b>	<b>1998</b>	<b>1998</b>
<b>1975 to 1979</b>	<b>1992</b>	<b>1998</b>	<b>1998</b>
<b>1980 to 12/1998</b>	<b>1993</b>	<b>1998</b>	<b>1998</b>
<b>Existing Piping</b>			
<b>Pressurized</b>	<b>1990</b>	<b>1998</b>	<b>N/A</b>
<b>Suction and Gravity</b>	<b>Same as Existing Tank</b>	<b>1998</b>	<b>N/A</b>

### d. Financial Responsibility Requirements

Type of Risk	Occurrence Limit	Aggregate Limit
<b>Used in Petroleum Production, refining, or marketing</b>		
<b>1 to 100 tanks</b>	<b>\$1,000,000</b>	<b>\$1,000,000</b>
<b>101 or more tanks</b>	<b>\$1,000,000</b>	<b>\$2,000,000</b>
<b>Not used in petroleum production, refining or marketing</b>		
<b>Total throughput of 10,000 gallons per month</b>		
<b>1 to 100 tanks</b>	<b>\$500,000</b>	<b>\$1,000,000</b>
<b>101 or more tanks</b>	<b>\$500,000</b>	<b>\$2,000,000</b>
<b>Total Throughput of more than 10,000 gallons per month</b>		
<b>1 to 100 tanks</b>	<b>\$1,000,000</b>	<b>\$1,000,000</b>
<b>101 or more tanks</b>	<b>\$1,000,000</b>	<b>\$2,000,000</b>

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5. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)
  - a. Known as the “Superfund” (Initially \$1.6 Billion into the fund).
  - b. Unlike RCRA, CERCLA is not a regulatory statute; rather it provides a basis to establish financial responsibility for cleanup of hazardous waste sites or facilities.
  - c. CERCLA Imposes virtually strict liability for the wrongdoer.
  - d. CERCLA Imposes Joint and Several Liability which shifts the burden of demonstrating relative liability to responsible parties who have the incentive to undertake whatever investigative work is necessary to enlarge the pool of responsible parties to share in the cost.
  - e. Damages established by CERCLA
    - 1) Clean up pollution.
    - 2) Injury, destruction, and loss of natural damages.
    - 3) Third party liability.
    - 4) Government reimbursement.
  - f. Statutory Defenses Available
    - 1) An act of God;
    - 2) An act of war; or
    - 3) Under carefully circumscribed conditions, an act or omission of a third party (Innocent Purchaser Defense).
    - 4) Defendant must prove by a preponderance of the evidence.
  
6. Superfund Amendments and Re-authorization Act (SARA) 1986

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- a. Increased the Superfund to \$8.5 Billion.
- b. Provided a fourth Statutory Defense under CERCLA - The Innocent Purchaser or Landowner.

Landowner could be considered innocent if:

1. Land was contaminated at time of the purchase; and
2. The purchasing party conducted a due diligence audit, survey, inquiry of previous ownership and use of the land.

- c. Authorized the design, construction, installation, and maintenance of underground storage tanks for storage of certain hazardous substances or petroleum as discussed above.
- d. Established UST financial responsibility requirements.
- e. Established non-compliance penalties of \$10,000 per tank per day.

7. 1990 Re-authorization of CERCLA.

- a. Decreased the Superfund to \$5.1 Billion.
- b. Remediation of potential superfund sites at that time was \$100 Billion.

**C. Motor Carrier Act of 1980 Sections 29 and 30.**

1. Trucking, or motor carrier, companies that are subject to regulation under the Motor Carrier Act of 1980 are required to furnish evidence of financial responsibility at minimum limits determined by the commodity that they transport for restoring environmental damage caused by their operations.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity

## Environmental Impairment Liability Advanced Coverages

transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

2. Requirement that the MCS 90 Endorsement be attached to the Commercial Auto Liability Insurance Contract or Business Auto Insurance Contract.
  
3. This endorsement, which must be attached to the policy of any motor carrier subject to its provisions (the back side of the endorsement details the types of carriers), requires the insurer to pay in for environmental restoration costs but the named insured must reimburse the insurance company for all incurred costs paid on behalf of the named insured.

Type of Carriage	Commodity Transported	Jan. 1, 1985 Limits
For-Hire (In interstate or foreign Commerce with a Gross Vehicle Weight rating of 10,000 or more pounds).	Property (Non-hazardous)	\$750,000
For-Hire and Private (In interstate, foreign or intrastate commerce, with a gross vehicle weight rating of 10,000 or more pounds).	Hazardous Substances, as defined in 49 CFR § 171.8 transported in cargo tanks or hopper type vehicles with capacities in excess of 3,500 water gallons; or in bulk Division 1.1, 1.2, and 1.3 materials. Division 2.3, Hazard Zone A or Division 6.1, Packing Group I, Hazard Zone A material; in bulk Division 2.1 or 2.2 or highway route controlled quantities of a Class 7 materials in 49 CFR § 173.403	\$5,000,000
For-hire and Private (In interstate or foreign commerce, in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of 10,000 or more pounds).	Oil Listed in 49 CFR § 172.101; hazardous waste, hazardous materials, and hazardous substances defined in 49 CFR ' 171.8 and listed in 49 CFR ' 172.101, but not mentioned in (2) above or (4) below.	\$1,000,000
For Hire and Private (In interstate or foreign commerce, with gross vehicle weight rating of less than 10,000 pounds).	Any quantity of Division 1.1, 1.2 or 1.3 material and quantity of a Division 2.3 Hazard Zone A, or Division 6.1, Packing Group 1, Hazards Zone A material or highway route controlled quantities of a Class 7 material as defined in 49 CFR § 173.403	\$5,000,000

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4. This Endorsement does not change the limits of coverage of the Auto Policy.
5. If an insurer is required to pay a loss because of this endorsement that it would not otherwise have been required to pay, the insured agrees to reimburse the insurer.
6. Therefore, it is in the insured's interest to have a policy that is as broad as possible to keep from having to reimburse the insurer.
7. It can also be in the insurer's interest to include broad coverage, considering that the narrower the coverage, the more important the motor carrier's financial status will be to the insurer.
8. The endorsement must be issued in the exact name of the motor carrier.
9. It applies on a "blanket" basis to all autos operated, maintained, or used regardless of whether such autos are specifically described.
10. Some insurers may want to require the motor carrier to maintain certain records for computation of premium purposes.
11. Non-compliance causes a Civil Penalty of \$11,000 for each violation and if this a continuing violation the penalty applies for each day of violation.

### **D. Toxic Substances**

1. Regulation of Pesticides - Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).
2. The Toxic Substances Control Act (TSCA)
3. Radon regulated by the TSCA.
4. Asbestos regulated by many statutes.
  - a. Inhalation risk gives rise to three major diseases - Lung Cancer, Asbestosis (a pulmonary disease), and mesothelioma (a cancer).

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- b. It is a hazardous substance under CERCLA.
  - c. It is addressed by the Occupational Safety and Health Act.
  - d. It is listed as an air pollutant under the Clean Air Act.
  - e. Also regulated by the TSCA for asbestos in schools and the necessary abatement programs.
5. Chlorofluorocarbons (CFCs) and Other Ozone Depleting Chemicals
- a. Regulated under the Consumer Product Safety Commission to warn about products containing the material.
  - b. Food and Drug Administration restrict CFC=s as propellants and used in self pressurized containers of food, drugs, and cosmetics.
  - c. Clean Air Act required that nonessential CFC production be phased out.
  - d. CFC's are listed as hazardous wastes under the RCRA.
6. Lead Regulations – TSCA, Clean Air Act and The Residential Lead Based Paint Hazard Reduction Act.

### **E. Noise Statutes Consider Noise as a Pollutant**

- 1. Federal Noise Control Act
- 2. State and Local Laws.
- 3. Aircraft Noise - Aircraft Noise and Abatement Act of 1968, Airport Noise and Capacity Act of 1990, Airport and Airway Improvement Act of 1982 and state and/or municipal governments have enacted laws to reduce aircraft noise.
- 4. Occupational Noise - Occupational Safety and Health Act (OSHA)

### **F. Fish and Wildlife Statutes Impact Pollution Exposures**

1. Hunting and Fishing Laws are used to control wildlife populations and both federal and state laws apply.
2. Deep Sea Fishing - Magnuson Act which established a 200 mile offshore economic zone and limits catches to maximum numbers set by joint federal state regional fishery advisory councils.
3. Endangered Species Act of 1973 (ESA) and Related Statutes

### **G. Land Use Statutes That Impact Pollution Exposures**

1. Wetlands, Coastal Zones, Shore Lands and Submerged Lands and Flood plains - Clean Water Act, Coastal Zone Management Act, Submerged Lands Act and Federal Emergency Management Agency for Flood Plains
2. State and Regional Planning
3. Historic Preservation - National Register of Historic Places governed under the National Historic Preservation Act and state and local laws are designed to include environmental issues impacting the property as well.
4. Wilderness Areas and Public Lands
  - a. The federal government owns 34% of the territory in the United States, including about half of Alaska.
  - b. National Forests are administered under the Multiple Use Sustained Yield Act, Federal Land Policy and Management Act, National Parks and Wildlife Refuges are regulated by the National Park Service and the Fish and Wildlife Service and the Wilderness Act created a national wilderness preservation system comprised of some lands from all four of the major categories of public lands - National Forests, BLM Lands, National Parks and Wildlife Refuges.



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5. Power Plant Site Selection Regulations - The Federal Power Act, Clean Water Act, Clean Air Act, and Nuclear Regulatory Commission.
6. Esthetic Controls or View or Eye Pollution
  - a. A sizable number of localities have enacted land use regulations empowering a board of architectural review or similar body to ensure that new construction conforms to the areas existing architectural design.
  - b. Billboards are also controlled by local ordinances for safety concerns for motorists and pleasure to the eye.
  - c. The federal Highway Beautification Act dealt with billboards within 660 feet of federal highways and automobile junkyards.
7. Agricultural Lands Pollution Exposures - Soil and Water Conservation Act, Conservation Reserve Program and Wetlands Reserve Program, and state and/or local statutes and ordinances.
8. Protect land for open space. [NIMBY – Not In My Back Yard]
9. Conservation Easements and Land Trusts

### **H. Energy Production and Mineral Extraction**

1. Solar Energy and Wind Power - Energy Conservation and Production Act and Wind Energy Systems Act, state or local laws.
  - a. More of this will be coming in the near future.
  - b. Direct impact to Ordinance or Law exposures for rebuilding after a loss – Greening Ordinances or Energy Efficiency
  - c. Access to solar lawsuits currently going through the courts.
2. Nuclear Energy - Atomic Energy Act, Nuclear Regulatory Commission, Nuclear Waste Policy Act, Low Level Radioactive Waste Policy Act, Hazardous Materials Transportation Act, and the Price-Anderson Act.

