



JAMES K. RUBLE SEMINAR

Ruble Graduate Seminar

Pennsylvania

August 8-9, 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

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Section 1

A Detailed Review of Provisions of the CGL

A DETAILED REVIEW OF PROVISIONS OF THE CGL

Craig F. Stanovich, CPCU, CIC, CRM, AU

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INSURING AGREEMENT – COVERAGE A – BI AND PD

I. CGL Trigger

- Does an “occurrence” trigger an occurrence-based CGL policy?

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

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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

INSURING AGREEMENT – COVERAGE A – BI AND PD

A. Is the CGL in effect when work is negligently performed the policy that is triggered?

- C&S Construction installs a deck on Rich's house today. The installation is done in a negligent manner – the deck is not properly fastened to the house.
- Two years later Rich is sitting on his deck when it collapses, seriously injuring Rich. He sues C&S for his BI.

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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

INSURING AGREEMENT – COVERAGE A – BI AND PD

- CGL Insurance in effect for C&S:
 - Today (Time Deck is Built) is Travelers
 - \$1,000,000 Each Occurrence Limit
 - January 1st to January 1st effective dates
 - Two Years Later (When Deck Collapses) is Hartford
 - \$1,000,000 Each Occurrence Limit
 - January 1st to January 1st effective dates

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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

INSURING AGREEMENT – COVERAGE A – BI AND PD

- B. Hartford CGL must respond – BI “occurred” during the Hartford CGL Policy Period.
- C. When the “occurrence” takes place is not the trigger of the CGL and therefore is not relevant. (See Notes)

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“The language of these three policies unambiguously distinguishes between the causative event – an accident or continuous or repeated exposure to conditions – and the resulting property damage. It is the property damage that must occur during the policy period, and ‘which results’ from the accident from the accident or ‘continuous or repeated exposure to conditions.’”

EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd’s
848 A.2d. 715, 721 (NN 2004)

- **Don't Confuse The "Occurrence" With "Trigger" of Coverage**

- "Occurrence" is ***not*** the trigger of coverage.
- "Occurrence" is the act of the insured (the accident, event or conditions) that results in injury.– ***Cause***
- It is the resulting injury during the policy period that *triggers* coverage.– ***Effect***

- » ***Source: Jenner & Block & Morrison Mahoney LLP***

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INSURING AGREEMENT – COVERAGE A – BI AND PD

D. When BI or PD occurs is relevant
and is the Trigger of an “occurrence”
CGL policy (See Notes)

E. BUT...

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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," that claims against insured that it manufactured defective plumbing system were covered if the buildings in issue suffered water damage due to leaks during the policy period, regardless of when the plumbing systems were installed, because plain language of policies state "that the insurable event which gives rise to the insurers' obligation to provide coverage is the physical damage to tangible property." [Emphasis added]

Millers Mut. Fire Ins. Co. of Tex. v. Ed Bailey, Inc., 647 P.2d 1249, 1250, 1253 (Idaho 1982), the Idaho Supreme Court :

... 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." [Emphasis added]

INSURING AGREEMENT – COVERAGE A – BI AND PD

II. CGL Trigger – What if exactly when BI or PD took place is difficult to determine?

- BI or PD may happen over time (progressive, cumulative or continuous injury or damage).
- Does this change the CGL policy Trigger?

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

INSURING AGREEMENT – COVERAGE A – BI AND PD

- A. Courts will determine when BI or PD took place - four “trigger” theories
 - 1. Exposure
 - 2. Manifestation
 - 3. Injury-in-Fact
 - 4. Continuous Trigger

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INSURING AGREEMENT – COVERAGE A – BI AND PD

1. **Exposure**—*All CGL policies are triggered if they are in effect during exposure to injurious or harmful conditions. Primarily used in asbestos cases, this theory considers bodily injury to begin when a person was first exposed to asbestos, usually at the first inhalation of asbestos fibers.*

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Source: *Trigger Theories and the CGL* by Craig F. Stanovich, CPCU, CIC, AU – December 2008

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INSURING AGREEMENT – COVERAGE A – BI AND PD

2. 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 the injury or damage may have been occurring prior to discovery may not be taken into account in this theory.

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Source: *Trigger Theories and the CGL* by Craig F. Stanovich, CPCU, CIC, AU – December 2008

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INSURING AGREEMENT – COVERAGE A – BI AND PD

- 3. 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.*

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Source: *Trigger Theories and the CGL* by Craig F. Stanovich, CPCU, CIC, AU – December 2008

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INSURING AGREEMENT – COVERAGE A – BI AND PD

4. **Continuous Trigger Theory**—*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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Source: *Trigger Theories and the CGL* – December 2008

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INSURING AGREEMENT – COVERAGE A – BI AND PD

B. States follow different theories, which may even differ within the state depending upon type of injury or damage:

- Asbestos, Silicosis, DES
- Noise, Mold, Arsenic, Lead Paint
- Environmental Damage
- Construction Defects

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INSURING AGREEMENT – COVERAGE A – BI AND PD

C. Some examples by state (See Notes):

- Exposure – AL, AK, GA, LA*, MA*, NY
- Manifestation – LA, MA, PA*, RI*, WV

*Highest State Court

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Source: General Liability Insurance Coverage – Key Issues in Every State (Third Edition), By Randy J. Maniloff and Jeffrey W. Stempel

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NOTE: Cases as of January 2015. States may fall into more than one category due to state or federal court decisions applying that state's law

Those states marked with an asterisk (*) are those states in the highest court has addressed the “trigger” issue. As noted earlier, the highest court may adopt more than one theory depending upon the type of injury or damage.

INSURING AGREEMENT – COVERAGE A – BI AND PD

C. Some examples by state (See notes):

- Injury-in-Fact – AL, FL, HI*, ID, IN, KS, MA, MD, MI*, MN*, MO, ND*, NH*, NY, NC*, ND*, OH, OR, PA, SC, TX*, UT,
- Continuous – AZ, CA*, CO*, CT*, DC, DE, GA, IL*, IN*, KS*, MA, MD, MN*, MS, NE, NJ*, NY, OH, PA*, SC*, TX, VT*, WA, WV, WI*

*Highest State Court

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Source: General Liability Insurance Coverage – Key Issues in Every State (Third Edition), By Randy J. Maniloff and Jeffrey W. Stempel

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INSURING AGREEMENT – COVERAGE A – BI AND PD

C. Some examples by state (See notes):

- No Authority – AR, IA, KY, ME, MT, NM, OK, SD, TN, WY

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Source: General Liability Insurance Coverage – Key Issues in Every State (Third Edition), By Randy J. Maniloff and Jeffrey W. Stempel

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Those states marked with an asterisk (*) are those states in the highest court has addressed the “trigger” issue. As noted earlier, the highest court may adopt more than one theory depending upon the type of injury or damage.

INSURING AGREEMENT – COVERAGE A – BI AND PD

D. Texas Supreme Court – August 29,
2008 (See Notes)

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

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This was a question certified to the Texas Supreme Court by the United States Court of Appeals for the Fifth District

OneBeacon Ins. Co. v. Don's Bldg. Supply, Inc. 496 F.3d 361 (5th Circuit 2007)

INSURING AGREEMENT – COVERAGE A – BI AND PD

D. Texas Supreme Court – August 29, 2008
(See Notes)

- Answer: *we hold that property damage under this policy occurred when actual physical damage to the property occurred. The policy says as much, defining property damage as "[p]hysical injury to tangible property," and explicitly stating that coverage is **available if and only if** "property damage' occurs during the policy period."*

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Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 20, 24 (Tex. 2008)

INSURING AGREEMENT – COVERAGE A – BI AND PD

D. Texas Supreme Court – August 29, 2008
(See Notes)

- Answer: So in this case, property damage occurred when a home that is the subject of an underlying suit suffered wood rot or other physical damage. *The date that the physical damage is or could have been discovered is irrelevant under the policy. Many courts agree with the analysis we adopt today, sometimes called the "actual injury" or "injury-in-fact" approach [Emphasis added.]*

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Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.,
267 S.W.3d 20, 24 (Tex. 2008)

INSURING AGREEMENT – COVERAGE A – BI AND PD

- Does continuous, progressive or continuous BI or PD change the CGL coverage trigger? NO!!
- Note that in *OneBeacon v. Don Building Supply*, Fifth Circuit asked when the PD took place, not if the CGL is triggered when the PD took place!!

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INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation of Loss

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

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INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation of Loss

B. Illustration – C&S Roofing Co. *improperly* installs a roof on 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 PD is found and roof fixed.

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C&S Roofing installed only the roof. Coverage is being sought for damage to property other than C&S work (the roof) – the water damage to other portions of the school.

INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation of Loss

B. Illustration – Here is the C&S
CGL insurance (during PD):

- YR 1 - \$1 mil CGL/\$4 mil XS - AIG
- YR 2 - \$1 mil CGL/No XS – Zurich
- YR 3 - \$1 mil CGL/No XS - ACE

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INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation of Loss

B. Illustration – Property damage is determined to be \$5 million that took place over the three years.

- Is C&S fully covered?
- Depends on theory of allocation

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INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation of Loss

All Sums – When multiple policies are triggered, insured may choose 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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INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation of Loss

All Sums – Under this approach, C&S is allowed to choose YR 1 – AIG and “go vertical” and thus would be covered for the entire \$5 million judgment. Most favorable theory for the insured. See Notes.

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YR 1 - \$5,000,000 Paid by AIG – Limit is \$5 Mil

YR 2 – NO CLAIM AGAINST ZURICH*

YR 3 - NO CLAIM AGAINST ACE*

Total: Insurers Pay: \$5,000,000

C&S pays \$ 0

*AIG might have a right of equitable contribution against Zurich and ACE for their proportionate share – this does not affect insured.

INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation of Loss

Pro Rata – Courts might allocate C&S loss by “time on risk.” As each insurer had one year out of three years on risk, each insurer is liable for 1/3 of \$5 million or \$1,666,666 each loss. C&S is not fully covered – uninsured for \$1,333,332. See Notes.

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YR 1 - \$1,666,666 Paid by AIG – Limit is \$5 Mil

YR 2 - \$1,000,000 Paid by Zurich – Limit is \$1Mil (C&S uninsured for \$666,666 for YR2)

YR 3 - \$1,000,000 Paid by ACE – Limit is \$1Mil (C&S uninsured for \$666,666 for YR3)

Total: Insurers Pay: \$3,666,666

C&S Uninsured for \$1,333,332

INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation – By State

- **All Sums** – AR, CA*,DE*, DC, IL*, IN*, MA, MT, NY, OH*, OR, PA*,TN, TX, VA, WA*,WV, WI*
- **Pro Rata** - AL, CA, CO*,CT*,GA, HI*, IA, ID, KS*, KY*, LA*, MA*, MD, MI, MN*, MO, NE*, NH*, NJ*, NY*, OR, RI, SC*, TX, UT*,VA, VT*

*Highest State Court

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Source: General Liability Insurance Coverage – Key Issues in Every State (Third Edition), By Randy J. Maniloff and Jeffrey W. Stempel

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Those states marked with an asterisk (*) are those states in the highest court has addressed the “allocation” issue.

INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation – By State

- **No Authority-** AK, AZ, FL, ME, MS, NV, NM, NC, ND, OK, SD, TN, WY

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Those states marked with an asterisk (*) are those states in the highest court has addressed the “allocation” issue.

INSURING AGREEMENT – COVERAGE A – BI AND PD

The Principles of the Law of Liability Insurance

- A majority of courts have held that, without an explicit *pro rata allocation* clause in the insurance policy, insurance companies “cannot limit their obligations to a *pro-rata* share or portion of the policyholder’s liability.”

American Law Institute

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From Letter Dated August 11, 2014 to the American Law Institute sent by “...attorneys [who] are ALI Council Members, Advisers and interested counsel who are dedicated to promoting clarity and uniformity in the law of liability insurance. This is also the stated goal of the American Law Institute.

INSURING AGREEMENT – COVERAGE A – BI AND PD

The Principles of the Law of Liability Insurance

- Under the majority rule, because standard general liability insurance policies require the insurance company to pay “all sums,” the policyholder is entitled to coverage in full under each of the triggered insurance policies, up to the limits of liability, if any, of each policy. This rule applies regardless of how many policies are triggered.
- American Law Institute

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From Letter Dated August 11, 2014 to the American Law Institute sent by “...attorneys [who] are ALI Council Members, Advisers and interested counsel who are dedicated to promoting clarity and uniformity in the law of liability insurance. This is also the stated goal of the American Law Institute.

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INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation – **HEADS UP!!**

C. Insurer may use non-ISO limitation or exclusionary endorsement such as:

1. Prior Work
2. Exclusion for progressive injury or
damage
3. First Manifestation endorsement
4. Non-cummulation endorsement

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Sample Exclusionary Wording (Progressive injury or damage
Exclusion):

This insurance does not apply to:

Any bodily injury or property damage that commenced in whole or
in part prior to this policy period.

INSURING AGREEMENT – COVERAGE A – BI AND PD

III. Theories of Allocation – **HEADS UP!!**

D. Effect of endorsements on C&S when Pro Rata allocation:

1. What if ACE and Zurich had exclusion for any injury or damage commencing prior to its policy period?
2. C&S insured for only \$1,666,666 and **uninsured for \$3,333,334**. See Notes

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YR 1 - \$1,666,666 Paid by AIG – Limit is \$5 Mil

YR 2 - \$0 Paid by Zurich – Limit is \$1Mil (C&S uninsured for \$1,666,666 for YR2 – excluded as prior PD)

YR 3 - \$0 Paid by ACE – Limit is \$1Mil (C&S uninsured for \$1,666,666 for YR3 – excluded as prior PD)

Total: Insurers Pay: \$1,666,666

C&S Uninsured for \$3,333,334

NOTE: All sums would still provide complete coverage for C&S on this claim.

**INSURING AGREEMENT –
COVERAGE A – BI AND PD**

IV. Known Loss or Damage - Montrose

A. No coverage provided if the BI or PD was known to certain insureds prior to the policy period.

B. Meant to exclude “known loss” or “loss in progress” but ISO wording is known injury or damage, not known loss.

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KNOWN INJURY OR DAMAGE WORDING

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

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part.

If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

INSURING AGREEMENT – COVERAGE A – BI AND PD

IV. Known Loss or Damage – Montrose Background

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

Source: ISO Circular LI-GL-1999-02 (January 7, 1999) 37

KNOWN INJURY OR DAMAGE WORDING

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

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part.

If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

**INSURING AGREEMENT –
COVERAGE A – BI AND PD**

IV. Known Loss or Damage –Illustration

D. C&S Roofing Co. *improperly* installs a roof on 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 C&S in the second year (YR2) but the roof is not roof fixed until year three.

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**INSURING AGREEMENT –
COVERAGE A – BI AND PD**

IV. Known Loss or Damage – Illustration

D. Here is the C&S CGL insurance:

- **YR 1 - \$1 mil CGL/No XS - AIG**
- **YR 2 - \$1 mil CGL/No XS – Zurich**
- **YR 3 - \$1 mil CGL/No XS - ACE**

**ASSUME ALL POLICIES HAVE KNOWN
INJURY OR DAMAGE WORDING
(MONTROSE WORDING)**

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**INSURING AGREEMENT –
COVERAGE A – BI AND PD**

IV. Known Loss or Damage – Illustration

D. C&S Roofing president found out about PD in YR2 (Zurich year). Same scenario of claim - \$5 million of PD takes place over three years. Who will pay?

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INSURING AGREEMENT – COVERAGE A – BI AND PD

IV. Known Loss or Damage –Illustration

D. \$1 million by AIG (policy limit)

\$1 million 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.

C&S must pay remaining \$3 Million regardless of Trigger Theory.

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KNOWN INJURY OR DAMAGE WORDING

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

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part.

If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

INSURING AGREEMENT –
COVERAGE A – BI AND PD

IV. Known Loss or Damage –Illustration

E. “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.

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**INSURING AGREEMENT –
COVERAGE A – BI AND PD**

IV. Known Loss or Damage – Illustration

E. “Strict Sameness” Test

H&H tenders claim to insurer. Insurer (Essex) denies coverage based on known damage limitation. Basis of denial is another homeowner had complained about H&H to city and H&H in 2000 about drainage issues from same subdivision. Does this constitute known PD for H&H?

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INSURING AGREEMENT –
COVERAGE A – BI AND PD

IV. Known Loss or Damage – Illustration

E. “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 “strict sameness” test.

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Essex Insurance Co. v. H&H Land Development Corporation, 525 F. Supp. 2d 1244 (M.D. Ga. 2007)

Duty To Defend

- **Duty To Defend - CGL Requirements**
- The duty to defend is triggered by a "suit" demanding damages against an insured for bodily injury, property damage, or personal and advertising injury covered by the CGL policy.
- If the damages being sought **are clearly not covered by the CGL** policy, the insurer will have no duty to defend

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Duty To Defend

- **The Meaning of "Suit."** A "suit," which is a term defined in the CGL policy means a civil proceeding, such as the filing of a complaint, more commonly known as a lawsuit.
- The definition of "suit" also includes arbitration or other ADR proceedings if the insured is 1) required to submit to such proceedings or 2) if the insurer consents to the proceeding.