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3. Geothermal Energy - Ocean Thermal Energy Conversion Act
4. Coal and Minerals Surface Mining - Surface Mining Control and Reclamation Act 1977 and state and/or local statutes.
5. Synthetic Fuels - National Environmental Policy Act (NEPA), the Energy Security Act created subsidies for Biomass Energy and Gasohol operations and Compressed Natural Gas, Electric and Hydrogen Powered Vehicles are being developed subject to the Clean Air Act and provide funding for testing of the vehicles.
6. Energy Conservation - Energy Policy and Conservation Act and Public Utility Regulatory Policies Act (PURPA)

### I. Conclusion of Statutes and Regulations

1. The advent of statutes requiring government agencies to weigh the impacts of their actions before activities under their jurisdiction are performed, funded, or permitted.
2. ISO 14000 was established to address environmental management systems, environmental auditing, labeling, and environmental performance evaluation for governments and business entities.
3. Environmental management, in particular, is offered as an alternative to traditional command and control regulatory enforcement.
4. The overall goal of an environmental management system is for the company to commit to reducing or even preventing pollution, in a systematic, regularly accountable manner, resulting in continual improvement in this regard.
5. Environmental management is contemplated as only an auxiliary to regulatory enforcement, rather than as a replacement for it.

## V. COVERAGE FOR POLLUTION EXPOSURES IN COMMERCIAL GENERAL LIABILITY INSURANCE COVERAGE FORMS

**Learning Objective 4: To explain pollution exclusions found in the Commercial General Liability Coverage Form.**

### A. Commercial General Liability Coverage Form Insuring Agreement

1. Known Pollution Event Exclusion - Occurrence Policy Trigger
  - a. Legally obligated to pay and defend:

#### Section I Coverages

##### Coverage A 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" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. 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 end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

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

- b. Caused by an Occurrence

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

- 1) In the case of an occurrence policy, the injury or damage must also have taken place during the policy period.
- 2) Note that the key to triggering coverage under the occurrence form is when the injury or damage takes place.
- 3) Therefore, the policy in effect at the time of the injury or damage is the policy under which coverage applies.
- 4) In some cases of bodily injury that develops over a prolonged period, or property damage that only gradually comes to light, the question of when the injury or damage occurs can be subject to dispute.
- 5) A long line of court decisions has resulted in the evolution of several approaches to fixing the time of bodily injury in cases where that injury develops from prolonged exposure to causative factors and develops over a period of years.
- 6) More recently, similar theories have been advanced by several courts to determine the timing of property damage in cases where the damage is latent or develops gradually until finally discovered.

The Third Circuit Court of Appeals found three separate "occurrences" for a scenario where a waste hauling company was sued for polluting three landfills over a 10-year period. The court rejected the view that only one "occurrence" existed and highlighted the fact that the insured hauled to separate landfills, in separate

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geographical locations, and at separate times over the course of nearly a decade, causing alleged environmental damage at distinct and discrete locations.

***Penn Nat'l Ins. Co. v. North River Ins. Co.***, 2019 WL 3430264, 2019 U.S. App. LEXIS 22561 (3d Cir. July 30, 2019)

- 7) In *Montrose, Chemical Corp. v Admiral Insurance Co.*, 913 P2d 878 (1995), the California Supreme Court ruled that the continuous injury trigger was applicable under that state's law with respect to "claims of continuous or progressively deteriorating damage or injury under ... third party CGL policies."

"It has long been understood that the standard form CGL policy provides liability coverage for damage or injury occurring during the policy period which results from an accident, or from continuous or repeated exposure to injurious conditions. There is no requirement that the sudden, accidental damage-causing act or event, or the conditions giving rise to the damage or injury, themselves occur within the policy period in order for potential liability coverage to arise."

"An insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains obligated to indemnify the insured for the entirety of the ensuing damage or injury."

"Where successive CGL policies have been purchased, bodily injury and property damage that is continuing or progressively deteriorating throughout more than one policy period is potentially covered by all policies in effect during those periods."

"Application of a manifestation trigger of coverage to an occurrence-based CGL policy would unduly transform it into a 'claims-made' policy."

- c. Known Injury or Damage Provision added in response to the Montrose Decision and other court decisions.

- 1) Paragraphs b.(3), c., and d. make it clear that knowledge on the part of an insured (or other specified persons) of such injury or damage will prevent coverage from being triggered.

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- 2) Injury or damage that occurs during a Commercial General Liability 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.
- 3) The "known loss" provisions of the Commercial General Liability insuring agreement does not interfere with application of a continuous injury trigger over that period of time when the insured has no knowledge that injury or damage is occurring or progressing.
- 4) However, 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.

- (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.
- 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.
- 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:

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- 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.

### h. Claims Example to Apply Known Injury or Damage Doctrine.

The insured client Chemical Tank Installers installed for Express Flush, a manufacturer of radiator fluid for automobiles, an above ground tank for the processing line. The effective date of Chemical Tank Installers Commercial General Liability Policy is July 1, 2002.

In March 2003, the installed above ground tank for the processing line was completed. In June after the tank was built and installed, Express Flush discovered that the toxic chemicals stored in the tank had been leaking from the time the tank was put to use in March 2003. Express Flush notified Chemical Tank Installers on June 15<sup>th</sup>, 2003, of the leak. [Completed Operations Claim or Construction Defect Claim]

- 1) Damage to plant's premises on June 15, 2003.
  - a) Chemical Tank Installer's July 1, 2003 CGL Occurrence Form Without "Known Injury or Damage Language" [1986 or older coverage form EDITION] would respond to injury or damage from the June 15, 2003 claim since it occurred during the CGL policy period.
  - b) If Chemical Tank Installer's CGL Occurrence Renewal Policy on July 1, 2004 is a 1986 or older coverage form EDITION with no "Known Injury or Damage Language", this new policy and its limits may also be triggered to provide coverage for the loss as well.

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- c) Chemical Tank Installer's July 1, 2003 CGL Occurrence Form with "Known Injury or Damage Language" [1999 or newer Coverage form EDITION ] would respond to injury or damage from the June 15, 2003 claim since it occurred during a Commercial General Liability policy period.
  - d) The July 1, 2003 Policy will provide the continuing pollution coverage after the expiration of June 30, 2003 subject to policy limits.
  - e) If Chemical Tank Installer's renews its CGL Occurrence Form on July 1, 2004 with a "Known Injury or Damage Language" [1999 or newer coverage form EDITION], the renewal policy will not respond to this June 15, 2003 claim.
- 2) Third Party Claim from the construction defect that caused damage to water rights and manifests or is discovered on or around July 15, 2004.

On July 15, 2004, the landowner and several families living in an apartment complex near the Express Flush plant filed a claim for injuries that they received due to contamination of their water well by the toxic chemicals.

- a) Is this a new claim or a continuation of the construction defect claim on June 15, 2003? [BI versus PD]

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

- b) Both the July 1, 2003 Policy and July 1, 2004 Renewal Policy would be triggered for this claim if the CGL Occurrence Form did not include "Known Injury or Damage Language" [1986 or older coverage form EDITION].



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- c) Both policies would provide defense and damage payments subject to the limit on an apportioned basis for the July 15, 2004 claim.
  - d) If the July 1, 2003 Policy and the July 1, 2004 Renewal Policy contained the “Known Injury or Damage Language” [1999 or newer coverage form EDITION], only the renewal policy would respond.
  - e) The occurrence must take place in the coverage territory and during the policy period and the occurrence is now manifested itself on July 15, 2004.
  - f) Only the July 1, 2004 Renewal Policy will respond.
- 3) Another Third-Party Claim from the construction defect that caused further damage to water rights and manifests or is discovered on or around March 15, 2005.

On March 15, 2005, several homeowners in another development to the west of the plant filed a claim for injuries that they received due to contamination of their water wells by the toxic chemicals.

- a) Is this a new claim or a continuation of the July 15, 2004 Occurrence? [Loss in Progress Doctrine]
- b) Is this a new claim or a continuation of the construction defect claim on June 15, 2003?
- c) How will the limits of insurance apply?

### SECTION III—LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

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- a. Insureds;
- b. Claims made or "suits" brought; or
- c. Persons or organizations making claims or bringing "suits."

- d) Possibly the July 1, 2003 Policy and the July 1, 2004 Renewal Policy would be triggered for this claim if the CGL Occurrence Form did not include "Known Injury or Damage Language".
- e) Both policies would provide defense and damage payments subject to the limit on an apportioned basis for the March 15, 2005 claim.
- f) However, the March 15, 2004 claim and the July 15, 2004 claim are for substantially the same causative factors and only one limit for each policy will apply.
- g) If the July 1, 2003 Policy and the July 1, 2004 Renewal Policy contained the "Known Injury or Damage Language" [1999 or newer coverage form EDITION], only the renewal policy would respond.
- h) The occurrence must take place in the coverage territory and during the policy period and the occurrence is now manifested itself on March 15, 2005.
- i) Only the July 1, 2004 Renewal Policy will respond.
- j) But the July 15, 2004 claim will be combined with the March 15, 2005 claim and only one limit will apply.

4) However, another construction operation was not covered.

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A sewer system owner that spent over \$600,000 to make proactive repairs to prevent future backups and potential sewage spills was not entitled to liability coverage, as the Fifth Circuit found that proactive repairs are not covered "damages" under the liability policy. The court found that, to constitute "damages" for purposes of the liability policy, it must be for "one claimed by, or ordered to be paid to, a person as compensation for loss or injury." According to the court, when the insured paid to repair its sewer system to make the proactive repairs, it was not compensating anyone for loss or injury. Thus, the court ruled that the insured's proactive repairs were not covered.