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Duty To Defend

- **Duty To Defend - Scope of Duty**
- It is generally acknowledged that the duty of defense in the CGL policy is broader in scope than the duty to pay on behalf of an insured.
- **Most jurisdictions require that even if only *one allegation* in a suit of multiple allegations is *potentially covered* by the CGL policy, the insurance company has a duty to defend *the entire* suit.**

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Source: *Duty to Defend in the CGL Policy* – August 2002

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Duty To Defend

- There are two common approaches to determining the obligation to defend; a jurisdiction may follow one or both of these approaches.
- **Four Corners Test (Eight Corners in TX)**
- **Extrinsic Evidence Test**

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Source: *Duty to Defend in the CGL Policy* – August 2002

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Duty To Defend

- **The "Four Corners" Complaint Test.** In this traditional test, courts will look only at the allegations in the suit and compare them to the coverage provided in the CGL policy.
- If any of the allegations are *potentially* covered by the policy, *the duty to defend is established.*
- Many jurisdictions have ruled that *any doubt* regarding the obligation to defend is to be resolved in favor of the insured

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Source: *Duty to Defend in the CGL Policy* – August 2002

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Duty To Defend

- **Extrinsic Evidence.** Some jurisdictions look *beyond* how the allegations are stated to the basis of the allegations. This approach may result in a justifiable denial to defend an action that appears on its face to be a potentially covered claim.
- For example, a complaint that merely inserts the word "negligence" will not generally change a complaint and trigger the duty to defend.

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Duty To Defend

- **Extrinsic Evidence.** A review of extrinsic evidence may also work *in favor of an insured*.
- A complaint that alleged breach of contract and resulting consequential damages was found to be analogous to damages arising out of defamation, a claim potentially covered by Coverage B of the CGL policy.
- *Boston Symphony Orchestra, Inc. v Commercial Union Insurance Co., 406 Mass 7, 12–13 (1989)*].

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Duty To Defend

- **Reimbursement of Defense Costs**
- An insurer will generally not be able to recover from an insured the cost of defending any claim that was *potentially covered* by the CGL policy but ultimately was determined not to be a covered claim.
- The cost of such defense *is considered part of the insurer's independent duty to defend as contained in the CGL form*. In fact, some courts have referred to this independent duty to defend as "litigation insurance."⁵²

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Duty To Defend

- **Reimbursement of Defense Costs** For those allegations which were *never* potentially covered, but which were defended with other potentially covered *allegations, reimbursement from an insured may be allowed.*
- The insurer must demonstrate the defense costs specifically allocated to the uncovered allegations to recover such costs.
- *Buss v Superior Court (Transamerica Ins. Co.), 16 Cal 4th 35, 65 (1997)*

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Duty To Defend

- **Disclaim the Duty To Defend.** An insurer must be able to *clearly demonstrate* that the suit has *no possibility of being covered by the CGL policy*.
- For example, it must be evident the allegations do not seek damages, even remotely, for bodily injury, property damage or personal or advertising injury.

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Duty To Defend

- **Reservation of Rights.** Where there is a possibility that CGL exclusions may apply to eliminate potential coverage or if some of the allegations are clearly not potentially covered by the CGL policy, the insurer may begin their defense but reserve their right to withdraw from defense as facts are established.

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Duty To Defend

- **Reservation of Rights.** Typically, the insured is advised that they may need to retain their own counsel.
- Many states view the issuance of a reservation of rights letter as creating a possible conflict of interest. *If a conflict of interest results, the insurer may be required to appoint separate independent counsel to represent the insured.*

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Duty To Defend

- **Reservation of Rights.** California, arguably one of the stronger advocates of appointment of independent counsel:
 - “... where there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights based on possible noncoverage under the insurance policy, *the insurer must pay the reasonable cost for hiring independent counsel by the insured*”

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Duty To Defend

- **Declaratory Judgment.** Insurers do have the option, either in lieu of or in addition to reserving their rights, to request the court to decide a dispute as respects their duty to defend via a declaratory judgment action.
- In essence, the insurer files an action asking the court to rule and declare the rights of each party under the CGL policy regarding defense.

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Duty To Defend

- *“The American Law Institute (ALI), in its current draft of the Restatement of the Law of Liability Insurance, has adopted the position that a liability insurer in breach of its duty to defend, but not acting in bad faith, forfeits the right to dispute coverage of the resulting judgment or reasonable, noncollusive settlement in a lawsuit. The ALI view is the minority rule in the courts in that most make bad faith a prerequisite for loss of a coverage defense ...”*

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Enhancing the Socially Instrumental Role of Insurance:
The Opportunity and Challenge Presented by the ALI
Restatement Position on Breach of the Duty to Defend

By Jeffrey W. Stempel

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

- A. **Illustration** - One problem that Richard Alain, owner of the restaurant Chez Richard, Inc., constantly battles is the turnover in his wait staff. Most of the personnel are part-time students who too often fail to appear for work on time (if they appear at all), leaving him shorthanded, and his customers annoyed.

60

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

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

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

Source: *When Workers are not Employees* - September, 2007.

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

- A. **Illustration** - At wits' end, Richard decides to use a temporary employment-staffing agency (Wait With Us, Inc.) to supply him with his wait staff. Although this approach is decidedly more expensive—the temporary staffing business, which specializes in restaurant staffing, guarantees a reliable supply of personnel.

61

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

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

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

- A. Illustration** -In his haste to make the perfect entree for a VIP, Richard leaves a large pot of boiled water precariously balanced on the counter where the wait staff picks up their orders. Unfortunately, while reaching to pick up a dish for a customer, a member of the wait staff, Lisa, who is a single mother, brushes against the pot, causing it to tip, splashing and seriously burning her hands and face.

62

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

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

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

- A. Illustration** -The staffing agency pays for the statutory workers compensation benefits now due Lisa. Because of the severity of her injuries and the need for others to care for her child, Lisa feels compelled to bring a tort action against Chez Richard, Inc., asserting that Chez Richard was negligent in causing her injuries. In her lawsuit, she has demanded \$500,000 damages for her pain and suffering and, separately, \$500,000 of damages on behalf of her child, because of loss of consortium.

63

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

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

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

A. Illustration -Initial motions by Chez Richard to dismiss Lisa's lawsuits fail as the judge rules the exclusive remedy of the state's workers compensation statute does not apply between Chez Richard and Lisa. Chez Richard sends the lawsuit to the CGL insurer right away, but is stunned when the insurer flatly denies the claim—and asserts no coverage exists because of Exclusion e: employers liability. The insurer goes on to explain that this exclusion applies to bodily injury to an employee of the insured.

64

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

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

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

A. Illustration -After a review of the CGL policy in effect for Chez Richard, his broker finds the answer and writes to the insurer to refute its claim denial: Lisa is a "temporary worker" under the CGL policy and thus not an "employee."

Is Lisa a "temporary worker" and thus not an employee or a "leased worker" and an employee?

65

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

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

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

- A. Illustration** - The insurer argues that although Lisa may have been furnished to Chez Richard by Wait With Us, she was not:
- 1) a substitute for a permanent employee who was on leave;
 - 2) or supplied to meet a seasonal need or short-term workload condition.

66

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

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

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

A. Illustration - The insurer then concludes that since Lisa did not meet all aspects of the definition of "temporary worker," she cannot be considered a "temporary worker." A "temporary worker," in the opinion of the insurer, is a person who is furnished for a finite period of time to support or supplement the insured's workforce—not one who is to perform indefinitely as part of the insured's main workforce. Is the insurer correct?

67

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

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

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

B. Solution- Arguably the most effective way to close the coverage gap described above is the Alternate Employer Endorsement. Chez Richard could have required Wait With Us to include the Alternate Employer Endorsement on the workers compensation and employers liability policy of Wait With Us, specifically scheduling Chez Richard, Inc., as the alternate employer. While not a CGL solution, the Alternate Employer Endorsement would have provided coverage to Chez Richard as an alternate employer for Lisa's tort suit. 68

Alternate Employer Endorsement (WC 00 03 01 A) (excerpt)

Part One (Workers Compensation Insurance) and *Part Two (Employers Liability Insurance)* will apply as though the alternate employer is insured.

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DEFINITIONS - EMPLOYEE

XI. Leased and Temporary Workers

C. Solution- Injury to Leased Workers (CG 04 24) endorsement. This endorsement simply states that the term "employee" does not include a "leased worker" or "temporary worker." The effect of this is the employers' liability exclusion of the CGL no longer applies to the claims for injuries to a leased or temporary worker—neither is considered an employee of the insured for the purposes of applying this exclusion.

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COVERAGE FOR INJURY TO LEASED WORKERS CG 04 24 10 93

With respect to the Employer's Liability exclusion (Section I) only, the definition of "employee" in the DEFINITIONS Section is replaced by the following:

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

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Is it a Problem?

- A. We find our client *also* has coverage on *someone else's insurance*. Or that some unrelated person or organization is covered on our client's CGL policy.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Is it a Problem?

B. “...we have again the *problem* of an Insurer who has written the policy and taken the Assured's premium, urging him to go elsewhere, tentatively, if not finally, because another insurer is, or ought to be, or may be, liable for the whole, half, or part of a loaf.”

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Marwell Constr., Inc. v. Underwriters at Lloyd's, London, 465 P.2d 298 (Alaska 1970), Alaska Supreme Court quoting the Fifth Circuit Court of Appeals

Source: *Other Insurance and the CGL Policy* - May, 2009.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Is it a Problem?

B. “In the process the moving insurer ... asserts, what it so often denied that the policy should be liberally construed and ... manages to make itself enough of a party to force a construction of another contract made by another insurer with another assured and which, under no circumstances, was made for its benefit.”

72

Marwell Constr., Inc. v. Underwriters at Lloyd's, London, 465 P.2d 298 (Alaska 1970), Alaska Supreme Court quoting the Fifth Circuit Court of Appeals

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Is it a Problem?

B. “So it is here. Coming as it does *the accident and the assureds all seem but forgotten* as the two insurers match clause against clause, coverage against exclusion, claim against denial, in this battle between fortuitous adversaries.”

73

Marwell Constr., Inc. v. Underwriters at Lloyd's, London, 465 P.2d 298 (Alaska 1970), Alaska Supreme Court quoting the Fifth Circuit Court of Appeals

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – What is it?

C. To be considered "other insurance" for the purposes of this policy condition, the other insurance must be both valid and collectible. First, other insurance must usually be *insurance*. Is "self-insurance" considered insurance?

74

4. Other Insurance

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

Source: *Other Insurance and the CGL Policy* - May, 2009.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – What is it?

C. Illustration - A general contractor has elected a \$1 million self-insured retention on its CGL policy.

If a \$500,000 suit is brought against the general contractor, does the general contractor's CGL policy qualify as other insurance from the standpoint of the subcontractor's insurer who has listed the general contractor on the subcontractor's CGL as an additional insured?

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4. Other Insurance

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

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – What is it?

- C. Self-insurance ... does not fall within this definition [insurance] and therefore, is not "other collectible insurance." *State Farm Mut. Auto. Ins. Co. v. Universal Atlas Cement Co.*, 406 So. 2d 1184 (Fla. Dist. Ct. App. 1981)

76

4. Other Insurance

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

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – is it Valid?

- D. "Valid" insurance normally means the insurance policy is legal, i.e., enforceable. If the other insurance is subject to rescission because of a misrepresentation made by the policyholder, it will generally not be considered valid.

Similarly, if an insured does not comply with policy conditions, the policy may not be valid, such as a failure to timely notify the insurer of an accident.

77

4. Other Insurance

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

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – is it Collectible?

- E. "Collectible" usually requires the insurer be solvent. Along the same lines, if the aggregate limit or limits of a policy are exhausted and the insurer has no further obligation to any insured, the policy may be "valid," but it is not "collectible."

78

4. Other Insurance

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

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – is it Available?

- F. Other insurance and concurrent coverage exists where there are two or more insurance policies covering the same interest and against the same risk. *Federal Ins. Co. v. Empire Mut. Ins. Co.*, 181 A.2d. 568, 569 (N.Y. App. Div. 1992)

79

4. Other Insurance

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

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Priority of Coverage

- G. If a person or organization has the status of insured, this CGL policy is primary, unless Item b. applies.

It is worth noting that "primary" is the "default" position in the CGL priority of coverage to *all insureds* (including additional insureds added to this policy) and is "primary" unless the other insurance falls within Item b. Excess Insurance.

80

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies.

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

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CONDITIONS – OTHER INSURANCE
XII. Other Insurance – Priority of Coverage
G. The CGL policy is excess over certain other types of insurance (four listed types), regardless of the wording of the other insurance clauses of those policies, whether such policies are purported to be primary, excess, contingent, or on any other basis.

81

Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:.

Source: *Other Insurance and the CGL Policy* - May, 2009.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Listed Excess

H. Builder's Risk. If the insured is also an insured on a first-party policy, such as a fire and extended coverage policy, a builders risk policy, an installation floater, or coverage that is similar to the policies previously listed, and the coverage is intended to insure "your work," the CGL is excess of such a first-party policy. The distinguishing factor here is that the first-party policies insure "your work."

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Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

Source: *Other Insurance and the CGL Policy* - May, 2009.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Listed Excess

- I. **Fire Insurance.** A tenant, while renting a premises it does not own, may agree in a lease to be responsible for any damage to the landlord's building, regardless of fault or cause. In such cases, the tenant usually purchases fire or other first-party property insurance in its own name to protect its interest in the building.

83

Excess Insurance

(1) This insurance is excess over:

- (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:.
- (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

Source: *Other Insurance and the CGL Policy* - May, 2009.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Listed Excess

- I. **Fire Insurance.** If a fire occurs, the tenant's CGL policy (which may provide some coverage under the "Damage to Premises Rented to You" exception) expressly states it will apply as excess of the first-party property policy purchased by the tenant for any damage to the landlord's building.

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Excess Insurance

(1) This insurance is excess over:

- (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:.
- (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

Source: *Other Insurance and the CGL Policy* - May, 2009.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Listed Excess

- J. Legal Liability.** An organization regularly rents conference rooms at various hotels. As part of its property insurance program, the organization purchases the Legal Liability Coverage Form (CP 0040) to pay for its potential legal liability for property damage to the conference rooms.

85

Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:.

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Listed Excess

- J. Legal Liability.** A presenter from the organization forgets to shut off a projector, which overheats and causes the sprinklers in the conference room to discharge. The CGL policy clearly states it will apply as excess over any payments made under the Legal Liability Coverage Form for the water damage to the conference room.

86

Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Listed Excess

K. Aircraft, Autos, or Watercraft. A new restaurant offers valet parking. Not only has the restaurant purchased a CGL policy, it also has purchased a business auto policy including coverage for non-owned autos. While sending a text message on his cell phone, the attendant, while parking a patron's auto, knocks down a passerby, causing bodily injury.

87

Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:.

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I – Coverage A – Bodily Injury And Property Damage Liability.**

Source: *Other Insurance and the CGL Policy* - May, 2009.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Listed Excess

K. Aircraft, Autos, or Watercraft. The injured passerby sues the restaurant. The claim is tendered to both the restaurant's CGL and business auto insurers. While the CGL does provide coverage to the restaurant for the bodily injury that took place while the attendant was parking the patron's auto, the CGL will apply only as excess of the Business Auto policy of the restaurant.

88

Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:.

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I – Coverage A – Bodily Injury And Property Damage Liability.**

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Additional Insured

- L. Additional Insured by Endorsement on the policy of Another.** Disputes over the priority of coverage often arise when a policyholder has purchased its own policy and has also intentionally obtained coverage as an additional insured on the CGL policy of an unrelated person or organization, such as a tenant or subcontractor.

89

Excess Insurance

(1) This insurance is excess over:

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

Source: *Other Insurance and the CGL Policy* - May, 2009.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Additional Insured

- L. Additional Insured by Endorsement on the policy of Another.** It is generally understood that the intent of this arrangement is that policyholder's own CGL policy, that is the CGL on which the policyholder is listed as a named insured, is to apply as excess and not share its limits with the CGL policy on which it is an additional insured.

90

Excess Insurance

(1) This insurance is excess over:

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement. The April 2013 ISO CGL policy has eliminated the underlined wording (attachment of an endorsement)

Source: *Other Insurance and the CGL Policy* - May, 2009.

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Additional Insured

- L. Additional Insured by Endorsement on the policy of Another.** For example, if a general contractor and a subcontractor both have an ISO CGL policy (December 2007 edition) with the current other insurance wording, and the general contractor is also listed as an additional insured *by endorsement* on the CGL of the subcontractor, the policies will pay as follows.

91

Excess Insurance

(1) This insurance is excess over:

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement. The April 2013 ISO CGL policy has eliminated the underlined wording (attachment of an endorsement)

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Additional Insured

- L. Additional Insured by Endorsement on the policy of Another.** To the extent the general contractor is covered as an additional insured on the CGL policy of the subcontractor, the CGL policy of the subcontractor will apply on a primary basis to protect the additional insured general contractor. Recall that the CGL "default" as respects the order of coverage is for an insured (including an additional insured) to apply as primary coverage.

92

Excess Insurance

(1) This insurance is excess over:

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement. The April 2013 ISO CGL policy has eliminated the underlined wording (attachment of an endorsement)

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Additional Insured

L. Additional Insured by Endorsement on the policy of Another. The general contractor's CGL policy is excess based on its "other insurance" wording:

- **b.** This insurance is excess over:
- **(1)** Any other primary insurance available to you covering you for damages ... for which you have been added as an additional insured by attachment of an endorsement.

93

Excess Insurance

(1) This insurance is excess over:

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement. The April 2013 ISO CGL policy has eliminated the underlined wording (attachment of an endorsement)

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Additional Insured

- L. Additional Insured by Endorsement on the policy of Another.** This example presupposes that the general contractor and the subcontractor both have the same ISO “other insurance” wording. Several insurers, both national and regional, have developed their own proprietary additional insured endorsement forms, which include very significant differences in the wording of the other insurance clause.

94

Excess Insurance

(1) This insurance is excess over:

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement. The April 2013 ISO CGL policy has eliminated the underlined wording (attachment of an endorsement)

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Method of Sharing

N. By Limits – If any policy does not permit equal shares, the sharing is by limits.

Illustration - CGL for Company A is written by XYX Mutual with a limit of \$1 million each occurrence; the CGL for Company B is written by ABC Indemnity with a limit of \$500,000 each occurrence. The damages awarded are \$300,000. How much will each insurer pay? In contribution by Limits, each insurer would its share of the loss determined by the proportion its limit applies to total (sum) policy limits.