*Eagle Water v. Ash*, No. 19-30056, 2019 U.S. App. LEXIS 29117 (5th Cir. Sept. 26, 2019)

### **B. Commercial General Liability Coverage Form Pollution Exclusion Historical Perspective.**

1. 1973 CGL Coverage Form allowed Sudden and Accidental Pollution Coverage.
2. 1986 CGL Coverage Form eliminated the sudden and accidental coverage and left some coverage.
3. 1988 CGL Coverage Form Revisions - Exclusion f. was significantly altered. It was strengthened in a number of ways. The strengthening provisions primarily fall into the following categories:
  - a. They broaden the list of ways in which excluded pollution can occur.
  - b. They broaden the definition of places from which excluded pollution losses can originate.
  - c. They broaden the range of ways in which an insured may be held responsible for the excluded pollution losses, e.g., past ownership of a property.
  - d. They broaden the class of insureds to which the exclusion applies.

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4. 1993 CGL Coverage Form Revisions - The exclusionary title was added.
5. 1996 CGL Coverage Form Revisions - The exception relating to accidental discharge of operating fluids from a piece of "mobile equipment" was added.
6. 1997 CGL Coverage Form Revision - Included mandatory endorsement CG 00 54, which added the exception pertaining to smoke, fumes, vapor, or soot from building heating equipment.
7. The 1998 CGL Coverage Form Revision
  - a. An exception to the exclusion pertaining to pollution events at or from any insured's premises restored coverage at premises owned by a party made an additional insured under a contractor's policy.
  - b. A new exception pertaining to fumes from materials used in the insured's work was inserted into the exclusion applicable to job sites.
  - c. The cleanup portion of the exclusion paragraph f. (2) was rewritten to make clear that the cost of remediating third-party property damage is not an excluded "cleanup cost."
  - d. The exclusion incorporated the exception relating to fumes from heating equipment and placed the hostile fire exception specifically in each paragraph of the exclusion to which it applied.
  - e. The terms pollutant and hostile fire, which were previously defined within the context of the exclusion, were made defined terms in the 1998 CGL revision.
8. The Commercial General Liability Coverage Form editions 10 01, 12 04, 12 07 and 04 13 have not changed the approach to pollution coverage within the coverage form.
9. Definition of Pollutants remains the same.

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15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

10. Definition of Hostile Fire remains the same.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

### C. POLLUTION EXCLUSION – CG 00 01 04 13 Coverage Form

1. No coverage except there is coverage for nine specific exception situations.
2. This is important to know and discuss with client when attempting to identify pollution exposures.
3. Useful in determining appropriate Risk Finance responses.

1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

4. EXCLUDES POLLUTION EVENT ON ANY PREMISE, SITE OR LOCATION OF ANY INSURED.

**(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:

- a. The 1973 "owned property" exclusion has been properly enforced in only a very few instances.

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- b. Most often, courts have avoided the 1973 "owned property" exclusion by resorting to one or more of the following six exceptions developed at common law:
  - 1) Groundwater Contamination.
  - 2) *Parens Patriae* Theory [The doctrine that a government has standing to prosecute a lawsuit on behalf of the citizens];
  - 3) "Government Cleanup" Theory;
  - 4) Source Remediation Theory;
  - 5) "Threatened" Off-Site Contamination; and
  - 6) "Alleged" Off-Site Contamination.
  - 7) Not all courts agree with every theory.
  - 8) **All Exceptions.** Some states favor the policyholder and have approved all common-law exceptions to the 1973 "owned property" exclusion that have been raised so far.
  - 9) **No Exceptions.** Some states favor the insurer in that they have not yet recognized any exceptions to the 1973 "owned property" exclusion.
  - 10) **Some Exceptions.** Some states take an intermediate approach by approving some exceptions but rejecting one or more others.

### 5. COVERAGE EXCEPTION # 1:

- a. Coverage for bodily injury sustained inside a building and caused by smoke, fumes, vapor or soot from the heating or cooling system.
- b. Motel guest succumbs to carbon monoxide poisoning caused by a defective furnace.

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- (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the buildings occupants or their guests;

6. COVERAGE EXCEPTION # 2:

- a. Bodily injury and property damage arising out of the insured's operations.
- b. At a location owned, occupied, rented or loaned to an additional insured.
- c. If the location was never owned, occupied, rented or loaned to any other insured.
- d. Contractor backs into a diesel fuel tank at construction site owned by the general contractor additional insured on the policy.

- (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such 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; or

7. COVERAGE EXCEPTION # 3:

- a. From an owned, occupied, rented or loaned premises, coverage for bodily injury and property damage arising out of heat, smoke or fumes from hostile fire.
- b. Auto body shop client has a fire in the paint spray booth and ashes and smoke from the fire enter surrounding properties causing property damage.

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**(iii)** "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

8. COVERAGE FORM EXCLUDES any premise or site or location that was used for the processing or treatment of waste.

**(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;

9. COVERAGE FORM EXCLUDES transporting, handling, storing treating or disposing of waste.

**(c)** Which are or were at any time at any time transported, handled, stored, treated, dispose 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

10. COVERAGE FORM EXCLUDES bringing a "pollutant" to a JOB SITE, if in connection with the operations of the named insured but some exceptions will apply.

**(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:

11. COVERAGE EXCEPTION # 4

- a. Covers an accidental release of "pollutants" from "mobile equipment" if the "pollutant" is used for the mechanical functions of the "mobile equipment".



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- b. Hydraulic line of a road scraper shakes free during operation and fluid leak out onto the ground and seeps into the stream on the property.
- c. Diesel fuel tank of the back hoe is ruptured when backed into another piece of equipment causing diesel fuel to leak.

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

### 12. COVERAGE EXCEPTION # 5:

- a. Covers if a release of gases, fumes, or vapors within the building from materials brought in connection with operations being performed.
- b. Flooring contractor installing industrial carpet in an office building uses a formaldehyde adhesive to bond the carpet to the concrete floor and it emits a vapor causing people to get sick.

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

### 13. COVERAGE EXCEPTION # 6:

- a. Covers if the operation causes a hostile fire that emits heat, smoke or fumes causing damage at the operational site or location.

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- b. Welding contractor completes welding on metal rack storage system and slag starts a fire.

**(iii)** "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

- 14. COVERAGE FORM EXCLUDES testing, monitoring, cleaning up, removing, treating, detoxifying, or neutralizing "pollutants".

**(e)** 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 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".

- 15. COVERAGE EXCEPTION # 7:

- a. CLEAN UP COVERAGE if the expense was necessary because of a covered property damage claim and
- b. There was no demand, request, order, or statutory requirement by a governmental authority.
- c. An air conditioning contractor performing operations on government buildings causes an escape of ammonia pollutants that were confined to the work site itself. The government, in its capacity as property owner, brings suit against the contractor for the cost of repairing the property damage and cleaning up the pollutants.

**(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,

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treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

### 16. COVERAGE EXCEPTION # 8:

- a. Bodily injury and property damage arising out of products and completed operations are not excluded.
- b. Bodily injury or property damage caused by an escape of the named insured's fingernail polish removal solution (MEK) while stored for shipment in a commercial warehouse not owned by or rented to the named insured. [The insured's product is not "waste" and not at an owned premise.]
- c. 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 and valves.
- d. REMEMBER THAT Completed operations losses of this kind are not excluded because they do not occur at a site where the insured is performing operations.]

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.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

### 17. COVERAGE EXCEPTION # 9: Sidetrack Agreement Absolute liability.

Paragraphs **(3)**, **(4)**, **(5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

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### 18. NINE COVERAGE EXCEPTIONS

- a. Heating Equipment pollution event.
- b. Pollution damage at additional insured property.
- c. Hostile fire on premises.
- d. Fluids of mobile equipment.
- e. Building materials brought into property causing pollution event.
- f. Operation premise hostile fire.
- g. Limited clean up with no government authority involvement.
- h. Products and completed operations provided but with other exclusions still applying.
- i. Loading and unloading operation on a sidetrack that causes damage to the sidetrack that is governed by a Sidetrack Agreement damages.

### D. **ISO POLLUTION ENDORSEMENTS THAT APPLY TO THE COMMERCIAL GENERAL LIABILITY COVERAGE FORM THAT YOU MIGHT SEE**

1. The ISO created endorsements that the **underwriter might use but in reality most companies will not use these endorsements.**
2. CG 04 28 - Pollution Exclusions - Named Peril Limited Exception for a Short Term Pollution Event
  - a. This endorsement adds an exception for releases of pollutants from an insured's premises or a contractor's job site, which begins and end with 48 hours.
  - b. The release must be caused by named perils.

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- c. Lightning, windstorm, earthquake, vandalism, explosion, implosion, collapse, puncture, bursting, rupture, collision or overturn of a tank, vessel, machinery, equipment, etc.
3. CG 04 29 - Limited Exception for a Short Term Pollution Event
  - a. This endorsement adds an exception for pollution releases from an insured's premises or at a contractor's job site which begins and ends within a 48 hour time frame and is not restricted as to the cause of the release.
  - b. The endorsement that the insurer must be notified within 14 days after the end of the release.
4. CG 04 30 - Pollution Exclusion - Limited Exception for Designated Pollutants
  - a. The attachment of this endorsement provides coverage for the release of a specific pollutant.
  - b. Used as a part of the insured's operations; from the insured's premises; or at a contractor's job site.
  - c. The pollutant must be designated in the schedule.
5. CG 22 64 - Pesticide or Herbicide Applicator Coverage
6. CG 22 78 - Hazardous Materials Contractors
7. CG 04 22 - Pollution Liability Coverage Extension Endorsement
  - a. THIS ENDORSEMENT ELIMINATES PARAGRAPH (1) OF THE POLLUTION EXCLUSION, THUS PROVIDING POLLUTION COVERAGE.
  - b. This endorsement is rarely used, and companies generally do not provide.
8. CG 24 15 - Limited Pollution Liability Extension Endorsement

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- a. THIS ENDORSEMENT PROVIDES COVERAGE FOR MOST ON PREMISES, ACCIDENTAL POLLUTION DISCHARGES, EXCEPT FROM UNDERGROUND STORAGE TANKS.
- b. Specialty carriers will use, or they may provide the CG 00 01 1973 Edition to provide sudden and accidental coverages.