95

c. Method Of Sharing

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

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CONDITIONS – OTHER INSURANCE

XII. Other Insurance – Method of Sharing

N. By Limits - Here's how the damages would be shared when contribution by limits applies.

- XYZ—\$1 million each occurrence limit
- ABC—\$500,000 each occurrence limit
- Total Limits: \$1.5 million
- XYZ's share of the loss would be \$200,000 as a percentage of \$1.5 million or 67 percent; ABC's share of the loss would be \$100,000 as a percentage of \$1.5 million or 33 percent.

96

c. Method Of Sharing

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

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PRODUCTS-COMPLETED OPERATIONS

XIII. Elements of Products/Completed Operations Coverage

First, to be included within the products-completed operations hazard, the bodily injury or property damage must occur away from premises owned or rented by the named insured *and* arise out of "your product" or "your work," terms also defined in the CGL.

97

16. "Products-completed operations hazard":

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

Source: *The Hazards of Products and Completed Operations – Understanding the Fundamentals*– October, 2006.

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PRODUCTS-COMPLETED OPERATIONS

XIII. Elements of Products/Completed Operations Coverage

Second, for a product claim to be within the products-completed operations hazard, the Bodily Injury or Property Damages must occur after the named insured has to have given up physical possession of “your product”.

98

16. "Products-completed operations hazard":

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

except:

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

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PRODUCTS-COMPLETED OPERATIONS

XIII. Products/Completed Operations Coverage – “Your Product”

- A. “Your Product” includes goods or products manufactured, sold, handled, distributed, or disposed of by the named insured, others trading under the named insured's name, and includes a person or organization whose business assets a named insured has acquired. Your product includes containers (but not vehicles), materials, parts, or equipment used or furnished in connection with goods or services, but does not include any real property.

99

21. "Your product":

a. Means:

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

Source: *The Hazards of Products and Completed Operations – Understanding the Fundamentals*– October, 2006.

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PRODUCTS-COMPLETED OPERATIONS

XIII. Products/Completed Operations Coverage – “Your Product – Warranties”

- B. The definition of your product specifically includes warranties and representations made with respect to the fitness, quality, durability, performance, or use of your product.
- *Black's Dictionary* (Seventh Edition) states:
 - **Warranty**
 - 2. *Contracts*. An express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp. the seller's promise that the thing being sold is as represented or warranted.

—

100

21. "Your product":

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product";

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PRODUCTS-COMPLETED OPERATIONS

XIII. Products/Completed Operations Coverage – “Your Product – Warranties”

- C. Illustration** – “This saw will cut through any material!!” When Joe Bob attempts to cut a pipe the, saw blade shatters, injuring Joe Bob. He brings a complaint against the saw manufacturer for his injuries – alleging the saw breached an express warranty – it was fit to cut through any material.

101

21. "Your product":

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product";

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PRODUCTS-COMPLETED OPERATIONS

XIII. Products/Completed Operations

Coverage – “Your Product – Warranties”

- Breach of warranty is a contract theory of liability, not a tort theory. Claims that allege a product caused bodily injury or property damage because of a breach of warranty are asserting a breach of contract claim. While subject to other policy terms and conditions, the CGL policy plainly intends to include breach of warranty claims in the definition of your product.

102

21. "Your product":

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product";

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PRODUCTS-COMPLETED OPERATIONS

XIII. Products/Completed Operations

Coverage – “Your Product – Warnings”

- In addition to warranties, your product also includes providing or failing to provide warnings
- **Illustration** – When attempting to drill into masonry, the drill bit breaks and hits Jerry in the eye. Jerry sues the manufacturer for failing to warn that eye protection is needed when using the drill.

103

21. "Your product":

a. Means:

(2) The providing of or failure to provide warnings or instructions.

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PRODUCTS-COMPLETED OPERATIONS

XIII. Products/Completed Operations Coverage – NOT “Your Product”

- D. Vending machines or *other property* rented to or located for use of others but not sold are not considered your product.

104

21. "Your product":

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

Source: *The Hazards of Products and Completed Operations – Understanding the Fundamentals*– October, 2006.

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PRODUCTS-COMPLETED OPERATIONS
**XIII. Products/Completed Operations
Coverage – NOT “Your Product”**

- D. Illustration** - A hardware store rents chainsaws to homeowners for their personal use. If the homeowner is injured when using the chainsaw because the hardware store failed to properly maintain the equipment, the homeowner's claim against the hardware store is not considered a claim that will fall within the products-completed operations hazard as the injury did not arise out of your product.

105

21. "Your product":

- 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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PRODUCTS-COMPLETED OPERATIONS

XIII. Products/Completed Operations Coverage – “Your Work”

- E. “Your Work” includes operations performed by the named insured or on the named insured's behalf, including material, parts, or equipment in connection with the operations. Operations or work performed on behalf of the named insured means that work done by your subcontractor is still considered “your work.”

106

22. "Your work":

a. Means:

- (1)** Work or operations performed by you or on your behalf; and
- (2)** Materials, parts or equipment furnished in connection with such work or operations.

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PRODUCTS-COMPLETED OPERATIONS
**XIII. Products/Completed Operations
Coverage – “Your Work”**

- E. Similar to your product, the definition of your work includes warranties and representations made with respect to the fitness, quality, durability, performance, or use of your work as well as providing or failure to provide warnings or instructions. The breach of contract issue applies in the same manner to “your work” as it does to “your product.”

107

22. "Your work":

a. Means:

b. Includes:

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

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PRODUCTS-COMPLETED OPERATIONS

XIII. Products/Completed Operations

Coverage – “Your Work – Completed?”

- F. The products-completed operations hazard does not apply if the work has not yet been completed or abandoned. When is “your work” considered “completed” or “abandoned?”

108

16. "Products-completed operations hazard":

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

(2) Work that has not yet been completed or abandoned.

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PRODUCTS-COMPLETED OPERATIONS

XIII. When is “Your Work – Completed?”

F. The earlier of:

- (a) When *all* the named insured's work as required in a contract has been finished.
- **Illustration** – Phil's Plumbing has a contract with the city of Orlando to install the plumbing at the Washington School. Phil also has a second contract with Orlando to install plumbing at the Jefferson School next year. Even though Phil will be doing more work for the owner (City of Orlando), his work is considered “completed” at the Washington School when the work called for in that contract is complete.

109

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

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PRODUCTS-COMPLETED OPERATIONS

XIII. When is “Your Work – Completed?”

F. The earlier of:

(b) When all the work at a job site has been completed if the named insured's contract requires work under the same contract but at another job site.

- **Illustration** – If Phil’s Plumbing had one contract with the city of Orlando to install the plumbing at the Washington School and the Jefferson School, his work is considered “completed” at the Washington School when the work at that job is finished even though the entire contract (both schools) is not complete.

110

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

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PRODUCTS-COMPLETED OPERATIONS
XIII. When is “Your Work – Completed?”

F. The earlier of:

(c) When that part of the work done at a job has been put to its intended use by someone other than another contractor or subcontractor working on the same project.

Illustration – Although Phil has completed only one wing of the Jefferson School, the city begins using the completed wing. His work is considered “completed” in the wing that is done even though his work at the job site is not finished nor is his contract complete.

111

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

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PRODUCTS-COMPLETED OPERATIONS

XIII. When is “Your Work – Completed?”

- F. Work is considered complete even if the completed work (as defined above) may need subsequent service, maintenance, repair, or replacement.

Illustration – Although Phil has completed the entire Jefferson School, he is called back a month later to replace faucets that are leaking. Even though Phil must go back to the school to repair or replace some of his work, all his work is considered “completed” at the school.

112

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

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PRODUCTS-COMPLETED OPERATIONS

XIII. What is NOT within the “product -completed operation hazard.”

- G. Transporting property is generally not considered to fall within the products-completed operation hazard.

Illustration – A manufacturer of plastic resin transports in it’s truck its product (plastic resin). The resins spill from the truck onto the highway, causing very slippery conditions that result in auto accidents and injuries to motorists. Although the resin is the product of the manufacturer, resulting claims against the manufacturer are NOT within the products-completed operations hazard of the manufacturer.

113

16. "Products-completed operations hazard":

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

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

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PRODUCTS-COMPLETED OPERATIONS
XIII. What is NOT within the “product -
completed operation hazard.”

G. EXCEPTION TO Transporting property!!

Illustration – A contractor overloads a common carrier's truck with sand and gravel, resulting in the small stones flying out of the truck and injuring pedestrians. This bodily injury claim would be considered to fall within the products-completed operations hazard from the standpoint of the contractor who overloaded the truck.

114

16. "Products-completed operations hazard":

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

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

Source: *The Hazards of Products and Completed Operations – Understanding the Fundamentals*– October, 2006.

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PRODUCTS-COMPLETED OPERATIONS

XIII. What is NOT within the “product - completed operation hazard.”

- G. Bodily injury or property damage that is caused by tools, uninstalled equipment or abandoned or unused materials is not included within the products-completed operations hazard.

Illustration – A teacher falls on a pipe that was left at the job site after Phil’s Plumbing finished its work at the the Jefferson School. This BI claim against Phil is not within the products-completed operations hazard.

115

16. "Products-completed operations hazard":

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

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

Source: *The Hazards of Products and Completed Operations – Understanding the Fundamentals*– October, 2006.

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PRODUCTS-COMPLETED OPERATIONS

XIII. What is NOT within the “product - completed operation hazard.”

- G. If the CGL Classification “includes” products-completed operations in the General Aggregate Limit.

Illustration – Buildings or Premises—Office—Not-for-Profit Class Code: 61227 NOC (not otherwise classified) “Products/Completed Operations are included.”

116

16. "Products-completed operations hazard":

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

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

Source: *The Hazards of Products and Completed Operations – Understanding the Fundamentals*– October, 2006.

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DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos

A. General Rule (with *important exceptions*)

1. CGL provides coverage for ownership, maintenance or use of “mobile equipment”
2. Business Auto Policy provides coverage for ownership, maintenance or use of “autos”

117

2. "Auto" means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos

B. Conceptual difference between the two definitions:

1. Vehicles "designed for travel on public roads" are usually "autos."
2. Vehicles "designed for use principally off public roads" are often "mobile equipment."

118

12. "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;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

(Definition Continues)

DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos

C. Mobile Equipment as Autos

1. Even if vehicle fits squarely within definition of “mobile equipment, “ it is considered “auto” IF
2. Vehicle is subject to compulsory motor vehicle law or financial responsibility law or other motor vehicle insurance law – determined by the law of state in which it is principally garaged or licensed.

119

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

- (a) Snow removal;
- (b) Road maintenance, but not construction or resurfacing; or
- (c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos

D. Mobile Equipment – A Closer Look

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;



120

12. "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;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

(Definition Continues)

DEFINITIONS – MOBILE EQUIPMENT



X. Mobile Equipment versus Autos

D. Mobile Equipment – A Closer Look

b. Vehicles
maintained for
use solely on or
next to premises
you own or rent;

121

12. "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;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

(Definition Continues)

DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos

D. Mobile Equipment – A Closer Look

**c. Vehicles
that travel on
crawler
treads;**



122

12. "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;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

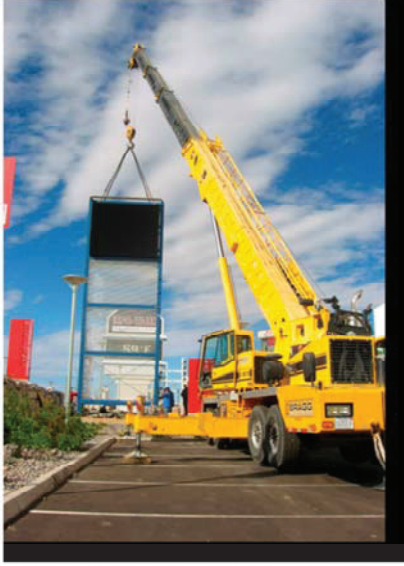
(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

(Definition Continues)

DEFINITIONS – MOBILE EQUIPMENT



X. Mobile Equipment versus Autos

D. Mobile Equipment – A Closer Look

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

- (1) Power cranes, shovels, loaders, diggers or drills; or
- (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

123

12. "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;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

(Definition Continues)

DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos

D. Mobile Equipment – A Closer Look

e. Vehicles not described in paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

- (1)** Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
- (2)** Cherry pickers and similar devices used to raise or lower workers;



124

12. "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;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

(Definition Continues)

DEFINITIONS – MOBILE EQUIPMENT



X. Mobile Equipment versus Autos

D. Mobile Equipment – A Closer Look

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo. (Vacuum)

125

12. "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;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a.**, **b.**, **c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

(Definition Continues)

DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos

D. Mobile Equipment – A Closer

Look

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

- (a) Snow removal;
- (b) Road maintenance, but not construction or resurfacing; or
- (c) Street cleaning;



126

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

- (a) Snow removal;
- (b) Road maintenance, but not construction or resurfacing; or
- (c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos



D. Mobile Equipment – A Closer Look

- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

127

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

- (a) Snow removal;
- (b) Road maintenance, but not construction or resurfacing; or
- (c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

DEFINITIONS – MOBILE EQUIPMENT

- X. Mobile Equipment versus Autos
 - E. When are “Autos” Covered Under the CGL?
 - 1. “Valet Parking” liability Exception – Tom’s Trattoria employee’s will park your car on weekends. One Saturday night, Tom’s employee accidentally backed into a patron while parking another patron’s auto. The patron sues Tom’s Trattoria. Does Tom have coverage in his CGL for this suit?

128

This insurance does not apply to:

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 does not apply to:

(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;

DEFINITIONS – MOBILE EQUIPMENT

- X. Mobile Equipment versus Autos
 - E. When are “Autos” Covered Under the CGL?
 - 2. “Cherry Picker” liability Exception –
Tim’s tree business has been growing – he has branched out into trimming trees around utility lines for local towns. When up in his bucket, he loses control of a tree limb he has just cut off and drops it on a passing motorist. The motorist car is damaged and she is injured. Is Tim covered under his CGL?

129

This insurance does not apply to:

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 does not apply to:

(b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment"

f. (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

f. (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

DEFINITIONS – MOBILE EQUIPMENT

- X. Mobile Equipment versus Autos
 - E. When are “Autos” Covered Under the CGL?
 - 3. “Mobile Equipment as Auto” liability Exception – Even though Mike’s backhoe is subject to his state’s MV compulsory insurance law, he damages underground utility lines when he forgets to call “DIGSAFE.” Does the CGL cover this “auto” for the damage to the underground utilities?

130

This insurance does not apply to:

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 does not apply to:

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

DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos

F. What does “subject to” mean?

Illustration – Stephanie’s Sewer Systems owns a backhoe that will be used on a public road for two months after her CGL policy begins. She concludes that during the two month job, the backhoe is considered an “auto” even though it clearly fits the definition of mobile equipment, as it must be registered. Her backhoe is “subject to” compulsory insurance.

131

2. "Auto" means:

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. However, "auto" does not include "mobile equipment".

DEFINITIONS – MOBILE EQUIPMENT

X. Mobile Equipment versus Autos

F. What does “subject to” mean?

Illustration – The job ends and the backhoe is used for next three months at a new job installing drainage in a private parking lot. While driving across the parking lot, Stephanie’s employee accidentally backs over and seriously injures an employee of the landowner. The employee of the landowner sues Stephanie for her injuries. At the time of the accident, the use of the backhoe does not require compulsory insurance. Is the backhoe still an “auto” at the time of the accident in the parking lot?

132

2. "Auto" means:

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. However, "auto" does not include "mobile equipment".



James K. Ruble Seminar

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Section 2

Risk Implications for Commercial Real Estate Leases

Landlord and Tenant

Relationship

A landlord-tenant relationship is created when there is

- (1) a reversion in the landlord;
- (2) creation of an estate in the tenant either at will or for a term less than that which the landlord holds;
- (3) a contract. [1]

2

Reversion – The interest that is left after subtracting what the transferor has parted with from what the transferor originally had. *Black's Law Dictionary Eighth Edition*.

Estate – The amount, degree, nature and quality of a person's interest in land or other property. *Black's Law Dictionary Eighth Edition*.

[1] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 1

Rights of Parties in Lease

The rights of a lessee and a lessor in property subject to a lease are divided; the lessee has possessory interest, and the lessor has the reversionary interest. [2]

3

Possessory interest – The present right to control property, including a right to exclude others by a person who is not necessarily the owner. *Black's Law Dictionary Eighth Edition*

Reversionary interest – A future interest left in the transferor or successor. *Black's Law Dictionary Eighth Edition*

[2] Ibid

Elements of a Lease

In order to be valid and enforceable, a lease generally must contain the following essential terms: (1) names of the parties; (2) a description of the demised realty; (3) a statement of the term of the lease; and (4) the rent or other consideration. [3]

4

[3] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 22

Types of Tenancies

Tenancy for years – The distinguishing characteristic of tenancy for years is that it is to endure a fixed or computable period of time. [4]

Periodic Tenancy – A “periodic tenancy” is one that endures for a certain period and will continue for subsequent like periods unless terminated by one of the parties at the end of the period [5]

Tenancy at Will –A “tenancy-at-will” is that which a tenant has by an entry made thereon under a demise to hold during joint wills of the parties. It may be terminated at any time at the will of either party. [6]

5

[4] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 110

5] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 115

[6] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 118

Landlord's Exposure

Damage By Fire to Building

Landlord will restore the Leased Premises to the extent (i) practicable, (ii) permitted by law, (iii) and insurance proceeds are available to Landlord. If Landlord reasonably determines it cannot restore the Leased Premises within 180 days from the date of casualty, Landlord will promptly give notice to Tenant; and either Landlord or Tenant may terminate this Lease by notice to the other party within thirty (30) days of Landlord's notice.

6

Is landlord required to restore building in the above?

Under what circumstances is landlord not required to restore building?

- If restoration not practicable
- If restoration not permitted by law
- If insurance proceeds not available

What other sections of the lease are pertinent to determining landlord's obligation to tenant?