### 9. CG 21 49 - Total Pollution Exclusion Endorsement

- a. Since the overly broad nature of the post-1986 pollution exclusion permits insurer abuse, courts will only apply it to exclude a loss if:
  - 1) the facts of the claim fit the *literal terms* of the exclusion; and
  - 2) the *pollution risk profile* as demonstrated by the facts of the claim is similar enough to "traditional environmental pollution" such that applying the exclusion would not be unreasonable or absurd under the circumstances.
- b. Remember that the courts do not precisely explain how they are determining if a given claim scenario is like "traditional environmental pollution," it appears as if they are impliedly assessing three pollution risk factors:
  - 1) The "**operational frequency**," which is the frequency with which the insured's operations involve the pollutant at issue;
  - 2) The "**expected toxicity**" of the particular substance causing injury to the claimant or contaminating the environment; and
  - 3) The "**geographic exposure**," or the potential for wide-scale harm as a result of the activity giving rise to the claim.

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Claim Scenario	Operational Frequency	Expected Toxicity	Geographic Exposure	Probable Claim Result
Wastes from the insured's facility contaminate site	Very High	Very High	Very High	Excluded
Toxic emissions from the insured's factory pollute air	Very High	Very High	Very High	Excluded
Insured sends toxic waste to a contaminated recycling facility	High	Very High	Very High	Excluded
Contractor is exposed to highly toxic chemicals while working at insured's factory	Very High	Very High	Medium	Excluded
Contractor uses <i>industrial</i> materials, which give off <i>highly toxic</i> fumes, at a job site	High	Very High	High	Excluded
Ammonia leaks from industrial refrigerator at the insured's warehouse	Medium	Very High	High	Excluded
Exterminator hired by insured landlord uses potentially lethal chemical	Low	Very High	High	Excluded
Carbon monoxide fumes from insured's HVAC unit injure tenants in one apartment	Very Low	High	Very Low	Covered
Exterminator hired by insured landlord uses ordinary pesticide at one rental unit	Low	Low	Very Low	Covered
Contractor applies <i>ordinary</i> building materials, which give off fumes, at a job site	Low	Very Low	Low	Covered
Insured landlord is sued for allowing buildup of exhaled carbon dioxide	Very Low	Very Low	Very Low	Covered
Building owner hires contractor to install carpet, which gives off smelly fumes	Very Low	Very Low	Very Low	Covered
Landlord is sued by tenant for lead paint exposure	Very Low	Very Low	Very Low	Covered
A child at a city pool complains about the chlorine in her eyes	Very Low	Very Low	Very Low	Covered

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10. CG 21 55 - Total Pollution Exclusion with a Hostile Fire Exception
11. ISO POLLUTION COVERAGE FORMS
  - a. CG 00 39 - Pollution Liability Coverage Form (Designated Sites)
  - b. CG 00 40 - Pollution Liability Ltd. Coverage Form (sites)
12. These endorsements are not approved in all states and there may be state specific pollution endorsements that apply.
13. Check with your underwriter if any of the above is available.

### **E. Commercial General Liability Coverage Form - Personal Injury and Advertising Injury Coverage B Exclusions That Apply to Pollution.**

1. Pollution Exclusion - In essence, the 1996 language (which has been preserved more or less unchanged in subsequent editions) represented total pollution exclusion to eliminate the trespass coverage granted by some courts.

<p><b>m.</b> Pollution</p> <p>"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.</p>
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2. Clean Up Exclusion
  - a. The pollution cleanup exclusion applicable to Coverage B is identical to Coverage A.
  - b. It does not contain the clarifying language pertaining to property damage claims independent of any governmental remediation request, since no such coverage is left intact by the basic Coverage B paragraph m. pollution exclusion.



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### **n.** Pollution-Related

Any loss, cost or expense arising out of any:

- (1) Request, demand or order 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) 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".

### **F. Successor Liability Coverages**

1. Generally, a company can acquire another in one of three ways,
  - a. Statutory mergers
  - b. Stock purchases
  - c. Asset purchases
2. In a statutory merger, the acquiring company subsumes the target company.
  - a. The target company ceases to exist as a separate entity, and only the acquiring company survives the corporate transaction.
  - b. In that kind of situation, state statutes specify that all of the long-tail liabilities for IBNR claims and contractual rights of the target company—including its rights under occurrence-based insurance policies—are automatically transferred to the acquiring company by operation of law.
3. In a stock purchase, the acquiring company purchases all of the stock of the target company so that the acquiring company becomes its new owner.

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- a. The target company continues to exist as a separate entity.
  - b. Its long-tail liabilities and insurance coverage remain in place, and the target company can still demand coverage for IBNR claims under its pre-acquisition insurance policies the same as before the corporate transaction.
4. In an asset purchase, the acquiring company buys all of the physical and intangible assets that the target company uses to carry on its business.
- a. The target company continues to exist as an empty shell.
  - b. Generally, neither the long-tail liabilities for IBNR claims nor the insurance policies of the target company are transferred by operation of law to the acquiring company. (There are a few exceptions to this.)
  - c. Normally, they will be transferred only if the acquiring company agrees to contractually assume the long-tail liabilities for IBNR claims, and the target company agrees to assign the insurance policies, under the terms of the purchase agreement.
5. Attempting to transfer insurance policies under an asset purchase agreement poses a coverage problem.
- a. Standard CGL policies contain a "no assignment" clause that prohibits the transfer of the policyholder's interest under the policy to another party without the insurance company's consent.
  - b. For example, the Common Policy Conditions coverage form attached to standard CGL policies states as follows.

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

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

6. Be very careful with acquisitions.

### VI. Fungus, Wet Rot, Dry Rot and Bacteria (Mold) Pollution Coverage Issues

**Learning Objective # 5: To review mold and its relation to pollution coverages.**

#### A. Property Insurance Coverage

1. Fungus Definition

1. "Fungus" means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

2. The fungus additional coverage provides coverage for certain types of loss from fungus, wet or dry rot, or bacteria that result from one of the specified causes of loss (other than fire and lightning) or from flood, if the policy has been endorsed to provide flood coverage.

#### E. Additional Coverage Limited Coverage For "Fungus", Wet Rot, Dry Rot And Bacteria

1. The coverage described in **E.2.** and **E.6.** only applies when the "fungus", wet or dry rot or bacteria is the result of one or more of the following causes that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence.
  - a. A "specified cause of loss" other than fire or lightning; or
  - c. Flood, if the Flood Coverage Endorsement applies to the affected premises.

3. Specified causes of loss defined.

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"Specified Causes of Loss" means the following: Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

4. Coverage applies to direct physical loss, the cost of tearing out and replacing property to gain access to the fungus, etc., and the cost of testing performed after restoration of the damaged property, if there is a reason to believe that fungi, wet or dry rot, or bacteria are present.

2. We will pay for loss or damage by "fungus", wet or dry rot or bacteria. As used in this Limited Coverage, the term loss or damage means:
  - a. Direct physical loss or damage to Covered Property caused by "fungus", wet or dry rot or bacteria, including the cost of removal of the "fungus", wet or dry rot or bacteria;
  - b. The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungus", wet or dry rot or bacteria; and
  - c. The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungus", wet or dry rot or bacteria are present.

5. Subject to an Annual Limit of Coverage

3. The coverage described under **E.2.** of this Limited Coverage is limited to \$15,000. Regardless of the number of claims, this limit is the most we will pay for the total of all loss or damage arising out of all occurrences of "specified causes of loss" (other than fire or lightning) and Flood which takes place in a 12-month period (starting with the beginning of the present annual policy period). With respect to a particular occurrence of loss which results in "fungus", wet or dry rot or bacteria, we will not pay more than a total of \$15,000

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even if the "fungus", wet or dry rot or bacteria continues to be present or active, or recurs, in a later policy period.

### 6. Limits of Insurance Impact

- 4.** The coverage provided under this Limited Coverage does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in loss or damage by "fungus", wet or dry rot or bacteria, and other loss or damage, we will not pay more, for the total of all loss or damage, than the applicable Limit of Insurance on the affected Covered Property.

If there is covered loss or damage to Covered Property, not caused by "fungus", wet or dry rot or bacteria, loss payment will not be limited by the terms of this Limited Coverage, except to the extent that "fungus", wet or dry rot or bacteria causes an increase in the loss. Any such increase in the loss will be subject to the terms of this Limited Coverage.

- 5.** The terms of this Limited Coverage do not increase or reduce the coverage provided under Paragraph **F.2.** (Water Damage, Other Liquids, Powder Or Molten Material Damage) of this Causes Of Loss Form or under the Additional Coverage "Collapse".

### 7. Business Income and Extra Expense Impact

- a. If the policy has been endorsed to provide business income or extra expense coverage, and the insured's operations are suspended due to a covered cause other than fungus, etc., but remediation of fungus, etc., increases the period of restoration, business income and extra expense coverage applies for only 30 days.
- b. If the loss that caused the fungus, etc., does not itself cause a suspension of the insured's operations, but the loss due to fungus, etc., necessitates a suspension, business income or extra expense coverage applies for a maximum of 30 days.

**6.** The following, **6.a.** or **6.b.**, applies only if Business Income and/or Extra

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Expense coverage applies to the described premises and only if the "suspension" of "operations" satisfies all terms and conditions of the applicable Business Income and/or Extra Expense coverage form.

- a. If the loss which resulted in "fungus", wet or dry rot or bacteria does not in itself necessitate a "suspension" of "operations", but such "suspension" is necessary due to loss or damage to property caused by "fungus", wet or dry rot or bacteria, then our payment under Business Income and/or Extra Expense is limited to the amount of loss and/or expense sustained in a period of not more than 30 days. The days need not be consecutive.
- b. If a covered "suspension" of "operations" was caused by loss or damage other than "fungus", wet or dry rot or bacteria but remediation of "fungus", wet or dry rot or bacteria prolongs the "period of restoration", we will pay for loss and/or expense sustained during the delay (regardless of when such a delay occurs during the "period of restoration"), but such coverage is limited to 30 days. The days need not be consecutive.

### 8. CP 04 31 Changes - Fungus, Wet Rot, Dry Rot, and Bacteria Endorsement

- a. This endorsement can be used to increase the \$15,000 limit that applies to direct physical damage and related costs to the amount shown in the endorsement schedule as the "Revised Limit."
- b. It also contains a "Separate Premises or Locations Option." If this option has been elected, as indicated in the endorsement schedule, the \$15,000 annual aggregate limit granted in the causes of loss form (or, if applicable, the revised annual aggregate limit shown in the endorsement schedule) applies separately to each premises or location described in the endorsement.
- c. Finally, the endorsement can be used to increase the indemnity period for business income or extra expense coverage under the fungus additional coverage, from the 30 days specified in the causes of loss forms to the number of

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days shown in the endorsement schedule.

### **CP 04 31 Changes - Fungus, Wet Rot, Dry Rot, and Bacteria Endorsement**

- A.** In the Limited Coverage For Fungus, Wet Rot, Dry Rot And Bacteria, the amount of \$15,000 is deleted and replaced by the amount indicated in the Schedule.
- B.** If the Schedule indicates that the Separate Premises Or Locations Option applies, then the amount of coverage (\$15,000, unless a higher amount is shown in the Schedule) is made applicable to separate premises or locations as described in the Schedule. For each premises or location so described, the amount of coverage is an annual aggregate limit, subject to the terms set forth in Paragraph 3. of the Limited Coverage For Fungus, Wet Rot, Dry Rot And Bacteria.
- C.** The coverage provided under this endorsement does not increase the applicable Limit of Insurance on any Covered Property. If a particular occurrence results in loss or damage by "fungus", wet or dry rot or bacteria, and other loss or damage, we will not pay more, for the total of all loss or damage, than the applicable Limit of Insurance on the affected Covered Property.
- D.** Under the Limited Coverage For Fungus, Wet Rot, Dry Rot And Bacteria, in the section applicable to Business Income and/or Extra Expense coverage, the number of days (30 days) in both paragraphs is deleted and replaced by the number of days indicated in the Schedule.

### **B. Commercial General Liability Coverage for Fungus**

- 1. The Environmental Protection Agency (EPA) has classified mold as a pollutant.
- 2. The CGL Pollutant definition and Pollution Exclusion should apply.
  - a. Pollutants Definition

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- 15.** "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

b. Pollution Exclusion

**f.** Pollution

- (1)** "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- (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

4. Varying court decisions concerning mold since it is a natural by-product of the environment and it is not man made.
- a. Some say it does not meet the definition of a pollutant.
- b. Some say it is a contaminant.
4. If the Total Pollution Exclusion endorsement is not added, the Pollution Exclusion does apply to the products and completed operations hazard.
- a. Mold appears after the work has been completed coverage may be granted for the removal and repair.
- b. The CG 21 67 Fungi and Bacteria Exclusion should not be on the policy.
5. Mold claims could be denied for contractors and others who perform operations of removal and repair under the following coverage A exclusions.
- a. Damage to Your Product Exclusion



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### k. Damage to Your Product

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

### b. Damage to Your Work Exclusion

### l. Damage to Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

### 6. CG 21 67 Fungi or Bacteria Exclusion

- a. Can be used by insurers to exclude virtually all claims arising out of mold or bacteria in a building.
- b. It eliminates coverage for bodily injury, property damage, and personal and advertising injury "that would not have taken place in whole or in part but for" a range of exposures to any fungi or bacteria; and any loss, cost, or expense entailed cleaning fungi or bacteria.
- c. The "but for" language used in the endorsement is equivalent to the very broad exclusionary language found in standard total pollution exclusion endorsements.
- d. One exception is allowed, and it pertains to fungi or bacteria that are intended for consumption or contained in products intended for consumption, such as edible mushrooms, strains of bacteria used to make cheese or yogurt.
- e. Food items contaminated with harmful bacteria such as salmonella or any injury or damage that can be attributed to mold or bacteria is excluded.

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- f. The exclusion is likely to be widely used on the general liability policies of contractors, who have the highest exposure to mold-related claims; and owners of large commercial buildings, who may be subject to bodily injury claims from tenants.
- g. Such claims would be covered under most pollution liability policies, which contain language broad enough to encompass mold infestations, and a few of which specifically include mold and its toxins as a covered pollutant.

### **CG 21 67 Fungi or Bacteria Exclusion**

#### **2. Exclusions**

This insurance does not apply to:

#### Fungi or Bacteria

- a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for consumption.

#### **7. CG 24 25 Limited Fungi or Bacteria Coverage**

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- a. Insurers desiring to limit CGL coverage with respect to bodily injury or property damage from mold, "sick building syndrome," and other claims connected to the development or spread of fungi or bacteria within a building can provide coverage for the exposure on a limited basis by attaching this endorsement.
- b. Coverage A (bodily injury and property damage liability), the endorsement makes coverage subject to a separate aggregate limit.
- c. This "fungi and bacteria liability aggregate limit" states the maximum amount that will be paid for all bodily injury, property damage, and Coverage C medical payments arising out of "fungi or bacteria" incidents during the policy period.
- d. Other limits of insurance pertaining to Coverages A and C the policy's each occurrence, "damage to premises rented to you," and medical expense limits also apply to covered fungi or bacterial liability claims.

**C. The following are added to Section III - Limits of Insurance:**

1. Subject to Paragraphs **2.** and **3.** of **Section III - Limits of Insurance**, as applicable, the Fungi and Bacteria Liability Aggregate Limit shown in the Schedule of this endorsement is the most we will pay under Coverage A for all "bodily injury" or "property damage" and Coverage C. for Medical Payments arising out of one or more "fungi or bacteria incidents". This provision **C.1.** does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for consumption.
2. Paragraphs **5.**, the Each Occurrence Limit, Paragraph **6.**, the Damage To Premises Rented To You Limit, and Paragraph **7.**, the Medical Expense Limit, of **Section III - Limits of Insurance** continue to apply to "bodily injury" or "property damage" arising out of a "fungi or bacteria incident".

8. Check the Pollution Policy to make sure that it covers mold if the policy is sold.

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- a. May be included in the definition of pollutant or pollutant condition.
- b. It may be within the coverage form exclusion and coverage will need to be endorsed.
- c. Policy may be silent.

### VII. TYPES OF ENVIRONMENTAL INSURANCE

**Learning Objective # 6: To identify and explain the types of environmental insurance coverages that are available to fill the gaps left by pollution exclusions in standard liability policies.**

#### **A. Environmental Insurance Coverage Forms Vary With Varying Titles – Admitted and Non-Admitted**

- 1. Premises Environmental Liability Insurance [Great American]
- 2. Indoor Air quality and Mold Liability Insurance [Great American]
- 3. Contracting Services Environmental Liability Insurance [Great American]
- 4. Professional and Contracting Services Environmental Liability [Great American]
- 5. Professional Plus and Contracting Service Environmental Liability [Great American]
- 6. Excess Environmental Liability Insurance [Great American]
- 7. Closure and Post Closure Financial Assurance [Great American]
- 8. Consultant's Environmental Liability (CEL) [XL Insurance]
- 9. Contractor's Pollution Legal Liability (CPL) [XL Insurance]

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10. Environmental – Commercial Automobile Liability (AL) [XL Insurance]
11. Environmental – Commercial General Liability (GL) [XL Insurance]
12. Environmental – Commercial General Liability for Chemical Risks (Chem-CGL) [XL Insurance]
13. Environmental – Pollution Protection Package (PPP) [XL Insurance]
14. Environmental – Property and Inland Marine (P&IM) [XL Insurance]
15. Environmental – Umbrella (UMB) [XL Insurance]
16. Environmental – Workers' Compensation (WC) [XL Insurance]
17. Environmental Consultants Professional Liability [XL Insurance]
18. Environmental Impairment Liability (EIL) [XL Insurance]
19. General Contractor's Pollution Legal Liability (GCPL) [XL Insurance]
20. Pollution & Remediation Legal Liability (PARLL) [XL Insurance]
21. Professional and Pollution Liability – General Contractors (PPL-GC) [XL Insurance]
22. Real estate Lenders Policy (RELP) [XL Insurance]
23. Remediation Stop Loss (RSL) [XL Insurance]
24. Must read the Coverage Forms and Applications to determine the provided coverage.
25. Please remember that the coverage form selection is based upon an excellent job of Risk Identification and Risk Analysis.

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26. The Coverage Form selected must fill the coverage gaps from the Commercial General Liability Coverage Form, Commercial Auto Coverage Form, Umbrella and Excess Coverage Form, Professional Liability Coverage Forms and Directors & Officers Coverage Forms.
27. Wholesalers should be contacted as well to contact – Starr, Berkley, Markel, and XL Catlain

### **B. Pollution Legal Liability or Environmental Impairment Liability (EIL)**

1. Some Companies use the ISO Pollution Liability Coverage Form
  - a. This Coverage Form is not commonly written but is showing up in the market.
  - b. Provides coverage to sites listed in the policy or to waste facilities in which waste from the designated site has been transferred.
  - c.. Basic Coverages
    - 1) Compensatory damages arising from bodily injury and property damage

#### **SECTION I. POLLUTION LIABILITY COVERAGE**

1. Insuring Agreement. Bodily Injury And Property Damage Liability
  - a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "pollution incident" and settle any claim or "suit" that may result.