Landlord's Exposure

Generally – What is Duty of Landlord *to the tenant* to rebuild the building after fire damage?

- As a general rule, under a general and unqualified agreement to repair, a lessor has a duty, upon destruction of the leased premises by fire or other casualty, to restore the premises to the condition they were in when the lease was executed. [7]

7

Is landlord's obligation to restore unqualified?

[7] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 461

Landlord's Exposure

Damage By Fire to Building

The lessors agree to keep said theatre buildings, and the equipment hereby leased, insured to the extent of its full insurable value in some reliable insurance company. In event the premises or property hereby leased shall at any time during the operation and continuance of this lease be damaged or destroyed by fire or other casualty, the lessors shall thereupon and forthwith repair and restore said premises and property to the same condition in which they were before the happening of such fire or other casualty [8]

8

What time period is landlord required to restore building?

Is this obligation to restore unequivocal?

Does this address the cause of the fire i.e. tenant's negligence versus unintentional act (i.e. lightning)?

Does the Landlord's obligation to rebuild relieve tenant of damage caused by tenant's negligence?

This paragraph of the lease does not expressly or impliedly exempt the defendant [tenant] from liability for any damage by fire to the demised premises caused proximately by its negligence. [9]

[8] *Winkler v. Appalachian Amusement Co., N.C.*, 79 S.E.2d 185 (1953)

[9] *Ibid*

Landlord's Exposure

Damage By Fire to Building- Is Tenant Liable to Landlord for ANY damage regardless of cause?

Generally, the liability of a tenant for the destruction of a building by fire depends on negligence. *In the absence of stipulations in the lease, the tenant is only required to use reasonable diligence to protect buildings on the demised premises from destruction by fire, and is not liable for accidental damages or destruction by fire; the tenant is liable only if the buildings are destroyed through the tenant's wrongful act or negligence.* [10]

9

[10] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 692

Landlord's Exposure

Damage By Fire to Building

If the Building is totally or partially damaged or destroyed, the Landlord shall diligently repair and restore the Building to substantially the same condition prior to damage or destruction; provided, however, that if in the Landlord's judgment, such repair and restoration cannot be completed within one hundred eighty (180) days (taking into account the time needed for a satisfactory settlement with any insurance company), then Landlord shall have the right, at its sole option, to terminate the lease by giving notice of termination within forty-five days after the occurrence of damage or destruction. Notwithstanding anything herein to the contrary, Landlord shall not be obligated to restore the Building if the cost of repairing or restoring the Building would exceed fifty percent (50%)

10

How long does the Landlord have to rebuild the building or repair the damage?

Diligently repair and restore – but not if the restoration takes over 180 days – if longer than 180 days, Landlord may cancel lease.

How long does the Landlord have to make the determination?

At least until settlement is reached with insurers.

What if the building total loss? Is the Landlord obligated to repair or restore?

If more than 50% destroyed, Landlord is NOT obligated to repair or restore – is lease then cancelled?

Landlord's Exposure

Damage By "Wear and Tear"

Tenant, at its expense, will keep and maintain the Premises and all fixtures and equipment in clean, safe and sanitary condition, and shall take good care thereof and make all repairs thereto, and in compliance with all applicable laws, regulations.

11

Generally, must tenant repair "wear and tear"?

Unless expressly excepted by the language of the lease, the lessee under a covenant to repair is not relieved from liability resulting from reasonable wear and tear or obsolescence [11]

[11] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 707

Landlord's Exposure

Surrender or "Yield Up" Clause

Tenant will yield up the Leased Premises in broom-clean condition with all furniture, trade fixtures, and equipment removed. All improvements, additions, installations, renovations, changes or alterations in the Leased Premises (except Tenant's trade fixtures) shall remain in the Leased Premises and be surrendered upon the expiration of the Term. Tenant will have no obligation under this section of this Lease with respect to reasonable wear and tear and damage by fire and casualty.

12

Tenant not responsible for "reasonable wear and tear."

Generally, what is Landlord's obligation to repair ordinary wear and tear"?

Generally, a landlord is under no obligation to a tenant to repair, unless there is a contract creating a duty to repair [12]

[12] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 454

Landlord's Exposure

Structural v. Non-Structural Repairs

A general covenant of the tenant to repair or to keep the premises in repair, merely binds the tenant to make ordinary repairs reasonably required to keep premises in proper condition, and does not require the tenant to make repairs involving structural changes. [13]

13

Is cost of repair an insurable or a business risk?

- Damage by wear and tear – business risk
- Damage to plate glass – may be insurable
- Damage by fire to premises – insurable

In some cases, structural and non-structural may be defined by a dollar amount – Example:

- Tenant is responsible for repairs under \$75,000
- Landlord is responsible for repairs over \$75,000

13] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 707

Landlord's Exposure

Property Insurance - Building

... it is generally true that, in the absence of a specific provision or agreement, a landlord is under no obligation to his or her tenant to procure or pay for insurance on the demised premises. [14]

14

If lease is silent on the issue of who insures the building, is Landlord responsible to Tenant?

[14] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 374

Landlord's Exposure

Property Insurance – Insurance Clause

Throughout the Lease Term, Landlord shall insure Building (or shall cause Building to be insured) against loss due to fire or other casualties, including broad form property insurance policies, with an agreed amount endorsement and full replacement cost coverage, exclusive of excavations, footings and foundations.

15

What does “cause Building to be insured mean?”

What are other casualties?

Does “other casualties” include Flood, Earthquake, Terrorism, Building Ordinance, etc.?

What is “broad form property insurance?”

Do they mean literally Causes of Loss – Broad Form?

Comment – Insurance clauses usually do not match terminology or “terms of art” used in the insurance business

What can be changed or added to clarify what is meant?

Landlord's Exposure

Property Insurance – Insurance Clause

Property insurance on the building, including the common areas, against loss or damage by risks of direct physical loss as insured against under Special Form (sometimes known as “all risk” coverage). The insurance coverage will be for not less than 90% of the full replacement value of the building, including an agreed value clause suspending coinsurance, and will include all permanent tenant improvements made by Landlord or approved by Landlord pursuant to the section entitled, “Alterations, Maintenance and Condition of the Leased Premises.” Landlord will be the named insured and all proceeds of insurance will be payable to Landlord.

16

Does this make clearer what Landlord is to purchase for property insurance?

Who is to receive the insurance proceeds?

Has Landlord agreed to insure tenant improvements?

Does the Tenant have any right to the insurance proceeds?

Where it is the intent of the parties to the lease that the lessor's fire insurance cover the lessee as well, if the lessors choose not to use the insurance proceeds to rebuild the leased premises, the lessee has an equitable interest in the proceeds to the extent of his or her liability for future rents [16]

[16] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 378

Landlord's Exposure

Tenant's Improvements

Legal Definition: Permanent improvements are improvements that the annexor [Tenant] intends to make an enduring part of the realty. By contrast, trade fixtures are items that are annexed to and put on the realty for the purpose of the annexor's business and are thus by operation of law removable.[17]

17

[17] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 749

Landlord's Exposure

Tenant's Improvements

Insurance Definition: Improvements and betterments are fixtures, alterations or additions:

- a) Made part of the building or structure you occupy but do not own; and
- b) You acquired or made at your expense but cannot legally remove. [18]

18

Who *owns* Tenant Improvements and when?

Absent an express contract in the lease to the contrary, any improvement constructed on the leased premises do not belong to the tenant but rather, are the property of the landlord at the end of the term of the lease. As a contract, a lease can allocate who owns the improvements during and after the term of a lease. [19]

[18] ISO Building and Commercial Property Coverage Form – CP 00 10 10 12 – included in Covered Property – Your Business Personal Property

[19] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 749

Landlord's Exposure

Tenant's Improvements- Problems

Lease is often silent on:

- 1) Who owns the lease improvements
- 2) Interest in Landlord/Tenant in Lease Improvements
- 3) Tenant's obligation to report value to Landlord of lease improvements
- 4) Who is to repair or replace the lease improvements – Landlord or Tenant

19

- 1) As improvement become part of the realty (by definition they are permanently attached to the building), should Landlord include value of Tenant's Improvements in insurable value of building?
- 2) **In the event of a building loss, insurer likely to include such values in coinsurance calculation – leaving Landlord with coinsurance penalty**
- 3) Insurance policies view tenant's interest as "use" interest
- 4) If Tenant does not report improvement's values to insurer, coinsurance issue noted in 3) is likely to result to Landlord

When lease is silent on repair or replacement of improvements, who must repair or replace?

In the absence of a statutory provision or agreement between the parties to the contrary, the lessor is not obligated to pay the lessee for improvement erected by the lessee upon the demised premises...[20]

{20} *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 458

Landlord's Exposure

Tenant's Improvements- Sample Lease Wording

Tenant will not make any alterations or improvements to the Leased Premises without Landlord's prior written consent. Tenant shall provide to Landlord the construction costs of Tenant's Work and the costs of any tenant's improvements made by or on behalf of Tenant with Landlord's prior written consent. Such costs shall be promptly provided to the Landlord.

20

Benefit to Landlord

Not only must Tenant obtain written consent of Landlord to make improvements, costs of improvement must be provided to the Landlord.

Landlord now can add costs (value) to insurable building value

Landlord's Exposure

Tenant's Improvements- Sample Lease Wording

...any and all alterations, changes and/or improvements made to the premises shall be deemed owned by the Lessee until such time as lease is terminated. The Lessee, at its own expense, and proceeding with reasonable speed, shall repair and reconstruct all improvements made by the Lessee to the Leased Premises.

21

Lessee also agrees to “purchase and maintain property insurance on a replacement cost basis on the property of Lessee...including coverage for damage to all alterations and improvement made by Lessee...”

Landlord may consider excluding from its Building coverage cost of Tenant's Improvements by using:

Additional Property Not Covered – ISO CP 14 20 11 91:

The following is added to PROPERTY NOT COVERED if an X is shown in a box on the Schedule below:

The value of improvements, alterations or repairs (including labor, materials and supplies) being performed by Tenant(s)

The above endorsement would avoid coinsurance problems for Landlord.

Landlord's Exposure

Time Element Exposures - Landlord

- **Loss of rental income from tenants – does rent abate?**
- **Loss of rental value – the value of Landlord's space**
- **Loss of “additional” rents – other charges i.e. utilities, taxes, etc.**
- **Lease cancellation**

22

Does rent automatically abate during a period when premises is untenable due to fire or other damage?

A tenant is not relieved of an express promise or covenant to pay rent in the event of destruction of the premises unless destruction is of the entire premises, such that nothing remains capable of being held or enjoyed. [21]

Look in lease for rent abatement clause – don't forget “additional rents”

[21] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section

Landlord's Exposure

Rent Abatement - Sample Lease Wording

If the damage to the demised premises by fire or other casualty should be so extensive as to render the whole or any part thereof untenable and unsuitable for use and occupation by the Tenant, then a just proportion of the rent shall be suspended or abated until the demises premises shall be restored or replaced..

23

Above is proportional rent abatement clause (including additional rents).

Landlord may insure exposure for Time Element including Rental Value coverage – ISO Business Income (And Extra Expense) Coverage Form CP 00 30 06 07

“Rental Value” means Business Income that consists of:

- a. **Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred as rental income from tenant occupancy of the premises described in the Declarations as furnished and equipped by you, including fair rental value of any portion of the described premises which is occupied by you; and**
- b. **Continuing normal operating expenses incurred in connection with that premises, including:**
 - (1) **Payroll; and**
 - (2) **The amount of charges which are the legal obligation of the tenant(s) but would otherwise be your obligations.**

Landlord's Exposure

Landlord's Liability Exposures

- **Older View** – ...the landlord is not liable to the tenant and others on the leased property for physical harm caused by a dangerous condition on the leased premises which existed when the tenant took possession...[or] where the dangerous condition comes into existence after tenant takes possession[22]

24

Basis for older view:

- Arises partly from caveat emptor (or caveat lessee) doctrine
- Reflects traditional high regard for land-owning class

Recognized exception under older view:

- Undisclosed dangerous condition – landlord has reason to believe dangerous condition will not be discovered or landlord conceals dangerous condition
- If premises leased for admission of the public

[22]Restatement of the Law, Second, Property 2d, Landlord and Tenant, Volume 1, Chapter Seventeen, Sections 355 and 356

Landlord's Exposure

Landlord's Liability Exposures

- **Evolving View** – Some courts have now repudiated the general rules of nonliability, and to the extent this trend continues, landlords may be responsible to tenants and others on the leased premises on the basis of the general law of negligence without regard to the rule for this chapter [23]

25

Considerations in imposing liability on Landlord:

Common areas – if in control of landlord but used by the tenant:

- Landlord may be subject to liability to tenant and others lawfully upon premises
- Liability is for a dangerous condition that landlord may make safe by reasonable care
- Examples – hall, stairs, elevators and approaches to the building

Landlord's duty to repair – if imposed or agreed upon by landlord

- Landlord is subject to liability for physical harm to tenant and others lawfully on premises by a condition of disrepair
- *Promise by tenant to keep leased premises in repair may relieve landlord of duty and thus liability arising from repair*

[23] Restatement of the Law, Second, Property 2d, Landlord and Tenant, Volume 1, Chapter Seventeen, Introductory Notes

Landlord's Exposure

Landlord's Liability Exposures- Hold Harmless & Indemnity

To the extent permitted by law, tenant agrees to hold harmless and indemnify the landlord against any and all injury, loss or damage and any and all claims, loss or damage...caused by or have resulted from any act, omission or negligence of the tenant, including tenant's employees and contractors, unless caused by the negligence of landlord, its agents, servants or employees.

26

Hold Harmless Agreement *A contract in which one party agrees to indemnify the other. See Indemnity. [Black's Law Dictionary 8th Edition]*

Indemnity Clause *A contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur also termed hold harmless clause. [Black's Law Dictionary 8th Edition]*

Agreement to be responsible for *some else's* liability to third parties

Very commonly found in Real Estate Lease Agreements

Usually fits with CGL's definition of "insured contract":

"Insured contract" means:

- a. **A contract for a lease of premises.** However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

Landlord's Exposure

Landlord's Liability Exposures- Release of Liability

Each party, on its own behalf and on behalf of any one claiming under or through it by way of subrogation or otherwise, hereby waives all claims, rights and causes of action against the other party, for any loss or damage in or to the building or other improvements located on the real property described in page 1, the demised premises and its contents caused by any risk insured against under any insurance policies carried by either party or required to be carried under this lease at the time of such loss or damage, even if such loss or damage may have been caused by the negligence of the other party, its officers, employees, contractors, agents or invitees.[24]

27

The Gap maintained a property insurance policy underwritten by five insurers providing coverage for personal property, betterments and improvements and business interruption. As a result of the fire, The Gap allegedly sustained covered losses of \$ 1,321,091.76, representing damage to its personal property, as well as a significant business interruption loss, but, because of its \$ 1 million deductible, recovered only \$ 321,091.76 under the policy.

The Gap claimed that the lease's waiver of subrogation provision did not bar recovery of the \$ 1 million of its property loss that was uninsured because of its deductible.

In any event, plaintiffs, as noted, do not assert any claim based on the owners' breach of their obligation to repair the demised premises. Instead, they base their damage claim on a cause of action in negligence, which, as discussed, is unaffected by the waiver of subrogation clause and would include damages for business interruption loss...

[24] *The Gap v. Red Apple Companies, Inc.* 725 NYS 2d 312 (N.Y. App. Division 2001)

Landlord's Exposure

Landlord's Liability Exposures- Waiver of Subrogation

But you may waive your rights against another party in writing:

- 1. Prior to a loss to your Covered Property or Covered Income.**
- 2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:**
 - a. Someone insured by this insurance;**
 - b. A business firm:**
 - (1) Owned or controlled by you; or**
 - (2) That owns or controls you; or**
 - c. Your tenant.**

This will not restrict your insurance.[25]

28

May a Landlord waive their rights of recovery (and thus extinguish the insurer's right of subrogation) against a Tenant for Property and Time Element Coverage without insurer's permission?

What must the Landlord do prior to or after a loss to waive recovery rights against a Tenant?

Only requirement - waiver or release must be in writing

[25] ISO Commercial Property Conditions CP 00 90 07 88 – I. Transfer of Rights of Recovery Against Others

Landlord's Exposure

Landlord's Liability Exposures- Liability Insurance of Tenant

Tenant will maintain general comprehensive public liability insurance with respect to the demised premises issued by insurance companies licensed in the state including Landlord and Tenant as named insureds in amounts not less than Three Million for injuries to one person and not less than Three Million with respect to injuries in any one accident and not less than Five Hundred Thousand with respect to damage to property. Each policy will provide that same shall not be modified or terminated without ten (10) days written notice to Landlord.

29

Issues with Tenant's Insurance Requirements: Outdated

- What is "general comprehensive public liability insurance?"
- What about auto liability insurance?
- Split Limits for BI and PD – not available
- Licensed in the State – non-admitted insurers not acceptable?
- Can Tenant obtain insurance for Landlord as Named Insured?
- Will Tenant's insurer provide 10 day cancellation notice to Landlord?

Landlord's Exposure

Landlord's Liability Exposures- Sample Wording for Tenant's Insurance

A standard "occurrence based" Insurance Services Office (ISO) Commercial General Liability Insurance or its equivalent to protect Tenant for liability arising out of the Premises and a standard Insurance Services Office (ISO) Business Automobile Liability Insurance or its equivalent to protect Tenant for liability arising out of motor vehicles owned, rented, hired, leased or borrowed by the Tenant for the maintenance, operation, use, loading or unloading of such motor vehicles on or near the Premises, with the following minimum limits of liability:

30

Commercial General Liability Insurance

- \$1,000,000 Each Occurrence Limit
- \$1,000,000 Personal & Advertising Limit
- \$2,000,000 General Aggregate Limit – Per Location
- \$2,000,000 Products-Completed Operations Aggregate Limit
- \$ 100,000 Damage to Premises Rented to You Limit
- \$ 5,000 Medical Expenses Limit

Business Automobile Liability Insurance

\$1,000,000 Combined Single Limit

Landlord shall be named as an additional insured on the Commercial General Liability policy using ISO additional insured form CG 20 11 04 13 or its equivalent...