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- (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, settlements or "clean-up costs".
- b. This insurance applies to "bodily injury" and "property damage" only if:
- (1) The "bodily injury" or "property damage" is caused by a "pollution incident" from an "insured site" or "waste facility" in the "coverage territory";
  - (2) The "bodily injury" or "property damage" is caused by a "pollution incident" that commences on or after the Retroactive Date shown in the Declarations;
  - (3) The insured's responsibility to pay damages because of "bodily injury" or "property damage" is determined in a "suit" on the merits in the "coverage territory" or in a settlement we agree to; and
  - (4) A claim for damages because of the "bodily injury" or "property damage" is first made against any insured, in writing, in accordance with Paragraph c. below, during the policy period or any Extended Reporting Period

### 2) Reimbursement of mandated off site clean-up costs.

#### 2. Insuring Agreement. Reimbursement Of Mandated Off-Site Clean-Up Costs

- a. We will pay for "clean-up costs" that the insured becomes legally obligated to pay for because of "environmental damage" to which this insurance applies. We have the right but not the duty to investigate, settle, contest or appeal, at our expense, any obligation asserted against an insured to pay "clean-up costs". But the amount we will pay

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for such "clean-up costs" is limited as described in Section III. Limits Of Insurance; and

- b. This insurance applies to "environmental damage" only if:
- (1) The "environmental damage" is caused by a "pollution incident" that commences on or after the Retroactive Date shown in the Declarations from an "insured site" or "waste facility" in the "coverage territory"; and
  - (2) The insured's obligation to pay "clean-up costs" because of the "environmental damage" is asserted under the statutory authority of the government of the United States of America, Canada or any governmental subdivisions of the United States or Canada. Notice asserting such obligation must be first received by you during the policy period.
3. No other obligation or liability to pay sums or to perform acts or services is covered unless explicitly provided for under Supplementary Payments.

- d. Bodily injury and property damage must arise from a pollution incident on an insured site or a waste facility.

13. "Pollution incident" means emission, discharge, release or escape of "pollutants" into or upon land, the atmosphere, or any watercourse or body of water, provided that such emission, discharge, release or escape results in "environmental damage". The entirety of any such emission, discharge, release or escape shall be deemed to be one "pollution incident".

- e. Environmental Damage Definition

6. "Environmental damage" means the injurious presence in or upon land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants or "pollutants".

- f. Provided on a claims made basis

- 1) Retroactive dates



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### 2) Extended Reporting Period provisions

#### g. Limitations

### **SECTION III. LIMITS OF INSURANCE**

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
  - a. Insureds;
  - b. Claims made or "suits" brought;
  - c. Persons or organizations making claims or bringing "suits"; or
  - d. Governmental actions taken with respect to "clean-up costs".
2. The Aggregate Limit is the most we will pay for the sum of:
  - a. All damages because of all "bodily injury" and "property damage"; and
  - b. All "clean-up costs" incurred because of all "environmental damage".
3. We will pay damages and "clean-up costs" only for the amount of the damages or "clean-up costs" which are in excess of the deductible amount, if any, shown in the Declarations. Subject to the Aggregate Limit above, the most we will pay in anyone "pollution incident" for the sum of:
  - a. All damages because of all "bodily injury" and "property damage"; and
  - b. All "clean-up costs" incurred because of all "environmental damage";will be the lesser of:
  - (1) The Each "Pollution Incident" Limit; or
  - (2) The sum of those damages and "clean-up costs."

2. Other Pollution Legal Liability (PLL) and Environmental Impairment Coverage (EIL) Forms

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- a. Purpose is to provide off site, third party bodily injury and property damage coverage including third party clean-up costs.
- b. Coverage trigger is usually claims made.
- c. Coverage
  - 1) Bodily injury and property damage related to off premises accidents or occurrences.
  - 2) No coverage for clean up at the insured's site but sometimes it can be endorsed to the contract.
  - 3) Usually only pays compensatory damages.
  - 4) No Punitive Damages allowed.
  - 5) The bodily injury and property damage must arise from an ENVIRONMENTAL HARM.
- d. Limits and deductibles
  - 1) Per incident with an annual aggregate.
  - 2) Deductible pays the lesser of loss minus deductible or the policy limit less deductible.
  - 3) Defense Costs (Supplementary Payments)
    - a) Within limits or can be in addition to limits.
    - b) Some policies contain a per site defense limit.
- e. Coverage Territory
- f. Common Coverage Form Exclusions
  - 1) Expected or intended
  - 2) Contractual

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- 3) Willful violation of government regulation
  - 4) Products and Completed Operations premises if damage arises out of the premises
  - 5) Damages to alienated premises if damage arises out of the premises
  - 6) Employment injuries
  - 7) Damage to property owned, rented to, used by or in the care of the insured
  - 8) Punitive damages
  - 9) Auto, watercraft, and aircraft
  - 10) Drilling wells
  - 11) Offshore facilities
  - 12) Acid Rain
  - 13) Clean-up of waste disposal facilities
  - 14) New Exclusions Showing Up
    - a) Cap and Trade
    - b) Asbestos
    - c) Fungus
    - d) Lead
    - e) Pandemic
- g. Underwriting requirements
- 1) Information necessary to obtain PLL insurance includes completion of an application, disclosure of at least the previous 2 years' financial information,

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details regarding any prior pollution claims or incidents, and any reports concerning environmental conditions at the sites to be covered.

- 2) Keep in mind that while detailed and full sub-surface delineation is no longer required to obtain PLL coverage, the more information a business owner can provide to an insurer regarding environmental site conditions, the better.
- h. Limitations for the coverage
  - 1) May exclude any potential environmental risks that are apparent. (Not complete coverage)
  - 2) May not cover all of the requirements under RCRA.
  - 3) Claims made issues:
    - a) Retroactive date limits past events and it may not be the coverage needed for the client.
    - b) Policy cancellation and problems with retroactive dates and tail coverage.

### **C. Contractors Environmental Impairment Liability Coverage (CEIL)**

1. Coverage Form Purpose: Coverage for the pollution exposures arising out of environmental work, especially on premises of others.
2. Gradual Pollution Incidents are covered.

#### **A. COVERAGE**

The Company will pay on behalf of the Insured all sums that the Insured shall become legally obligated to pay as Loss as a result of Claims for Bodily Injury, Property Damage, or Clean-up Costs caused by a Pollution Conditions resulting from Covered Operations. The Pollution Conditions must be unexpected and unintended from the standpoint of the Insured. Claims for

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Bodily Injury, Property Damage, or Clean-up Costs must be first made against the Insured and reported to the Company during the Policy Period.

POLLUTION CONDITIONS means the discharge, dispersal, release, seepage, migration, escape, or presence of smoke, vapors, odors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, including medical, infectious, or pathological wastes, or other irritants, contaminants, pollutants, or radiation, including electromagnetic fields and naturally occurring radioactive materials, into or upon land or structures thereupon, the atmosphere, or any watercourse or body of water (including groundwater), provided such conditions are not naturally present in the environment in the concentration or amounts discovered.

Source: American International Specialty Lines Insurance Company (AIG) 2000.

3. Sudden and Accidental Pollution Incidents are covered.

### **B. Sudden and Accidental Pollution Incidents Only**

"Occurrence" means the temporally sudden and accidental discharge, dispersal, release or escape of "pollutants."

"Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, petroleum and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Source: Contractors Pollution Liability Policy United Coastal Insurance Company.

4. Who needs the coverage?
  - a. Emergency response contractors
  - b. Industrial cleaning contractors
  - c. Environmental remediation contractors
  - d. Underground storage tank installation and removal contractors
5. Common Characteristics

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- a. Can be written on an indemnification basis or a pay on behalf of basis.

**B.** The Company shall pay ... "damages" ... if the "damage" is first incurred during the "policy period" of this Policy. For purposes of this condition, it is stipulated and agreed that for all claimants and "claims" the calendar date on which "damage" is first incurred shall be deemed solely and exclusively to be that date on which any individual or entity first has notice that the "pollution condition" exists;

Source: Contractors Pollution Liability Coverage Part, Gulf Insurance Company, Form ENVCPPL 01B 10 98.

- b. Compensatory damages only (General and Special Damages)

The Company shall pay on behalf of the "insured" those "damages" in excess of the Self Insured Retention that the "insured" becomes legally obligated to pay:

2. If the "damages" result from a "pollution condition" at any site where any "Insured" or any independent contractor working on behalf of any "insured," is performing, or has performed, any contracting or remediation operations anywhere in the world;

Source: Contractors Pollution Liability Coverage Part, Gulf Insurance Company, Form ENVCPPL 01B 10 98.

- c. Special Definition of Property Damage

- 1) Damage to tangible property including loss of use of undamaged property and
- 2) "Cleanup costs" refers to amounts spent to remove or neutralize pollutants and restore the damaged property to an uncontaminated condition. Under most forms, costs incurred to test for or determine the extent of contamination are covered as cleanup costs, but some policies consider these outlays to be claim expenses.

Property Damage means the following:

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1. Physical injury to or destruction of tangible property including the resulting loss of use thereof;
2. Cleanup costs incurred by a third party or mandated by any governmental entity;
3. Loss of use of tangible property that has not been physically injured or destroyed.
4. Physical damage to soil, surface water, groundwater or plant or animal life.

Source: Contractors Pollution Liability Policy, CNA Insurance Company, Form G-130922-A, Ed. 02/99.

- d. Written on a claims made basis and usually requires that claims be made and reported during the policy period.
- e. Defense is included within the limits of coverage

We will not settle any claim without our informed consent. If we recommend a settlement to you, which is acceptable to the claimant, and you elect to contest the claim or continue any legal proceedings in connection with the claim; our obligation to defend ceases and our liability is limited to the total amount for which the claim could have been settled plus the amount of claim expenses incurred up to the time we made the recommendation for settlement.

Source: Contractors Pollution Liability Policy, CNA Insurance Company, Form G-130922-A, Ed. 02/99.

- f. Limits of Insurance
  - 1) Blanket, project specific or site specific
  - 2) Per loss with an aggregate

The deductible stated in the Declarations applies to each Loss because of all Bodily Injury, Property Damage, and Environmental Damage arising out of any one Pollution Condition or out of the same, related or continuous Pollution Conditions. The deductible shall be paid by the NAMED INSURED and remain uninsured.

Source: Contractor's Pollution Liability Policy, American International Specialty Lines Insurance Company, Form 68056 (6/97).

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g. Exclusions

- 1) Those common to other liability policies
- 2) Other special exclusions
  - a) Expected or Intended Injury exclusion to limit intentional pollution acts such as dumping in a vacant lot or improperly disposing of material in to the dumpster.