Tenant's Exposure

Tenant Agrees to be Responsible for Building

Triple Net Lease – A “net” type lease, which may also be denominated a “net-net” or “net-net-net” lease, typically requires lessee to pay a monthly lump sum for rental, in addition to holding the lessee responsible for all other costs and expenses arising out of the property, including taxes and insurance. In a long term net lease, the tenant has virtually complete responsibility to repair. [26]

31

Triple Net Lease often characterized as arrangement in which Tenant has agreed to be responsible as if Tenant *owned building* including:

- Tenant responsible for any damage to the building, whether accidental or by negligence of Tenant
- Tenant responsible to purchase insurance on the building
- Insurable interest of Tenant is created by agreement to repair or restore damage regardless of fault

[26] *American Jurisprudence*, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 716

Tenant's Exposure

Triple Net Lease – Sample Wording

Tenant agrees that in the event of the damage or destruction of the Leased Premises, Tenant forthwith shall proceed to repair, restore, replace or rebuild the Leased Premises (including Tenant's leasehold improvements), to substantially the condition in which the same were immediately prior to such damage or destruction.

32

Tenant has assumed responsibility to rebuild or repair leased premises, *regardless of fault of tenant.*

Should tenant rely on their own GL policy to pay for such damages?

Exclusions to Coverage A:

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",

9. "Insured contract" means:

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

Tenant's Exposure

Triple Net Lease – Sample Insurance Requirement

Tenant shall, at its own cost and expense, keep the building insured and shall cover the Landlord for loss due to fire, extended coverage and so-called “all risk” to the full insurable value thereof. Further, the Tenant agrees to pay the Landlord the amount of any deductible applicable to each loss...

33

Tenant has agreed to purchase property Insurance.

How is Tenant to “cover the Landlord” with insurance purchased by Tenant?

Standard Approach: List Landlord as Loss Payee – Loss Payable Form
CP 12 18 10 12*

F. Building Owner Loss Payable Clause

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

*New in 2007

Tenant's Exposure

Landlord as Named Insured on Tenant's Property Policy

Additional Insured – Building Owner CP 12 19 06 07*

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

*New in 2007

34

Alternative to Loss Payable Clause

Even though this new endorsement is entitled “Additional Insured” the Landlord (Building Owner) has the status as a Named Insured for the purposes of the listed Building.

Does status of Named Insured instead of Loss Payee provide broader protection for Landlord?

Under the additional insured—building owner endorsement, covered loss to the identified building would be adjusted with and payable to both the insured and the building owner, since both are insureds with respect to the identified building. However, under the building owner loss payable option in the loss payable provisions endorsement, covered loss to the identified building would be adjusted with and payable to the building owner only, except that loss to tenants' improvements and betterments is adjusted with the insured tenant. © International Risk Management Institute, Inc. 08/01/09

Tenant's Exposure

Tenant's Improvements

Landlord is not responsible for replacing tenant improvements absent agreement to do so. [27]

Therefore, Tenant should be prepared to repair or replace its own improvements and include replacement value of improvements in Tenant's Business Personal Property limits. [28]

35

[27] In the absence of a statutory provision or agreement between the parties to the contrary, the lessor is not obligated to pay the lessee for improvement erected by the lessee upon the demised premises...

American Jurisprudence, Second Edition, A Modern Comprehensive Text Statement of American Law, Volume 49, Landlord and Tenant (Thomson/West 2006), Section 458

[28] Building and Personal Property Coverage Form CP 00 10 10 12

- b. Your Business Personal Property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises, consisting of the following ...:
 - (6) Your use interest as tenant in improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
 - (a) Made a part of the building or structure you occupy but do not own; and
 - (b) You acquired or made at your expense but cannot legally remove;

Tenant's Exposure

Tenant's Improvements – Valuation

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

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

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

With respect to tenants' improvements and betterments, the following also apply:

(3) If the conditions in d.(1) and d.(2) above are not met, the value of tenants' improvements and betterments will be determined as a proportion of your original cost, as set forth in the Valuation Loss Condition of this Coverage Form; and

(4) We will not pay for loss or damage to tenants' improvements and betterments if others pay for repairs or replacement.

36

If Tenant purchases Replacement Cost Option, valuation will be as follows:

- 1) If the Tenant repairs or replaces damaged improvements (subject to other replacement cost conditions), the insurer will pay full replacement cost (subject to policy limit, coinsurance, etc.)
- 2) If the Landlord (or others) pays to repair or replace the Tenant's damaged improvements (may be as the result of building repair or replacement), Tenant's insurer will not pay (Tenant has already been indemnified).
- 3) If the Tenant does not repair or replace damaged improvements, Tenant's insurer will pay only unamortized value of original cost of improvements.

Tenant's Exposure

Tenant's Improvements – Unamortized Original Cost

Tenant has 10 year lease. At the beginning of the lease, Tenant installs \$2 million of improvements. In year 7 of the lease, fire destroys Tenant's improvements that now have a replacement cost of \$2.5 million – but Tenant does not replace improvements. What will Tenant recover from their insurer?

37

Tenant's recovery will be as follows: **Original Cost: \$2 million**

Used up or "amortized" 7 years of 10 year lease – 70% Amortized

Unused or "unamortized" 3 years of a 10 year lease – 30% Unamortized

30% of Unamortized. Original cost is \$2 million. Insurer pays 30% or \$2 million or \$600,000.

The theory is that all the "use interest" left in the improvement as Tenant cannot use the improvements after lease expiration.

Tenant's Exposure

Tenant's Improvements – Undamaged Improvements

Tenant has a 10 year lease and installs \$2 million worth of improvements. In year 2, a serious fire damages the building. Landlord has the option to cancel all leases if more than 50% of building is damaged by fire or other casualty. Landlord cancels Tenant's lease. None of Tenant's improvements are damaged by the fire. What will Tenant recover from its insurer for the cost of its improvements?

38

Tenant will not be able to recover any amount from their insurer – there has been no physical loss or damage to covered property (tenant's improvements) – thus no loss under Tenant's Property Insurance policy.

NOTE: If Tenant plans to make substantial or costly improvements to leasehold, it is critical for Tenant to know exactly under what circumstances Landlord may cancel lease.

Option to Consider : Leasehold Interest Coverage Form CP 00 60

A. COVERAGE

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

- c. Improvements and Betterments, meaning the unamortized portion of payments made by you for improvements and betterments.

Tenant's Exposure

Tenant's Time Element - Rents

...The occurrence of any loss, damage, destruction of the Leased Premises however caused whether covered by insurance or not shall not be grounds for any reduction or abatement of rent.

39

Tenant has agreed to no abatement in rent, regardless of whether the premises is untenable.

1. Business Income

Business Income means the:

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

Tenant may treat obligation to continue rent payments as a continuing normal operating expenses under Business Income Coverage

Important additional benefit – if properly written, Business Income and Extra Expense will pay more than Tenant's obligation to pay rent to Landlords- such as loss of Net Income or Extra Expense to continue operations at another location.

Tenant's Exposure

Tenant's Lease Cancellation Loss Exposures

In addition to loss of value of improvement, Tenant may lose the following if lease is cancelled due to an insured event:

- Bonus rent paid**
- Below market or favorable rent**
- Prepaid rent that will not be returned**

40

LEASEHOLD INTEREST COVERAGE FORM

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

Covered Leasehold Interest means the following for which an amount of "net leasehold interest" at inception is shown in the Leasehold Interest Coverage Schedule:

a. Tenants' Lease Interest, meaning the difference between the:

- (1) Rent you pay at the described premises; and
- (2) Rental value of the described premises that you lease.

b. Bonus Payments, meaning the unamortized portion of a cash bonus that will not be refunded to you. A cash bonus is money you paid to acquire your lease. It does not include:

- (1) Rent, whether or not prepaid; or
- (2) Security.

d. Prepaid Rent, meaning the unamortized portion of any amount of advance rent you paid that will not be refunded to you

Tenant's Exposure

Tenant's Liability – Arising out of Repairs

Tenant agrees to be responsible for all maintenance and repairs necessary at the premises. Tenant agrees that a duly authorized representative of the Landlord will make quarterly inspections and may notify Tenant of any maintenance and repairs required. Tenant shall complete such repairs within 30 days...

41

If tenant agrees to be responsible for repairs, may relieve landlord of liability for injury arising out of failure to repair

Tenant responsible for its own negligence i.e. failure to perform repairs with reasonable care resulting in injury to landlord's or tenant's invitees, licensees.

Tenant's Exposure

Tenant's Liability – Damage to Landlord's Property

So what happens if a tenant negligently damages the leased premises, the lease is silent on liability and the landlord has insurance to coverage the damage? By insuring the premises, the question becomes whether the landlord took on the obligation of covering the tenant's negligence under his insurance – shielding the tenant from liability to the landlord's insurer. [28]

42

[28] Aleatra P. Williams, "Insurers' Rights of Subrogation Against Tenants: The Begotten Union Between Equity and Her Beloved," *Defense Law Journal*, Volume 57, No. 1, May, 2008

Tenant's Exposure

The "Sutton Rule"

...The modern trend, also known as the "*Sutton* rule," prohibits an insurer from recovering against a negligent tenant in a subrogation claim unless the rental agreement expresses a contrary intent. [29]

43

Some reasons for prohibiting subrogation against Tenant [30]:

1. Tenant as "Co-insured" – "the Sutton court held subrogation should not be permitted because the law treats the tenant as a co-insured of the landlord unless there is an express agreement to the contrary."
2. Reasonable expectations – "The possibility that a lessor's insurer may proceed against a lessee is almost certainly not within the expectation of most landlords and tenants unless they have been forewarned by expert counseling."
3. Security Deposits – "The receipt of a security deposit may be viewed as a landlord's waiver of claims against a tenant."
4. Economic Waste – "...each tenant in a building would have to carry massive amount of liability insurance. At the same time, the tenant's are paying for landlord's property insurance as part of their rent or additional rent."
5. Tenant as Reinsurer – "Subrogation in the landlord-tenant context shifts risks of insurance losses onto tenants..."

[29] Aleatra P. Williams, "Insurers' Rights of Subrogation Against Tenants: The Begotten Union Between Equity and Her Beloved," *Defense Law Journal*, Volume 57, No. 1, May, 2008

[30] Ibid

Landlord/Tenant Subrogation in all 50 States – Matthiesen, Wickert & Lehrer, S.C. – www.mwl-law.com

Tenant's Exposure

Tenant's Liability – Damage to Landlord's Property

Coverage options available to Tenant (absent "Sutton" rule):

- Damage to Premises Rented to You
- Legal Liability CP 0040
- First Party (Property) Insurance

44

Damage to Premises Rented to You – Fire Damage ONLY and limit often inadequate (\$100,000 to \$500,000)

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits Of Insurance [Damage to Premises Rented to You]

LEGAL LIABILITY COVERAGE FORM CP 00 40– Covered causes (Special) and limit may be greater – but still requires fault (tort liability)

A. Coverage

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

Covered Property, as used in this Coverage Form, means tangible property of others in your care, custody or control that is described in the Declarations or on the Legal Liability Coverage Schedule.

Tenant's Exposure

Tenant's Liability – Hold Harmless and Indemnify

Tenant shall indemnify and hold harmless Landlords, his agents, servants and employees against and from any and all claims arising from Tenant's use or condition of the Premises or conduct of its business from any liability arising out any act, neglect, fault or omission of Tenant, its agents or employees proceeding brought against Landlord by reason of such claim.

45

To the extent such liability is for bodily injury or property damage AND the claim is not excluded by the CGL, indemnity agreements for lease of premises fall within definition of "insured contract" under Tenant's CGL policy.

Care should be taken to avoid assuming liability via the hold harmless and indemnity that is not covered by the CGL (for example, premises pollution) that would leave the Tenant with an obligation to indemnify but without the benefit of insurance to fund the indemnity.

Further, indemnity agreements may be unenforceable either by statute or by case law – Example: **Massachusetts MGL 186, Section 15:**

Any provision of a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to indemnify the lessor or landlord or hold the lessor or landlord harmless, or preclude or exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenance used in connection therewith, shall be deemed to be against public policy and void.

Tenant's Exposure

Tenant's – Property Insurance Requirements

Tenant at its sole cost shall maintain fire and extended coverage insurance on all alterations and all other contents of the Tenant located on the Demised Premises, including any Leasehold Improvements, in an amount sufficient so that no coinsurance penalty will be applied in case of loss.

46

While a lease requirement for Tenant to purchase insurance on Tenant's own property located on the premises is not uncommon, it is often left out of the insurance provisions of a lease as focus tends to be on liability Insurance.

No mention of deductible amount (See *The Gap v. Red Apple Companies, Inc.* 725 NYS 2d 312 (N.Y. App. Division 2001))

See also Waiver of Subrogation

Tenant's Exposure

Requirement Tenant Purchase Rental Income Insurance

Tenant's Insurance. Tenant agrees to purchase and maintain in force throughout the term of this lease (including extensions of this lease) the following insurance:

- i. Rental Income insurance protecting Landlord from loss of rents and other charges during the period while the Premises are untenable due to fire or other casualty (for the period reasonably determined by Landlord).**

47

In the event the lease does not allow for the rent to abate, Landlord may demand that Tenant purchase Rental Income insurance *for the benefit of Landlord* to provide funding for Landlord's loss of rental income during periods when premises is untenable due to damage by a covered cause of loss.

BUSINESS INCOME – LANDLORD AS ADDITIONAL INSURED (RENTAL VALUE) CP 15 03 06 07 (new in 2007)

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

"Rental Value" means the:

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

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

Tenant's Exposure

Waiver of Subrogation (Mutual Waiver)

To the extent that Landlord's or Tenant's insurance pays for loss, Landlord and Tenant hereby releases the other from any and all liability to the other or anyone claiming through or under them by way of subrogation for any loss or damage to property insured by fire or any other casualties included in Paragraph 16 [Insurance], even if either party was negligent in causing such damage, so long as insurance is in force at the time of the damage.

48

Fairly common in real estate leases – Mutual Waiver of Subrogation (so-called) –more accurately a mutual *exculpatory agreement*. The intended effect is:

If insurance the Tenant's insurance pays the Tenant for damage to the Tenant's property caused by the Landlord, the Tenant has released the Landlord from liability and Tenant's insurer cannot recover from Landlord, even if Landlord is negligent.

Similarly, if the Landlord's insurance pays the Landlord for damage to the Landlord's property caused by the Tenant, the Landlord has released the Tenant from Liability and the Landlord's insurer cannot recover from Tenant, even if Tenant is negligent.

However, if the insurance of either does *not* pay because:

- The loss is not covered by the other's insurance (i.e. Business Income); or
- The loss falls within the deductible
- The loss exceeds the Landlord's or Tenant's policy Limits
- The loss results in coinsurance penalty to either

The release does not apply and Tenant or Landlord may still be liable

Tenant's Exposure

Tenant's Liability Insurance Requirements

Tenant at its sole cost and expense maintain public liability insurance for personal injury and death, property damage, advertising injury and completed operations and products liability coverage, with a least a limit of \$1,000,000 Combined Single Limit. Landlord and Landlord's agent shall be named as additional insureds to the extent of its interest under this lease only.

49

It should be expected by Tenant to name Landlord as additional insured

Do they mean personal injury or bodily insurance (using insurance terms of art)?

What is a Combined Single Limit? Is no Aggregate Limit allowed?

Who is Landlord's agent to be additional insured? What is "extent of its [Landlord's] interest under this lease?"

ADDITIONAL INSURED – MANAGERS OR LESSORS OF PREMISES CG 20 11 04 13

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability **arising out of the ownership, maintenance or use of that part of the premises leased to you** and shown in the Schedule and subject to the following additional exclusions:

This insurance does not apply to:

1. Any "occurrence" which takes place after you cease to be a tenant in that premises.
2. Structural alterations, new construction or demolition operations performed by or on behalf of the person or organization shown in the Schedule.