Coverage does not apply to any LOSS based upon or arising out of any dishonest, fraudulent, malicious or knowingly wrongful act committed by or at the direction of the INSURED. Notwithstanding the foregoing, such insurance as would otherwise be afforded under this Policy shall be applicable with respect to each and every INSURED who did not personally commit or personally participate in committing or personally acquiesce in or remain passive after having personal knowledge of one or more dishonest, fraudulent, or malicious or knowingly wrongful acts, errors, or omissions pertaining to this exclusion.

b) Known Conditions

**A.** Any Claim based upon or arising out of Pollution Conditions existing prior to the inception date of this Policy, if any employee of the Named Insured responsible for environmental affairs, control or compliance or any manager, supervisor, officer, director, or partner of the Named Insured knew or reasonably could have foreseen that such Pollution Conditions could give rise to a Claim.

Source: Contractor's Pollution Liability Policy, American International Specialty Lines Insurance Company, Form 68056 (6/97).

c) Transportation Exclusions

**C.** Collision or Accident of Any Auto

**F.** any "claim" which arises from, or is in any way related to, any collision or accident of any kind, involving any kind or type of automobile, truck, boat, watercraft, airplane, helicopter, or other aircraft or vehicle of any kind or type;



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Source: Contractors Pollution Liability Coverage Part, Gulf Insurance Company, Form ENVCP 01B 10 98.

## d) Contractual Liability Exclusion

The insurance provided by this Coverage Form does not apply to:

"Bodily injury", "property damage", or "environmental contamination" for which the insured is obligated to pay damages or costs by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

Source: Limited Pollution Coverage Form Work Sites, The Maryland Insurance Company, Form 930069 Ed. 4/95.

- 3) Generally, excludes involvement in a Joint Venture.
- 4) A separate coverage form is necessary for the Joint Venture to cover the partners.
- 5) Watch out for nuclear exclusions, especially if the contractor is hauling tailings.

h. Terms may be flexible and negotiable.

## D. Underground Storage Tank Liability Insurance

1. Coverage is a hybrid of first party property and third party liability coverage elements.
  - a. Coverage A Bodily Injury and Property Damage for an Underground Storage Tank Incident Definitions.

**14.** "Underground storage tank incident" means a "release" from an "insured tank". The entirety of continuous or repeated "releases" from the same "insured tank" shall be deemed to be one "underground storage tank incident".

**8.** "Insured tank" means any petroleum underground storage tank not excluded or exempted from the definition of underground storage tank under section 6991 of the Hazardous and Solid Waste Amendments of 1984, including any

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attached underground pumps and piping, if such tank is owned or operated by you and is listed in the Declarations of this policy. "Insured tank" does not include any tank which has been replaced by you during the policy period or the Extended Reporting Period, if such replacement is done without our agreement in writing.

b. Insuring Agreement

### SECTION I. UNDERGROUND STORAGE TANK COVERAGE

#### 1. Insuring Agreement. Bodily Injury And Property Damage Liability

a. Coverage A - Bodily Injury and Property Damage Liability

- (1) We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies.
- (2) This insurance applies to "bodily injury" and "property damage" only if:
  - (a) The "bodily injury" or "property damage" is caused by an "underground storage tank incident" that commences on or after the Retroactive Date shown in the Declarations of this policy and before the end of the policy period;
  - (b) The insured's responsibility to pay damages because of "bodily injury" or "property damage" is determined in a "suit" on the merits in the "coverage territory" or in a settlement we agree to; and
  - (c) A claim for damages because of the "bodily injury" or "property damage" is first made against any insured, in writing, in accordance with Paragraph (3) below, during the policy period or any Extended Reporting Period we provide under Section V. Extended Reporting Periods.

c. Coverage B Corrective Actions Coverage Definition [Cure Coverage]

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- 2.** "Corrective action costs" means reasonable and necessary expenses incurred by you in response to a confirmed "underground storage tank incident" for corrective action as specified in 40 CFR Sections 280.60-280.67 and 40 CFR Section 280.72 promulgated by the Federal Environmental Protection Agency (EPA).

d. Coverage B Corrective Action Insuring Agreement.

**b.** Coverage B. Corrective Action Costs

- (1)** We will pay those sums the insured becomes legally obligated to pay for "corrective action costs" to which this insurance applies as a result of an "underground storage tank incident".
- (2)** This insurance applies only if:
- (a)** An "underground storage tank incident" commences on or after the Retroactive Date shown in the Declarations of this policy and before the end of the policy period; and
- (b)** Such "underground storage tank incident" is reported in writing, in accordance with Paragraph (3) below, during the policy period or any Extended Reporting Period we provide under Section V. Extended Reporting Periods.
- (3)** An "underground storage tank incident" will be considered reported at the earliest time:
- (a)** You report to us, in writing, an "underground storage tank incident";
- (b)** You report to an "implementing agency", in writing, an underground storage tank incident,
- (c)** You receive a written notice from an "implementing agency" which requests or demands that you take action due to an "underground storage tank incident".

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(4) The amount we will pay for damages because of "bodily injury" or "property damage" (Coverage A) or for "corrective action costs" is limited as described in Paragraph 1. of Section III. Limits. . . .

2. Underwriting requires inspection prior to quoting and binding coverage.
3. Providers of Coverage
  - a. Private Carriers.
  - b. State UST Funds.
    - 1) Found in 28 states.
    - 2) State funds provide only part of the required coverage.
4. The limits available for this coverage range from \$1 million to \$10 million, with minimum premiums as low as \$2,000 per tank and minimum deductibles of \$5,000.

### **E. Waste Transportation Pollution Liability Insurance**

1. Exposures
2. Coverage
  - a. Liability
    - 1) Loading and unloading
    - 2) In-transit
    - 3) Trucking, or motor carrier, companies that are subject to regulation under the Motor Carrier Act of 1980 are required to furnish evidence of financial responsibility at minimum limits determined by the commodity that they transport

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- b. First Party Site Pollution Coverage
  - 1) Site pollution includes the clean-up.
  - 2) Historical and or ongoing contamination coverage.
- c. Typically, subject to a deductible or self-inured retention.

### **F. Environmental Professional Liability - Engineers and Consultants Errors and Omissions Liability Insurance and Professional Environmental Consultants Liability**

- 1. Separate policy.
- 2. Can be covered by an endorsement to the professional liability E & O Policy.

### **G. Property Transfer and Remediation Insurance and Post Acquisition Real Property Insurance**

- 1. Provides coverage for cleanup costs of real property when contamination is first discovered after the named insured acquires the property.
- 2. First introduced in 1991.
- 3. Underwriting.
  - a. Environmental audit required usually at a minimum price.
  - b. Full Scale Environmental Investigation may be required after indications discovered from audit report.
  - c. Full scale environmental investigation can be very expensive.

### **H. Financial Institution Environmental Liability Insurance**

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1. The court case United States v. Fleet Factors Corp created the exposure.
2. Coverage.
  - a. Protects financial institution from liability to third parties, including regulatory agencies, arising from ownership interest in polluted property.
  - b. Protects the insured from economic loss suffered because of borrower inability to repay the loan on contaminated property.
  - c. Coverage to include off-site migration of pollution, pollution from ongoing operations, and even third-party bodily injury in limited cases.
  - d. Limits have been extended to \$10 million per site and \$20 million aggregate, and the policies can be written on a per-site basis or for an entire loan portfolio.

### **I. Other Types of Environmental Insurance**

1. Site Owners Pollution Legal Liability Insurance (PLL) or Cost Cap Policy
  - a. An owner of a polluted piece of property has already expended thousands or even millions of dollars to investigate and obtain cost estimates to clean up the site.
  - b. The property owner wants some product that will protect him should the remediation project run over budget due to a change in governmental regulations or if the environmental remediation contractor encounters previously unknown contamination on the jobsite within the scope of work.
  - c. The cost cap policy essentially provides coverage for the excess costs and expenses to remediate pollution conditions at a covered location.

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- d. It does not provide for third-party claims of bodily injury or property damage, as it is not meant to serve as a PLL policy.
- e. Legal defense costs may or may not be provided.
- f. It is written on a claims-made-and-reported basis with significant self-insured retention amounts (generally \$250,000 or greater), and a policy term of generally no longer than the timeframe to complete the remediation project.
- g. A detailed remedial work plan is required, with detailed cost budget, and any covered costs more than that work plan to be paid by the insurer up to the applicable liability limits.
- h. Coverage is not provided for just any type of cost overrun; rather, the excess costs must generally arise out of one of the following contingencies:
  - 1) A material change in governmental regulations or cleanup standards during the project;
  - 2) The discovery of increased levels of pollution; or
  - 3) The discovery of pollution not within the original work plan.
- i. A change in conditions that would trigger coverage must be reported to the insurer in an expeditious manner to avoid coverage issues, and usually the insured is required to submit regular status reports to the insurer, who will be monitoring the project's status.
- j. Merger and Acquisition representations and warranties in the purchase agreement may require the purchase of this coverage.

### 2. Directors and Officers Environmental Insurance

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- a. Also available is a policy that covers pollution-related claims against directors and officers that are excluded from standard D&O policies.
  - b. This coverage is especially important for directors and officers of an environmentally sensitive operation or environmental remediation projects.
3. Owners Controlled Contractors Insurance Liability Program (OCIP) or Contractors Controlled Insurance Liability Program (CCIP)
- a. Because of the substantial pollution liability loss exposures in large environmental cleanup projects, site owners typically require pollution insurance coverage from contractors performing professional services or remediation operations at the site.
  - b. However, high minimum premiums faced by each contractor individually and the reality that many contractors do not carry pollution coverage on an ongoing basis often make it impractical to require each contractor to purchase a separate policy to cover the cleanup work.
  - c. Under an owner-controlled insurance program, the site owner purchases the primary pollution insurance protection for itself and all contractors involved in the project.
  - d. The program can provide CPL insurance and environmental consultants E&O insurance or asbestos abatement liability and asbestos consultants E&O coverages.
  - e. Commonly a program of this type is established by the site owner purchasing a single \$5 million per occurrence, \$10 million aggregate CPL or E&O insurance policy, or a policy that combines these coverages.
  - f. Individual contractors are then endorsed onto the policy through the completion of a simplified application process.
  - g. The site owner is the named insured on the policy, and the contractors are added as additional named insured.



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4. Closure and Post Closure Insurance (Waste Disposal Site)
  - a. Surety Bonds posted to confirm financial capability to perform if required.
  - b. Coverage can be written under a PLL or an EIL policy but it must be renewed every year.
  
5. Asbestos and Lead Liability
  - a. Asbestos abatement liability insurance policies typically track the CGL policy form.
  - b. Most provide coverage for asbestos abatement operations by amendment of the CGL pollution exclusion.
  - c. Both the CPL and asbestos abatement liability policy use payroll and receipts as the rating basis to determine premium.
  - d. Since these coverages are redundant for premium computation purposes, if two different insurers are being used, each of the insurers should be aware of the existence of the other policy and should issue endorsements that enable the insured to avoid paying double the necessary premium.
  - e. Policy forms and insurer integrity vary a great deal within the asbestos abatement liability insurance market.

### **J. Quick Pollution Liability Checklist**

1. What are the retroactive dates for the Claims Made Policy?
2. What are the Extended Reporting Period Provisions of the Claims Made Policy?
3. What is the Self Insured Retention or Deductible?
4. How are defense costs handled?

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- a. In addition to the limits?
- b. Within the limits? (Usually within the limits)
5. What locations are covered?
  - a. Scheduled locations only?
  - b. Blanket locations?
6. What injuries and damages are covered?
  - a. Bodily injury and property damage?
  - b. Off premises clean up?
  - c. On site remediation or cleanup?
7. Who is an insured?
  - a. Named insured in the declarations page?
  - b. Officers, directors, stockholders, partners, members, and employees?
  - c. Newly acquired or formed entities included?
8. Is mold covered or excluded?
9. What are the per occurrence and aggregate limits of coverage and are there separate limits for the commercial general liability coverage and the clean-up coverage?
10. What are the exclusions?
  - a. Contractual?
  - b. Intentional non-compliance with statute or regulations?
  - c. Ownership, maintenance, use and loading or unloading or autos, water craft, and aircraft?

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- d. Loading and unloading of cargo or stock?
  - 1) Absolute exclusion?
  - 2) Off premises only?
- e. Asbestos and lead excluded?
- f. Underground Storage tanks excluded?
- g. Ports and offshore facilities excluded?
- h. Professional liability exposures excluded?
- i. EPA National Priorities List (Superfund Sites) excluded?
- j. Fines and penalties excluded?
- k. Punitive damages excluded?

### **K. Risk Management Techniques that Apply to the Exposure**

- 1. Avoidance
  - a. Client should not buy or lease anything.
  - b. Client should not perform any operations.
  - c. Client should not manufacturer or sell products.
  - d. The tail of past acts may still haunt the client.
- 2. Non- Insurance Transfer
  - a. One party transfers the responsibility and liability to another party.

Lessor agrees to indemnify, defend and hold harmless Lessee, its directors, officers, shareholders, employees, agents, contractors, subcontractors, subtenants, concessionaires and invitees from and against any and all claims, demands, losses, liabilities, judgments,
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settlements, damages, penalties, consequential damages (including those arising out of Lessee=s loss or impaired use of the premises), exemplary damages, fines, encumbrances, liens, remediation, abatement, costs and expenses of investigation in defense of any claim, action or suit, demand or administrative proceeding (including reasonable attorney's fees) arising directly or indirectly from the presence or suspected presence of any Hazardous Materials in, upon, beneath or affecting the premises, or arising in any manner whatsoever out of the violation or obligation under any of the laws and any federal, state or local statute, regulation, guidelines, requirement, order, ordinance, code, license, permit, or similar items relating to the protection of the environment or human health and any common law cause of action or liability related to the environment, public health or personal injury or property damage arising from exposure re to any Hazardous Materials or arising in any manner whatsoever out of the presence of USTs beneath the surface of the Leased Premises or the leakage of Hazardous Materials from the USTs onto the Leased premises.

- b. Remember that the client is not transferring the liability; he or she is only transferring the obligation to pay.
  - c. Can the Indemnitor honor the contract and make the payments if necessary?
  - d. Always consult an attorney in developing non-insurance transfer agreements.
3. Risk Control
- a. Site assessments prior to purchasing or leasing property.
  - b. Phase One Assessment.
    - 1) Review records for the site.
    - 2) Review past, current and proposed uses for the site.
    - 3) Physical inspection of the site.
    - 4) Review and Inspect adjacent land.
    - 5) Review Regulatory records.
    - 6) Costs range from lows at \$3,500 to highs of \$35,000.

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- c. Phase Two
  - 1) Testing for pollutants.
  - 2) Analysis of soils, air, building insulation and water samples.
  - 3) Develop an abatement plan with recommendations for control.
  - 4) Cost will range from \$15,000 to \$125,000 or more depending on the pollutants.
- 4. Insurance Risk Transfer
  - a. Insurance contract that responds to third party bodily injury and property damage and includes remediation coverage.
  - b. Coverage for operations, underground tanks, contractor operations, products and completed operations, transit and professional liability exposures.

## VIII. POLLUTION MARKET AND TARGET RISKS

### A. Pollution Market place

- 1. The market for pollution liability coverage has traditionally been broken down into three segments:
  - a. "Generators": businesses such as manufacturers and service stations with a recognized and ongoing exposure to pollution incidents;
  - b. Environmental operations: remediation contractors, engineers, consultants, haulers, and makers of equipment or products used in environmental remediation; and
  - c. General business operations: without a clearly defined environmental liability exposure but subject occasionally to such claims.

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2. Insurance coverage for risks in the first two categories has been available at generally stable prices and terms in recent years, even during the hard market that beset other lines.
  - a. That continues to be true of "generator" risks, but insureds in the second category environmental contracting and servicing operations have faced a somewhat harder market in the last year, with significant premium increases and, in some cases, a restriction of coverage provisions, especially for the professional liability exposures of engineers and consultants.
  - b. That trend is expected to continue through 2019 and 2020.
3. Business entities in the third category: those with only occasional or difficult-to-measure pollution exposures can expect the market to vary between very hard and very competitive.
  - a. General contractors and subcontractors seeking contractor's pollution liability (CPL) insurance have encountered rapidly rising premiums and restrictive coverage provisions in the last couple of years, and many have had to turn to alternative risk financing or contractual transfer strategies to deal with the exposure.
  - b. Many pollution liability policies, for example, are now written to exclude mold claims, with a buy-back option that allows the insurer to underwrite the exposure on a submission-by-submission or even project-by-project basis.
4. The financial risk segment of the market, offering products that cover the contingent environmental risks associated with real estate transfers and corporate mergers and acquisitions, or cap the cost of known remediation obligations, continues to be a hotbed of innovation.

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5. This segment of the market is very competitive but also requires careful scrutiny of policy provisions, since coverage terms can vary widely.
6. Currently, there are six major insurers writing environmental insurance products on a readily available basis with significant capacity and many different coverage options:
  - a. Chartis, American International Specialty, or AIG Environmental
  - b. XL Environmental (formerly ECS) Capital,
  - c. Chubb Environmental Solutions,
  - d. Ace Insurance,
  - e. Zurich,
  - f. Gulf/Travelers
  - g. STARR (Environmental)
  - h. Berkley
  - i. Markel
  - j. XL Catlain
  - k. It is estimated that these markets account for approximately 85 percent of environmental premiums written each year.
  - l. While others offer environmental insurance (American Safety, Markel, Great American, Travelers, Seneca, Liberty Mutual, Hartford), such products are often underwritten on a limited risk basis with capacity and coverages less broad than that offered by the six major insurers.

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7. Each insurer offers coverage on both admitted and non-admitted paper, depending on the risk to be insured and the nature and extent of any manuscript endorsements attached to the policy.
8. Despite the relative limited number of insurers offering environmental insurance products, consumers find a marketplace of competitive coverage options and pricing, even in today's hardening insurance market.

### **B. Target Risks**

1. Pollution Legal Liability Insurance. (PLL)
  - a. The PLL policy is most suitable for firms with operations that present a threat of contamination to surrounding properties from any materials considered to be pollutants under the CGL policy.
  - b. PLL insurance can also be used to meet the financial responsibility requirements for landfills and treatment storage and disposal sites under the Resource Conservation and Recovery Act, for petroleum operations under the Oil Pollution Act of 1990, and under various state financial responsibility laws.
  - c. The following target markets.
    1. General manufacturers
    2. Chemical manufacturers
    3. Petroleum and mining operations
    4. Landfills and treatment, storage, and disposal facilities
    5. Utilities
    6. Health care industry



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- d. PLL insurers have targeted larger firms, and the minimum premiums and self-insured retentions on these programs range from \$10,000 to \$25,000, and from \$25,000 to \$50,000, respectively.
  - e. Programs have been established for smaller sized operations with less pervasive exposures at minimum premiums of \$5,000 and SIRs of \$25,000.
  - f. Special programs have been established for industry groups (e.g., health care) to address some of the unique environmental risks of those groups.
2. Contractors Pollution Liability Insurance.
- a. Contractors pollution liability (CPL) insurance can be considered stopgap coverage for the pollution exposure arising out of environmental work.
  - b. It provides pollution liability and defense coverage for bodily injury, property damage, and environmental cleanup costs for the contractor's described operations.
  - c. Although CPL coverage has its roots in pollution legal liability insurance, a standard PLL policy provides little or no insurance protection for contractors.
  - d. The PLL policy covers pollution emanating from the insured's owned sites, while the CPL policy recognizes that a contractor will be operating on sites owned by others.
  - e. CPL coverage is available for, and should be considered by, any contractor who is working on environmentally sensitive projects.
  - f. Because most properties being developed today have had some previous commercial or agricultural use, environmental exposures are not limited to heavy industrial or waste disposal sites.

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- g. Currently insurers are willing to provide the coverage on an incidental basis but are reluctant to insure non-environmental contractors who are bidding on remediation work.
- h. Contractors that have been specifically targeted by CPL insurance markets include the following.
  - 1) Environmental remediation contractors
  - 2) Underground storage tank installation/removal contractors
  - 3) Emergency response contractors
  - 4) Industrial cleaning contractors
  - 5) Mobile treatment contractors
  - 6) Biological remediation contractors

### **IX. Conclusion**

- A. Know the coverage you are selling and be careful with the Claims Made Disclosure requirements in your state.**
- B. Work with your client in completing the applications.**
- C. Be incredibly careful on the financial strength of the insurance carrier chosen.**
- D. Read the Coverage Forms Carefully.**