James K. Ruble Seminar

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Section 3

Insuring the E-Commerce Account

INSURING THE E-COMMERCE ACCOUNT

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I. History of the Internet

A. Intent

B. Historical Timeline

- 1. Sputnik / 1958 ARPAnet established line item in AF Bill**
- 2. 1960 – Packet switching theory**
- 3. 1965 – First network experiments**
- 4. 1967 – IPMS used (later became servers)**
- 5. 1969 – First 4 nodes of ARPAnet installed**
- 6. 1971 – 15 nodes on ARPAnet**
- 7. 1972 – First e-mail program**
- 8. 1977 – 111 hosts on ARPAnet**
- 9. 1978 – TCP/IP established**
- 10. 1981 – Microsoft has less than 40 employees**
- 11. 1981 – 214 nodes on ARPAnet**
- 12. 1983 – Birth of the Internet – DoD and ARPAnet use TCP/IP**
- 13. 1983 – 562 nodes and “@” for domain names**
- 14. 1984 – 1,000 hosts**
- 15. 1986 – 5,000 hosts**
- 16. 1987 – 10,000 hosts**
- 17. 1989 – 100,000 hosts**

18. 1992 – E-commerce begins – Congressman Rick Boucher’s amendment to the National Science Foundation Act of 1950 allows commerce on the net

19. 1993 – 1,000,000 hosts

20. 1995 – Bill Gates wakes up the internet

II. Future of the Internet

A. Structural Changes

B. Growth of E-Business

1. Web site construction is increasing dramatically

a) It seems as if everybody is a dot.com now

b) Your insured is too busy making use of this new technology to consider the risks

2. All industries are or will be involved in some manner with E-commerce

a) 85% of all business are expected to have an Internet presence by the end of 2013

3. Internet traffic doubles every 100 days

a) 7 new people get Internet access every second

4. Web page growth has tripled in one year

5. Linked systems will bring substantial earnings

6. E-mail outnumbers snail mail 10-1

7. 25% of the U.S. population is buying something on line

8. The Internet reaches 50 million users within 4 years

a) Radio – 35 years

b) Television – 13 years

9. Redefines traditional risk with the use and dependence on Internet technology

10. This is the basis of a new global economy and will change forever everything about how a business operates

11. Connecting critical business systems directly to critical business partners

C. Cyberlaw

1. Litigation is increasing exponentially every year

2. Few court cases have reached citation level

3. Law surrounding Cyberspace is developing constantly

4. The U.S. and other countries are continuously reviewing and revising treaties and statutory law to address applicability to internet use

5. National and international committees meet annually to discuss all issues surrounding the Internet

D. Types of E-Business

1. Content provider

a) Hosts its own Web site

b) Creates media content electronically

c) Distributes media content electronically

2. Service provider

a) Provides its own proprietary online service to providers

(1) AOL

(2) Prodigy

3. Internet tool provider

a) Provides Internet access services, support, software or consulting

(1) Netcom

(2) Netscape

(3) Advertising agency that develops Web sites for clients

4. E-Commerce account

a) Utilizes the telecommunications networks for business

(1) Advertising/promotion (passive website)

(2) Sales of products or services (active website)

b) Intranet

(1) Communication within a company

(2) Interdependent E-mail activities

c) Extranet

(1) Direct link with other business using Internet connections

III. Mechanics of Operation

A. Transfer of Information

- 1. Amplitude modulation (AM) versus frequency modulation (FM)**
- 2. Data transmitted by phase shift in the carrier wave**
- 3. Many different frequencies used to transmit data**
- 4. “Modems” modulate and demodulate**

B. Packet Switching

- 1. Makes the internet possible**
- 2. Think in terms of post cards (URL)**
- 3. Each packet contains information and an address (IP/TCP)**
- 4. Routers and servers arrange the packets**

C. Network Diagram

1. Company Network

2. Vulnerabilities

- a) DNS mining*
- b) Spoofing (IP & DNS)*
- c) IP hijacking*
- d) Port scanning*
- e) Stealth scanning*
- f) Ping scanning*
- g) SNMP probing*
- h) System identification*
- i) Default exploration*
- j) NT registry mining*
- k) Password cracking*
- l) Session key recovery*
- m) Dictionary attacks*
- n) Log exploration*
- o) Buffer overflow attack*
- p) Denial of service*

3. Hacker Profile

- a) *Casual attackers (80%)*
 - (1) 12 to 24 year old male
 - (2) Under-achiever
- b) *Experienced attackers (18%)*
 - (1) 18 to 28 year old male
 - (2) Computer-science
- c) *Professional attackers (2%)*
 - (1) 20+ year old male

4. Hacker Process

- a) *Stage one: discovery*
 - (1) Company information
 - (2) Types of computers and operating system
 - (3) Services
 - (4) Physical information
- b) *Stage two: penetration*
 - (1) System defaults
 - (2) Bad passwords
 - (3) Bad system policies
 - (4) System bugs
- c) *Stage three: control*
 - (1) Destroy evidence/cover tracks
 - (2) Obtain additional accounts
 - (3) Obtain root/administration access
 - (4) Open new holes
 - (5) Spread to other systems

IV. Types of Losses

A. First Party

- 1. Network Computer Theft**
- 2. Damage to Network Assets**
- 3. Denial of Service – Business Interruption**
- 4. Key Disaster Recovery**
- 5. Computer Hostage/Extortion**

B. Third Party Losses

- 1. Denial of Service**
- 2. Repudiation of Access**
- 3. Destruction of Data**
- 4. Unauthorized Access**
- 5. Trademark and Copyright Infringement**

C. Computer Security Issues and Trends

V. Risk Management and E-Commerce

A. Risk Management Process

B. Elements of Network Security

- 1. Internal Assessment**
- 2. External Assessment**

VI. Traditional Personal Insurance Policies

A. Money, Stored Value Cards and Smart Cards

- Scrip is used as a fundraiser, sold at a percentage of value
- Stored value card could be a phone card
- Smart card has a chip

3. Special Limits of Liability.

The special limit for each category shown below is the total limit for each loss for all property in that category. These special limits do not increase the Coverage C limit of liability.

- a. \$200 on money, bank notes, bullion, gold other than goldware, silver other than silverware, platinum other than platinumware, coins, medals, scrip, stored value cards and smart cards.

B. Business Personal Property

3. Special Limits of Liability.

The special limit for each category shown below is the total limit for each loss for all property in that category. These special limits do not increase the Coverage C limit of liability.

- h. \$2,500 on property, on the "residence premises," used primarily for "business" purposes.
- i. \$1,500 on property, away from the "residence premises", used primarily for "business" purposes. However, this limit does not apply to loss to antennas, tapes, wires, records, disks or other media that are:
 - (1) Used with electronic equipment that reproduces, receives or transmits audio, visual or data signals, and
 - (2) In or upon a "motor vehicle".

C. Credit Cards & Forgery

4. Property Not Covered. We do not cover:

- j. Credit cards, electronic fund transfer cards or access devices used solely for deposit, withdrawal or transfer of funds except as provided in E.6, Credit Card, Electronic Fund Transfer Card Or Access Device, Forgery And Counterfeit Money under Section I – Property Coverages; or

a) *Credit Card, Fund Transfer Card, Forgery and Counterfeit Money*

- HO 04 53 CAN BE USED TO INCREASE limit

- CARD MUST BE IN INSURED'S NAME

- BUSINESS USE excluded

6. Credit Card, Electronic Fund Transfer Card Or Access Device, Forgery and Counterfeit Money.

a. We will pay up to \$500 for:

- (1) The legal obligation of an "insured" to pay because of the theft or unauthorized use of credit cards issued to or registered in an "insured's" name;
- (2) Loss resulting from theft or unauthorized use of an electronic fund transfer card or access device used for deposit, withdrawal or transfer of funds issued to or registered in an "insured's" name;
- (3) Loss to an "insured" caused by forgery or alteration of any check or negotiable instrument; and
- (4) Loss to an "insured" through acceptance in good faith of counterfeit United States or Canadian paper currency.

All loss resulting from a series of acts committed by any one person or in which any one person is concerned or implicated is considered to be one loss.

This coverage is additional insurance. No deductible applies to this coverage.

b. We do not cover:

- (1) Use of a credit card, electronic fund transfer card or access device:
 - (a) By a resident of your household;
 - (b) By a person who has been entrusted with either type of card or access device; or
 - (c) If an "insured" has not complied with all the terms and conditions which the cards are issued or the devices accessed.

(2) Loss arising out of "business" use or dishonesty of an "insured."

c. If the coverage in a. above applies, the following defense provisions also apply:

- (1) We may investigate and settle any claim or suit that we decide is appropriate. Our duty to defend a claim or suit ends when the amount we pay for the loss equals our limit of liability.
- (2) If a suit is brought against an "insured" for liability under **a.(1)** or **a.(2)** above, we will provide a defense at our expense by counsel of our choice.
- (3) We have the option to defend at our expense an "insured" or an "insured's" bank against any suit for the enforcement of payment under **a.(3)** above.

PERSONAL PROPERTY REPLACEMENT COST LOSS SETTLEMENT

A. Eligible Property

1. Covered losses to the following property are settled at replacement cost at the time of the loss:
 - a. Coverage C
 - b. If covered in this policy:
 - (1) Awnings, outdoor antennas and outdoor equipment, and
 - (2) Carpeting and household appliances;
whether or not attached to buildings.
2. This method of loss settlement will also apply to the following articles or classes of property if they are separately described and specifically insured in this policy and not subject to agreed value loss settlement:
 - a. Jewelry;
 - b. Furs and garments:
 - (1) Trimmed with fur; or
 - (2) Consisting principally of fur;
 - c. Cameras, projection machines, films and related articles of equipment;
 - d. Musical equipment and related articles of equipment;
 - e. Silverware, silver-plated ware, goldware, gold-plated ware and pewterware, but excluding:
 - (1) Pens or pencils;
 - (2) Flasks;
 - (3) Smoking instruments; or
 - (4) Jewelry; and
 - f. Golfer's equipment meaning golf clubs, golf clothing and golf equipment.

Personal Property Replacement Cost coverage will not apply to other classes of property separately described and specifically insured.

B. Ineligible Property

Property listed below is not eligible for replacement cost settlement. Any loss will be settled at actual cash value at the time of loss but not more than the amount required to repair or replace.

1. Antiques, fine arts, paintings and similar articles of rarity or antiquity, which cannot be replaced.
2. Memorabilia, souvenirs, collectors items and similar articles, whose age or history contribute to their value.
3. Articles not maintained in good or workable condition.
4. Articles that are outdated or obsolete and are stored or not being used.

C. Replacement Cost Loss Settlement Condition

The following loss settlement procedure applies to all property described in **A.** above:

1. We will pay no more than the least of the following amounts:
 - a. Replacement cost at the time of loss without deduction for depreciation;
 - b. The full cost of repair at the time of loss;
 - c. The limit of liability that applies to Coverage C, if applicable;
 - d. Any applicable special limits of liability stated in this policy; or
 - e. For loss to any item described in **A.2.a. – f.** above, the limit of liability that applies to the item.
2. If the cost to repair or replace the property described in **A.** above is more than \$500, we will pay no more than the actual cash value for the loss until the actual repair or replacement is complete.
3. You may make a claim for loss on an actual cash value basis and then make claim for any additional liability in accordance with this endorsement provided you notify us, within 180 days after the date of loss, of your intent to repair or replace the damaged property.

All other provisions of the policy apply.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

SPECIAL COMPUTER COVERAGE

DEFINITIONS

With respect to the coverage provided by this endorsement, "computer equipment" means:

1. Computer hardware, software, operating systems or networks; and
2. Other electronic parts, equipment or systems solely designed for use with or connected to equipment in 1. above.

SECTION I – PERILS INSURED AGAINST

With respect to "computer equipment" defined above, the Perils Insured Against which apply to Coverage C – Personal Property are deleted and replaced by the following:

1. We cover an "insured's" "computer equipment", as defined in this endorsement, against risk of direct physical loss.
2. We do not insure, however, for loss:
 - a. Excluded under Section I – Exclusions.
 - b. 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 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 system 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) Theft in or to a dwelling under construction, until the dwelling is finished and occupied;
 - (3) Mold, fungus or wet rot.
 - (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 the dwelling has been vacant for more than 60 consecutive days immediately before the

loss. A dwelling being constructed is not considered vacant.

- (5) Dampness of atmosphere or extremes of temperature unless the direct cause of loss is:
 - (a) Rain or snow; or
 - (b) Sleet or hail;
- (6) Refinishing, renovating or repairing property;
- (7) Collision, other than collision with a land vehicle, sinking, swamping or stranding of watercraft of all types, including their:
 - (a) Trailers;
 - (b) Furnishings;
 - (c) Equipment; and
 - (d) Outboard engines or motors;
- (8) Acts or decisions, including the failure to act or decide, of any:
 - (a) Person or group; or
 - (b) Organization or governmental body.However, any ensuing loss not excluded or excepted in this policy is covered.
- (9) 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:
 - (i) Agricultural smudging; or
 - (ii) 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 one or more of the Perils Insured Against that would apply under Coverage C of the policy form if this endorsement were not attached to the policy form.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:
 - (i) Pavements or patios;
 - (ii) Footings or foundations;
 - (iii) Walls or floors;
 - (iv) Roofs or ceilings; or
 - (v) Bulkheads.
- (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."

Exception to b.(9)

Unless the loss is otherwise excluded, we cover loss to "computer equipment" resulting from an accidental discharge or overflow of water or steam from within a:

- (i) Storm drain or water, steam or sewer pipe off the "residence premises"; or

- (ii) Plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance on the "residence premises".

We do not cover loss to the system or appliance from which this water or steam escaped.

For the purpose of this provision, a plumbing system or household appliance does not include a sump, sump pump or related equipment or a roof drain, gutter, down spout or similar fixtures or equipment.

Section I – Water Exclusion paragraphs **a.** and **c.**, that apply to surface water and water below the surface of the ground, do not apply to loss by water covered under **b.(9)** above.

With respect to the precluded perils in **2. b.(1)** through **(3)** and **b.(9)**, any ensuing loss not precluded by any other provision in this policy is covered.

SPECIAL CONDITIONS

The coverage provided by this endorsement does not:

1. Increase the Coverage **C** Limit Of Liability.
2. Modify the Coverage **C** Special Limits Of Liability; or
3. Modify any provision that applies to Coverage **C** Property Not Covered.

All other provisions of this policy apply.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

IDENTITY FRAUD EXPENSE COVERAGE

DEFINITIONS

With respect to the provisions of this endorsement only, the following definitions are added:

1. "Identity fraud" means the act of knowingly transferring or using, without lawful authority, a means of identification of an "insured" with the intent:
 - a. To commit; or
 - b. To aid or abet another to commit;any unlawful activity that constitutes a violation of federal law or a felony under any applicable state or local law.
2. "Expenses" means:
 - a. Costs for notarizing affidavits or similar documents which attest to fraud required by financial institutions or similar credit grantors or credit agencies.
 - b. Costs for certified mail to law enforcement agencies, credit agencies, financial institutions or similar credit grantors.
 - c. Lost income resulting from time taken off work to:
 - (1) Complete fraud affidavits; or
 - (2) Meet with or talk to law enforcement agencies, credit agencies and/or legal counsel;up to a maximum payment of \$200 per day. Total payment for lost income is not to exceed \$5,000.
 - d. Loan application fees for re-applying for a loan or loans when the original application is rejected solely because the lender received incorrect credit information.
 - e. Reasonable attorney fees incurred as a result of "identity fraud" to:
 - (1) Defend lawsuits brought against an "insured" by merchants, financial institutions or their collection agencies.
 - (2) Remove any criminal or civil judgments wrongly entered against an "insured"; and
- (3) Challenge the accuracy of completeness of any information in a consumer credit report.
- f. Charges incurred for long distance telephone calls to:
 - (1) Merchants;
 - (2) Law enforcement agencies;
 - (3) Financial institutions; or
 - (4) Similar credit grantors, or credit agencies; to report or discuss an actual "identity fraud".

The following Additional Coverage is added under Section I:

IDENTITY FRAUD EXPENSE

We will pay up to \$15,000 for "expenses" incurred by an "insured" as the direct result of any one "identity fraud" first discovered or learned of during the policy period.

Any act or series of acts committed by one or more persons, or in which such person or persons are aiding or abetting others against an "insured", is considered to be one "identity fraud", even if a series of acts continues into a subsequent policy period.

This coverage is additional insurance.

EXCLUSIONS

The following exclusions apply to this coverage:

We do not cover:

1. Loss arising out of or in connection with a "business".
2. "Expenses" incurred due to any fraudulent, dishonest or criminal act by an "insured" or any person aiding or abetting an "insured", or by any authorized representative of an "insured", whether acting alone or in collusion with others.
3. Loss other than "expenses".

SECTION I – CONDITIONS

B. Deductible

The following replaces any other deductible provision in this policy with respect to any one covered loss covered under this endorsement.

We will pay only that part of the total loss that exceeds \$500.

C. Duties After Loss

The following is added:

Send to us, within 60 days after our request;

- a. Receipts;
- b. Bills; or
- c. Other records;

that support your claim for “expenses” under “identity fraud” coverage.

All other provisions of this policy apply.

SAMPLE

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PERSONAL INJURY COVERAGE

DEFINITIONS

The following definition is added:

“Personal injury” means injury arising out of one or more of the following offenses, but only if the offense was committed during the policy period:

1. False arrest, detention or imprisonment;
2. Malicious prosecution;
3. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
4. Oral or written publication of material, in any manner, that slanders or libels a person or organization or disparages a person’s or organization’s good, products or services; or
5. Oral or written publication of material, in any manner, that violates a person’s right of privacy.

“Fungi” means any type or form of fungus, including mold or mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi.

However, this does not include any fungi that are, are on, or are contained in, a good or product intended for consumption.

SECTION II – LIABILITY COVERAGES

A. Coverage E – Personal Liability

The following is added to Coverage E – Personal Liability:

Personal Injury Coverage

If a claim is made or suit is brought against an “insured” for damages resulting from an offense, defined under “personal injury”, to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which an “insured” is legally liable. Damages include prejudgment interest awarded against an “insured”; and
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when our limit of liability for the offense has been exhausted by payment of a judgment or settlement.

SECTION II – EXCLUSIONS

With respect to the coverage provided by this endorsement, Section II – Exclusions is replaced by the following:

This insurance does not apply to:

1. “Personal injury”:
 - a. Caused by or at the direction of an “insured” with the knowledge that the act would violate the rights of another and would inflict “personal injury”;
 - b. Arising out of oral or written publication of material, if done by or at the direction of an “insured” with knowledge of its falsity;
 - c. Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;
 - d. Arising out of a criminal act committed by or at the direction of an “insured”;
 - e. Arising out of liability assumed by an “insured” under any contract or agreement except any indemnity obligation assumed by the “insured” under a written contract directly relating to the ownership, maintenance or use of the premises;
 - f. Sustained by any person as a result of an offense directly or indirectly related to the employment of this person by an “insured”;
 - g. 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 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”.

This exclusion does not apply to:

- (1) The rental or holding for rental of an “insured location”;
 - (a) On an occasional basis if used only as a residence;

(b) 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

(c) In part, as an office, school, studio or private garage; and

(2) An "insured" under the age of 21 years involved in a part-time or occasional, self-employed "business with no employees;

h. Arising out of civic or public activities performed for pay by an "insured";

i. To you or an "insured" as defined under Definition 5.a. or 5.b.

This exclusion also applies to any claim made or suit brought against you or an "insured" to:

(1) Repay; or

(2) Share damages with;

another person who may be obligated to pay damages because of "personal injury" to an "insured";

j. Injury arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.

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

k. Arising directly or indirectly, in whole or in part, out of the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi", wet or dry rot, or bacteria.

2. Any loss, cost or expense arising out of any:

a. Request, demand or order that an "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, "fungi", wet or dry rot, or bacteria; or

b. Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, clean up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, pollutants, "fungi", wet or dry rot, or bacteria.

SECTION II – ADDITIONAL COVERAGES

With respect to the coverage provided by this endorsement, Paragraph **D. Loss Assessment** is deleted and replaced by the following;

D. Loss Assessment

We will pay up to \$1,000 for your share of loss assessment charged against you, as an owner or tenant of the "residence premises", during the policy period by a corporation or association of property owners, when the assessment is made as a result of "personal injury" not excluded under this endorsement.

We do not cover assessments charged against you or a corporation or association of property owners by any governmental body.

Regardless of the number of assessments, the limit of \$1,000 is the most we will pay for loss arising out of "personal injury".

SECTION II – CONDITIONS

With respect to the coverage provided by this endorsement, Section II – Condition I. Policy Period does not apply and Conditions **A. Limit of Liability**, **B. Severability Of Insurance** and **C. Duties After "Occurrence"**, are replaced by the following:

A. Limit Of Liability

Our total liability under Personal Injury Coverage for all damages resulting from any one offense will not be more than the Limit Of Liability shown in the Declarations for Coverage **E**. This limit is the same regardless of the number of "insureds", claims made or suits brought.

B. Severability Of Insurance

This insurance applies separately to each "insured". This condition will not increase our limit of liability for any one offense.

C. Duties After Offense

In the event of a covered offense, you or another "insured" will perform the following duties that apply. We have no duty to provide coverage under this policy if your failure to comply with the following duties is prejudicial to us. You will help us by seeing that these duties are performed:

1. Give written notice to us or our agent as soon as is practical, which sets forth:

a. The identity of the policy and "named insured";

b. Reasonably available information on the time, place and circumstances of the offense; and

c. Names and addresses of any claimants and witnesses;

2. Cooperate with us in the investigation, settlement or defense of any claim or suit;
3. Promptly forward to us every notice, demand, summons or other process relating to the offense;
4. At our request, help us:
 - a. To make settlement;
 - b. To enforce any right of contribution or indemnity against any person or organization who may be liable to an "insured";
 - c. With the conduct of suits and attend hearings and trials; and
 - d. To secure and give evidence and obtain the attendance of witnesses;
5. No "insured" shall, except at such "insured's" own cost, voluntarily make payment, assume obligation or incur expense other than for first aid to others at the time of the "personal injury".

All other provisions of this policy apply.

SAMPLE

D. Building and Personal Property Coverage Form – CP 00 10 10 00

1. Covered Property

a) *Business Personal Property*

- MACHINERY & EQUIPMENT
- ALL OTHER PERSONAL PROPERTY
- LABOR, MATERIALS & SERVICES
- LEASED PROPERTY, UNLESS CP 14 60 USED

b. Your Business Personal Property consists of the following property located in or on the building or structure described in the Declarations or in the open (or in a vehicle) within 100 feet of the building or structure or within 100 feet of the premises described in the Declarations, whichever distance is greater:

- (2) Machinery and equipment;
- (4) All other personal property owned by you and used in your business;
- (5) Labor, materials or services furnished or arranged by you on personal property of others;
- (7) Leased personal property for which you have a contractual responsibility to insure, unless otherwise provided for under Personal Property of Others.

2. Replacement Cost

3. Replacement Cost

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

- (1) The Limit of Insurance applicable to the lost or damaged property;
- (2) The cost to replace the lost or damaged property with other property:
 - (a) Of comparable material and quality; and
 - (b) Used for the same purpose; or
- (3) The amount actually spent that is necessary to repair or replace the lost or damaged property.

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

UPGRADE VALUE ENDORSEMENT

HOW MUCH WE PAY

When a loss involves “hardware” described on the Upgrade Value Schedule, the Loss Settlement Terms are replaced by the following loss settlement provisions, but only as regards the described “hardware”:

Loss Settlement Terms, Upgrade Value – The following terms apply subject to paragraphs 1., 2., 4., 5., and 6. under How Much We Pay:

1. **Partial Loss** – If a loss is a partial loss, “we” pay the lesser of:
 - a. the amount determined under Valuation; or
 - b. the cost to repair or rebuild the property with material of like kind and quality to the extent practicable.
2. **Total Loss** – If a loss is a total loss, “we” pay the lesser of:
 - a. the upgrade hardware “limit” indicated on the Upgrade Value Schedule for the upgrade “hardware”; or
 - b. the amount “you” actually and necessarily spend in replacing the damaged or destroyed “hardware”.
3. **The Upgrade Value Does Not Apply Until Hardware is Replaced** – The upgrade value does not apply until the damaged or destroyed “hardware” is replaced. “You” may make a claim for actual cash value before replacement takes place, and later for the upgrade value if “you” notify “us” of “your” intent within 180 days after the loss.
4. **You Must Submit A List Of Applicable Hardware** – The loss settlement terms under this endorsement do not apply unless prior to the loss “you” submit to “us” a list of “hardware” that includes:
 - a. a description and the actual cash value of each item of “hardware” that “you” own and that “you” plan to replace; and
 - b. a description and current cost of upgrade “hardware” that “you” intend as a replacement for “your” current “hardware” and that is of greater processing abilities, speed, functions or features.

IM 7213 10 02

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LEASED PROPERTY

This endorsement modifies insurance provided under the following:

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

Premises No.	Bldg. No.	SCHEDULE	
		Description of Property	Agreed Value (Optional)

- *CLM rule 31.c.(7)*
- *Separately scheduled*
- *With valued option, insured can cover the property for a stipulated value rather than Actual Cash Value*
- *Coinsurance still applies*

- A.** When this endorsement is attached to the STANDARD PROPERTY POLICY CP 00 99 the term Coverage Part in this endorsement is replaced by the term Policy.
- B.** Your Business Personal Property is revised to include personal property of others in your care, custody or control under written leases, as described in the Schedule or in the Declarations.
- C.** If an agreed value is entered for property in the Schedule or in the Declarations, this amount will be considered to be the value of the described property at the time of loss or damage. But this does not otherwise alter the application of the Coinsurance condition.
- D.** Property described in the Schedule or in the Declarations is not included under any Personal Property of Others coverage in this Coverage Part.

3. Personal Property of Others

- IN YOUR CARE, CUSTODY OR CONTROL AND
- IN OR ON BUILDING OR WITHIN 100 FEET

c. Personal Property of Others that is:

- (1) In your care, custody or control; and
- (2) Located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

However, our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

a) Personal Property of Others Valuation

- REPLACEMENT COST FOR PPO IS NOW AN OPTION

4. Extension of Replacement Cost to Personal Property of Others

a. If the replacement Cost Optional Coverage is shown as applicable in the Declarations, then this Extension may also be shown as applicable. If the Declarations show this Extension as applicable, then Paragraph **3.b.(1)** of the Replacement Cost Optional Coverage is deleted and all other provisions of the Replacement Cost Optional Coverage apply to replacement cost on personal property of others.

b. With respect to replacement cost on the personal property of others, the following limitation applies:

If an item(s) of personal property of others is subject to a written contract which governs your liability for loss or damage to that item(s), then valuation of that item(s) will be based on the amount for which you are liable under such contract, but not to exceed the lesser of the replacement cost of the property or the applicable Limit of Insurance.

b) Coverage Extension

- PERSONAL EFFECTS OF INSURED, OFFICERS, PARTNERS, EMPLOYEES
- ⓪ EXCEPT THEFT
- PERSONAL PROPERTY OF OTHERS
- \$2,500 LIMIT

b. Personal Effects and Property of Others.

You may extend the insurance that applies to Your Business Personal Property to apply to:

- (1) Personal effects owned by you, your officers, your partners or members, your managers or your employees. This extension does not apply to loss or damage by theft.
- (2) Personal property of others in your care, custody or control.

The most we will pay for loss or damage under this Extension is \$2,500 at each described premises. Our payment for loss of or damage to personal property of others will only be for the account of the owner of the property.

4. Property Limited

- ELECTRONIC DATA

- VALUABLE PAPERS
AND RECORDS

2. Property Not Covered

Covered Property does not include:

- n. Electronic data, except as provided under the Additional Coverage, Electronic Data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This paragraph, n., does not apply to your “stock” of prepackaged software, or to electronic data which is integrated in and operates or controls the building’s elevator, lighting, heating, ventilation, air conditioning or security system;
- o. The cost to replace or restore the information on valuable papers and records, including those which exist as electronic data. Valuable papers and records include but are not limited to proprietary information, books of account, deeds, manuscripts, abstracts, drawings and card index systems. Refer to the Coverage Extension for Valuable Papers And Records (Other Than Electronic Data) for limited coverage for valuable papers and records other than those which exist as electronic data;

a) *Electronic Data*

- DESTROYED OR CORRUPTED

- VIRUS COVERAGE

- \$2,500 ANNUAL AGGREGATE

f. Electronic Data

- (1) Under this Additional Coverage, electronic data has the meaning described under Property Not Covered, Electronic Data. This Additional Coverage does not apply to your “stock” or prepackaged software, or to electronic data which is integrated in and operates or controls the building’s elevator, lighting, heating, ventilation, air conditioning or security system.
- (2) Subject to the provisions of this Additional Coverage, we will pay for the cost to replace or restore electronic data which has been destroyed or corrupted by a Covered Cause of Loss. To the extent that electronic data is not replaced or restored, the loss will be valued at the cost of replacement of the media on which the electronic data was stored, with blank media of substantially identical type.
- (3) The Covered Causes of Loss applicable to Your Business Personal Property apply to this Additional Coverage, Electronic Data, subject to the following:
 - (a) If the Causes of Loss – Special Form applies, coverage under this Additional Coverage, Electronic Data, is limited to the “specified causes of loss” as defined in that Form, and Collapse as set forth in that Form.
 - (b) If the Causes of Loss – Broad Form applies, coverage under this Additional Coverage, Electronic Data, includes Collapse as set forth in that Form.
 - (c) If the Causes of Loss form is endorsed to add a Covered Cause of Loss, the additional Covered Cause of Loss does not apply to the coverage provided under this Additional Coverage, Electronic Data.
 - (d) The Covered Causes of Loss include a virus, harmful code or similar instruction, introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for loss or damage caused by or resulting from manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you or for you to inspect, design, install, modify, maintain, repair or replace that system.
- (4) The most we will pay under this Additional Coverage, Electronic Data, is \$2,500 (unless a higher limit is shown in the Declarations) for all loss or damage sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss payment on the first occurrence does not exhaust that amount, then the balance is available for subsequent loss or damage sustained in but not after that policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.

a) *How the coverage is activated*

- TRIGGERED by ENTRY of 80% OR HIGHER COINSURANCE

5. Coverage Extensions

Except as otherwise provided, the following Extensions apply to property located in or on the building described in the Declarations or in the open (or in a vehicle) within 100 feet of the described premises.

If a Coinsurance percentage of 80% or more or a Value Reporting period symbol is shown in the Declarations, you may extend the insurance provided by this Coverage Part as follows:

b) *Valuable Papers and Records*

- DOES NOT COVER PROPERTY of OTHERS

- NOT ELECTRONIC DATA

- COST TO RESEARCH
- \$2,500

c. Valuable Papers and Records (Other Than Electronic Data)

(1) You may extend the insurance that applies to Your Business Personal Property to apply to the cost to replace or restore the lost information on valuable papers and records for which duplicates do not exist. But this Extension does not apply to valuable papers and records which exist as electronic data. Electronic data has the meaning described under Property Not Covered – Electronic Data.

(2) If the Causes of Loss – Special Form applies, coverage under this Extension is limited to the “specified causes of loss” as defined in that Form, and Collapse as set forth in that Form.

(3) If the Causes of Loss – Broad Form applies, coverage under this Extension includes Collapse as set forth in that Form.

(4) Under this Extension, the most we will pay to replace or restore the lost information is \$2,500 at each described premises, unless a higher limit is shown in the Declarations. Such amount is additional insurance. We will also pay for the cost of blank material for reproducing the records (whether or not duplicates exist), and (when there is a duplicate) for the cost of labor to transcribe or copy the records. The costs of blank material and labor are subject to the applicable Limit of Insurance on Your Business Personal Property and therefore coverage of such costs is not additional insurance.

E. Causes of Loss – Special Form CP 10 30 09 17

1. Specified Causes of Loss

- Collapse MISSING

"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.

- 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.

- b. Falling objects does not include loss or damage to:

(1) Personal property in the open; or

(2) The interior of a building or structure, or property inside a building or structure, unless the roof or an outside wall of the building or structure is first damaged by a falling object.

- c. Water damage means:

(1) Accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance any part of a system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam; and

(2) Accidental discharge or leakage of water or waterborne material as the direct result of the breaking apart or cracking of a water or sewer pipe caused by wear and tear when the pipe is located off the described premises and is connected to or is part of a potable water supply system or sanitary sewer system operated by a public or private utility service provider pursuant to authority granted by the state or governmental subdivision where the described premises are located.

But water damage does not include . . .

COMPUTER COVERAGE

AGREEMENT

In return for "your" payment of the required premium, "we" provide the coverage described herein subject to all the "terms" of the Computer Coverage. This coverage is also subject to the "schedule of coverages" and additional policy conditions relating to assignment or transfer of rights or duties, cancellation, changes or modifications, inspections, and examination of books and records.

Endorsements and schedules may also apply. They are identified on the "schedule of coverages".

Refer to Definitions for words and phrases that have special meaning. These words and phrases are shown in quotation marks or bold type.

DEFINITIONS

1. The words "you" and "your" mean the persons or organizations named as the insured on the "schedule of coverages".
2. The words "we", "us", and "our" mean the company providing this coverage.
3. "Business" means the usual business operations occurring at a premises described on the "schedule of coverages".
4. "Computer hacking" means an unauthorized intrusion:
 - a. by an individual or group of individuals, whether employed by "you" or not, into "hardware", "software", or a computer network; and

b. that results in but is not limited to:

- 1) deletion, destruction, generation, or modification of "software";
- 2) alteration, contamination, corruption, degradation, or destruction of the integrity, quality, or performance of "software";
- 3) observation, scanning, or copying of "data records", "programs and applications", and "proprietary programs";
- 4) damage, destruction, inadequacy, malfunction, degradation, or corruption of any "hardware" or "media" used with "hardware"; or
- 5) denial of access to or denial of services from "your" "hardware" or "your" computer network.

5. "Computer virus" means the introduction of any malicious, self-replicating electronic data processing code or other code:

a. into "hardware" or "software"; and

b. that is intended to result in, but is not limited to:

- 1) deletion, destruction, generation, or modification of "software";
- 2) alteration, contamination, corruption, degradation, or destruction of the integrity, quality, or performance of "software";
- 3) damage, destruction, inadequacy, malfunction, degradation, or corruption of any "hardware" or "media" used with "hardware"; or
- 4) denial of access to or denial of services from "your" "hardware" or "your" computer network.

6. "Data records" means files, documents, and information in an electronic format and that are stored on "media".

7. "Electrical disturbance" means electrical or magnetic damage, disturbance of electronic recordings, or erasure of electronic recordings.
8. "Flood" means flood, surface water, waves, tidal water, or the overflow of a body of water, all whether driven by wind or not. This includes spray that results from these whether driven by wind or not.
9. "Hardware" means a network of electronic machine components (microprocessors) capable of accepting instructions and information, processing the information according to the instructions, and producing desired results.
 - a. **Hardware Includes** -- "Hardware" includes but is not limited to:
 - 1) mainframe and mid-range computers and network servers;
 - 2) personal computers and workstations;
 - 3) laptops, palmtops, notebook PCs, other portable computer devices and accessories including, but not limited to, multimedia projectors; and
 - 4) peripheral data processing equipment, including but not limited to, printers, keyboards, monitors, and modems.
 - b. **Hardware Does Not Include** -- "Hardware" does not include:
 - 1) "software"; and
 - 2) "off-site server" and "on-site server".
10. "Limit" means the amount of coverage that applies.
11. "Mechanical breakdown" means the malfunction or failure of moving or electronic parts, component failure, faulty installation, or blowout.
12. "Media" means processing, recording, or storage media used with "hardware". This includes but is not limited to films, tapes, cards, discs, drums, cartridges, or cells.
13. "Off-site server" means a server for "your" Web site:
 - a. that is not at a premises described on the "schedule of coverages"; and
 - b. that is being maintained and/or operated by an independent contractor acting as "your" Web host or "your" Internet service provider that is acting as "your" Web host.
14. "On-site server" means a server for "your" Web site:
 - a. that is at a premises occupied by "you" and described on the "schedule of coverages"; and
 - b. that is being maintained and/or operated by "you" or an independent contractor acting as "your" Web site consultant.
15. "Pollutant" means:
 - a. any solid, liquid, gaseous, thermal, or radioactive irritant or contaminant, including but not limited to acids, alkalis, chemicals, fumes, smoke, soot, vapor, and waste. Waste includes materials to be recycled, reclaimed, or reconditioned, as well as disposed of; and
 - b. electrical or magnetic emissions, whether visible or invisible, and sound emissions.
16. "Power supply disturbance" means interruption of power supply, power surge, blackout, or brownout.
17. "Programs and applications" means operating programs and applications that "you" purchase and that are:
 - a. stored on "media"; or
 - b. pre-installed and stored in "hardware".

18. "Proprietary programs" means proprietary applications or programs that are developed in-house or that "you" had developed specifically for "you" and that are:

- a. stored on "media"; or
- b. installed and stored in "hardware".

19. "Restoration period" means:

a. the time it should reasonably take to resume "your" "business" to a similar level of service starting from the date of a physical loss of or damage to covered property at a premises described on the "schedule of coverages" that is caused by a covered peril and ending on the date:

- 1) the property should be rebuilt, repaired, or replaced; or
- 2) "business" is resumed at a new permanent location.

This is not limited by the expiration date of the policy.

b. The "restoration period" also means the increased time required to comply with the enforcement of any ordinance, law, or decree that:

- 1) regulates the construction, use, or repair of any property; or
- 2) requires the demolition of any property, in part or in whole, not damaged by a covered peril.

The ordinance, law, or decree must be in force at the time of loss.

"Restoration period" does not mean the increased time required to comply with the enforcement of any ordinance, law, or decree that requires "you" or anyone else to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize or in any way respond to or assess the effects of "pollutants".

c. Only as regards coverage described under Off Premises Utility Service Interruption; Interruption of Web Site (if added to this coverage part by endorsement); and Property In Transit in the Supplemental Income Coverages, "restoration period" also means the time it should reasonably take to resume "your" "business" starting from the date of direct physical loss of or damage caused by a covered peril to:

- 1) property not located at a premises described on the "schedule of coverages" and that is owned by a utility, a landlord, or another utility supplier;
- 2) "your" Web site operation that is being maintained or operated by and that is located at the premises of an independent contractor or Internet service provider; and
- 3) property in transit;

and ending on the date the property should be rebuilt, repaired, or replaced. This is not limited by the expiration date of the policy.

20. "Schedule of coverages" means:

- a. all pages labeled schedule of coverages or schedules which pertain to this coverage; and
- b. declarations or supplemental declarations which pertain to this coverage.

21. "Sinkhole collapse" means the sudden settlement or collapse of earth supporting the covered property into subterranean voids created by the action of water on a limestone or similar rock formation.

Sinkhole collapse does not include the value of the land or the cost of filling sinkholes.

22. "Software" means "media", "data records", "programs and applications", and "proprietary programs".

Software does not mean "Web site software".

23. "Specified perils" means aircraft; civil commotion; explosion; falling objects; fire; hail; leakage from fire extinguishing equipment; lightning; riot; "sinkhole collapse"; smoke; sonic boom; vandalism; vehicles; "volcanic action"; water damage; weight of ice, snow, or sleet; and windstorm.

Falling objects does not include loss to:

- a. personal property in the open; or
- b. to the interior of buildings or structures or to personal property inside buildings or structures unless the exterior of the roofs or walls are first damaged by a falling object.

Water damage means the sudden or accidental discharge or leakage of water or steam as a direct result of breaking or cracking of a part of the system or appliance containing the water or steam.

24. "Terms" means all provisions, limitations, exclusions, conditions, and definitions that apply.
25. "Volcanic action" means airborne volcanic blast or airborne shock waves; ash, dust, or particulate matter; or lava flow.
- Volcanic action does not include the cost to remove ash, dust, or particulate matter that does not cause direct physical loss to the covered property.
26. "Web site server" means "on-site server" and "off-site server".
27. "Web site software" means the following software that are used in "your" "Web site server":
- a. "media";

- b. "data records";
- c. programs and applications which means operating programs and applications that "you" purchase and that are stored on "media" or pre-installed and stored in "Web site servers"; and
- d. proprietary programs which means proprietary applications or programs that are developed in-house or that "you" had developed specifically for "you" and that are stored on "media" or installed and stored in "Web site servers".

PROPERTY COVERED

"We" cover the following property unless the property is excluded or subject to limitations.

1. Hardware --

- a. **Coverage** -- "We" cover direct physical loss caused by a covered peril to "hardware" and similar property of others that is in "your" care, custody, or control.
- b. **Coverage Limitations** -- "We" only cover "hardware" and similar property of others:
 - 1) when a "limit" for "hardware" is indicated on the "schedule of coverages"; and
 - 2) while at a premises described on the "schedule of coverages".

2. Software --

- a. **Coverage** -- "We" cover direct physical loss caused by a covered peril to:
 - 1) "media";
 - 2) "programs and applications"; andsimilar property of others that is in "your" care, custody, or control.

- b. **Coverage Limitations** -- "We" only cover "media", "programs and applications", and similar property of others:
 - 1) when a "limit" for "media" and "programs and applications" is indicated on the "schedule of coverages"; and
 - 2) while at a premises described on the "schedule of coverages".
- c. **We Do Not Cover** -- Except as provided under Supplemental Coverages, "we" do not cover:
 - 1) "data records"; and
 - 2) "proprietary programs".

INCOME COVERAGE

"We" provide the following coverage unless the coverage is excluded or subject to limitations.

- 1. **Coverage Options** -- One of the following described coverage options applies when that option is indicated on the "schedule of coverages":
 - a. Earnings and Extra Expense; or
 - b. Extra Expense only.
- 2. **Coverage** --
 - a. **Covered Property** -- "We" provide the coverages described below during the "restoration period" when "your" "business" is necessarily wholly or partially interrupted by direct physical loss of or damage to covered property at a premises described on the "schedule of coverages" as a result of a covered peril.

- b. **Described Premises and Air Conditioning System** -- "We" provide the coverages described below under 3. and 4. during the "restoration period" when "your" "business" is necessarily wholly or partially interrupted as a result of direct physical loss of or damage to:
 - 1) a premises described on the "schedule of coverages" that prevents "you" from using covered property; or
 - 2) the air conditioning or electrical systems which are necessary for the operation of covered property and results in a reduction or suspension of "your" "business".
- c. **If You Lease Your Premises** -- If "you" lease, rent, or do not own the premises "you" occupy, for the purposes of determining an Income Coverage loss, "your" location is the space that "you" lease, rent, or occupy including, but not limited to, all passageways to "your" location within the building.
- 3. **Earnings** -- "We" cover "your" actual loss of net income (net profit or loss before income taxes) that would have been earned or incurred and continuing operating expenses normally incurred by "your" "business", including but not limited to payroll expense.
- 4. **Extra Expense** -- "We" cover only the extra expenses that are necessary during the "restoration period" that "you" would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a covered peril.
 - a. **Expenses To Reduce Interruption** -- "We" cover any extra expense to avoid or reduce the interruption of "your" data processing operations and continue operating at a premises described on the "schedule of coverages", replacement location, or a temporary location. This includes expenses to relocate and costs to outfit and operate a replacement or temporary location.

"We" will also cover any extra expense to reduce the interruption of "business" if it is not possible for "you" to continue operating during the "restoration period".

- b. **Expenses To Repair/Restore Property and Information** -- To the extent that they reduce a loss otherwise payable under this coverage, "we" will cover any extra expenses to:

- 1) repair, replace, or restore any property; and
- 2) research, replace, or restore information on damaged documents, manuscripts, or records that:
 - a) are inscribed, printed, or written; or
 - b) exist on electronic or magnetic media.

PROPERTY NOT COVERED

1. **Accounts, Bills, or Documents** -- "We" do not cover accounts, bills, evidences of debt, records, abstracts, deeds, manuscripts, program documentation, or other documents except those that are in "software" form and then only in that form.
2. **Checked Luggage** -- "We" do not cover loss resulting from theft or disappearance of a laptop, palmtop, notebook PC, or any portable computer while in transit as checked luggage.
3. **Contraband** -- "We" do not cover contraband or property in the course of illegal transportation or trade.
4. **Loaned, Leased, or Rented To Others** -- "We" do not cover property that "you" loan, lease, or rent to others.
5. **Money and Securities** -- "We" do not cover currency, food stamps, lottery tickets not held for sale, money, notes, or securities.

6. **Stock in Trade** -- "We" do not cover property that is "your" stock in trade.
7. **Web Site Servers** -- "We" do not cover "Web site servers" including "Web site software".

COVERAGE EXTENSIONS

Provisions That Apply To Coverage Extensions -

- The following Coverage Extensions indicate an applicable "limit". This "limit" may also be shown on the "schedule of coverages".

If a different "limit" is indicated on the "schedule of coverages", that "limit" will apply instead of the "limit" shown below.

However, if no "limit" is indicated for a Coverage Extension, coverage is provided up to the full "limit" for the applicable covered property unless a different "limit" is indicated on the "schedule of coverages".

Unless otherwise indicated, the coverages provided below are part of and not in addition to the applicable "limit" for coverage described under Property Covered.

The "limit" provided under a Coverage Extension cannot be combined or added to the "limit" for any other Coverage Extension or Supplemental Coverage including a Coverage Extension or Supplemental Coverage that is added to this policy by endorsement.

The following coverage extensions are not subject to and not considered in applying coinsurance conditions.

1. **Debris Removal** --
 - a. **Coverage** -- "We" pay the cost to remove the debris of covered property that is caused by a covered peril.

b. **We Do Not Cover** -- This coverage does not include costs to:

- 1) extract "pollutants" from land or water;
or
- 2) remove, restore, or replace polluted land or water.

c. **Limit** -- "We" do not pay any more under this coverage than 25% of the amount "we" pay for the direct physical loss. "We" will not pay more for loss to property and debris removal combined than the "limit" for the damaged property.

d. **Additional Limit** -- "We" pay up to an additional \$5,000 for debris removal expense when the debris removal expense exceeds 25% of the amount "we" pay for direct physical loss or when the loss to property and debris removal combined exceeds the "limit" for the damaged property.

e. **You Must Report Your Expenses** -- "We" do not pay any expenses unless they are reported to "us" in writing within 180 days from the date of direct physical loss to covered property.

2. **Electrical and Power Supply Disturbance** --

a. **Coverage** -- "We" cover direct physical loss to covered property caused by:

- 1) "electrical disturbance"; or
- 2) "power supply disturbance".

b. **Coverage Limitation** -- "We" only cover loss caused by "electrical disturbance" and "power supply disturbance" if the cause of such disturbance took place within 500 feet of the premises where the loss occurred.

However, if the "schedule of coverages" indicates that there is no limitation, then the 500 feet limitation described above does not apply to this Coverage Extension.

3. **Emergency Removal** --

a. **Coverage** -- "We" pay for any direct physical loss to covered property while it is being moved or being stored to prevent a loss caused by a covered peril.

b. **Time Limitation** -- This coverage applies for up to 365 days after the property is first moved. Also, this coverage does not extend past the date on which this policy expires.

4. **Emergency Removal Expenses** --

a. **Coverage** -- "We" pay for "your" expenses to move or store covered property to prevent a loss caused by a covered peril.

b. **Time Limitation** -- This coverage applies for up to 365 days after the property is first moved. Also, this coverage does not extend past the date on which this policy expires.

c. **Limit** -- The most "we" pay in any one occurrence for expenses to move or store covered property to prevent a loss is \$1,000.

d. **This Is A Separate Limit** -- The "limit" for Emergency Removal Expenses is separate from, and not part of, the applicable "limit" for coverage described under Property Covered.

5. **Fraud and Deceit** --

a. **Coverage** -- "We" cover theft of covered property when "you", "your" agents, customers, or consignees are fraudulently induced to part with the covered property:

- 1) to persons who falsely represent themselves as the proper persons to receive the property; or
- 2) by the acceptance of fraudulent bills of lading or shipping receipts.

b. **Limit** -- The most "we" pay in any one occurrence for theft of covered property under this Coverage Extension is \$1,000.

6. **Mechanical Breakdown Coverage** -- "We" pay for loss to covered property caused by "mechanical breakdown".

SUPPLEMENTAL COVERAGES

Provisions That Apply To Supplemental Coverages -- The following Supplemental Coverages indicate an applicable "limit". This "limit" may also be shown on the "schedule of coverages".

If a different "limit" is indicated on the "schedule of coverages", that "limit" will apply instead of the "limit" shown below.

However, if no "limit" is indicated for a Supplemental Coverage, coverage is provided up to the full "limit" for the applicable covered property unless a different "limit" is indicated on the "schedule of coverages".

Unless otherwise indicated, a "limit" for a Supplemental Coverage provided below is separate from, and not part of, the applicable "limit" for coverage described under Property Covered.

The "limit" available for coverage described under a Supplemental Coverage:

- a. is the only "limit" available for the described coverage; and
- b. is not the sum of the "limit" indicated for a Supplemental Coverage and the "limit" for coverage described under Property Covered.

The "limit" provided under a Supplemental Coverage cannot be combined or added to the "limit" for any other Supplemental Coverage or Coverage Extension including a Supplemental Coverage or Coverage Extension that is added to this policy by endorsement.

The following coverage extensions are not subject to and not considered in applying coinsurance conditions.

1. **Acquired Locations** --

- a. **Coverage** -- "We" cover direct physical loss caused by a covered peril to covered property at locations that "you" acquire during the policy period.
- b. **Limit** -- "We" pay up to \$250,000 for covered property at locations that "you" acquire.
- c. **Time Limitation** -- This coverage applies for up to 60 days from the date "you" acquire the location or until "you" report the acquired location to "us", whichever occurs first.

However, this coverage does not go beyond the end of the policy period.

- d. **Additional Premium** -- "You" must pay any additional premium due from the date "you" acquire the location.

2. **Earthquake Coverage** -- If coverage is indicated on the "schedule of coverages", "we" cover direct physical loss caused by earthquake and volcanic eruption to covered property while at a premises described on the "schedule of coverages".

3. **Flood Coverage** -- If coverage is indicated on the "schedule of coverages", "we" cover direct physical loss caused by "flood" to covered property while at a premises described on the "schedule of coverages".

4. **Newly Purchased or Leased Hardware** --

- a. **Coverage** -- "We" cover direct physical loss caused by a covered peril to additional "hardware" including pre-installed "programs and applications" that "you" purchase or lease during the policy period.

b. **Limit** -- The most that "we" pay for any loss under this additional coverage is the least of:

- 1) the actual cash value of the covered property; or
- 2) \$250,000.

c. **Time Limitation** -- "We" extend coverage to the additional "hardware" that "you" purchase or lease for up to 60 days.

This supplemental coverage will end when any of the following first occur:

- 1) this policy expires;
- 2) 60 days after "you" obtain the additional "hardware"; or
- 3) "you" report the additional "hardware" to "us".

d. **Additional Premium** -- "You" must pay any additional premium due from the date "you" purchase or lease the additional "hardware".

5. **Off-Site Computers** --

a. **Coverage** -- "We" cover direct physical loss caused by a covered peril to covered property in the custody of "you", "your" officers, "your" partners, or "your" employees, while:

- 1) at "your" residence or the residence of "your" officers, partners, or employees;
- 2) temporarily at a premises that is not described on the "schedule of coverages"; or
- 3) in transit between a:
 - a) residence or temporary premises; and
 - b) premises described on the "schedule of coverages".

b. **Limit** -- The most "we" pay in any one occurrence for loss to off-site covered property is \$2,500.

6. **Pollutant Cleanup and Removal** --

a. **Coverage** -- "We" pay "your" expense to extract "pollutants" from land or water if the discharge, dispersal, seepage, migration, release, or escape of the "pollutants" is caused by a covered peril that occurs during the policy period.

b. **Time Limitation** -- The expenses to extract "pollutants" are paid only if they are reported to "us" in writing within 180 days from the date the covered peril occurs.

c. **We Do Not Cover** -- "We" do not pay the cost of testing, evaluating, observing, or recording the existence, level, or effects of "pollutants".

However, "we" pay the cost of testing which is necessary for the extraction of "pollutants" from land or water.

d. **Limit** -- The most "we" pay for each location is \$10,000 for the sum of all such expenses arising out of a covered peril occurring during each separate 12-month period of this policy.

7. **Property In Transit** --

a. **Coverage** -- "We" cover direct physical loss to covered property caused by a covered peril while in transit.

b. **Limit** -- The most "we" pay in any one occurrence for loss to covered property in transit is \$5,000.

8. **Proprietary Programs and Data Records** --

a. **Coverage** -- "We" cover the cost of research or other expenses necessary to reproduce, replace, or restore lost files or codes on lost or damaged "data records" and "proprietary programs" and similar property of others that is in "your" care, custody, or control.

- b. **Coverage Limitations** -- "We" only cover "data records", "proprietary programs", and similar property of others:
- 1) while at a premises described on the "schedule of coverages"; and
 - 2) if the cost of research or other expenses necessary to reproduce, replace, or restore lost files or codes are incurred due to a direct physical loss caused by a covered peril to "data records" and "proprietary programs".
- c. **Limit** -- The most "we" pay in any one occurrence for "data records" and "proprietary programs" is \$5,000.
9. **Rewards** --
- a. **Coverage** -- "We" pay for reward information that leads to a conviction for:
- 1) arson,
 - 2) theft, or
 - 3) vandalism including, but not limited to, "computer hacking" and "computer virus".
- The conviction must involve a covered loss caused by arson, theft, or vandalism.
- b. **Limit** -- The most "we" pay in any one occurrence for reward information is \$1,000.
- c. **Limit Is Not Increased By The Number of Persons Providing Information** -- The amount "we" pay is not increased by the number of persons involved in providing the information.
10. **Sewer Backup and Water Below the Surface** -
- If coverage is indicated on the "schedule of coverages", "we" cover direct physical loss caused by:
- a. water that backs up through a sewer or drain; or
 - b. water below the surface of the ground, including but not limited to water that exerts pressure on or flows, seeps, or leaks through or into a described premises.
11. **Software Storage** --
- a. **Coverage** -- "We" cover direct physical loss caused by a covered peril to duplicate and back-up "software" stored at a "software" storage location.
- b. **Coverage Condition** -- Each "software" storage location must be in a separate building which is at least 100 feet away from a premises described on the "schedule of coverages".
- c. **Limit** -- The most "we" pay in any one occurrence for loss to duplicate and back-up "software" is \$25,000.
12. **Virus and Hacking Coverage** --
- a. **Coverage** -- "We" cover direct physical loss to covered "hardware" and "software" caused by a "computer virus" or by "computer hacking".
- b. **We Do Not Cover** -- "We" do not cover:
- 1) loss of exclusive use of any "data records" or "proprietary programs" that have been copied, scanned, or altered;
 - 2) loss of or reduction in economic or market value of any "data records" or "proprietary programs" that have been copied, scanned, or altered;

- 3) theft from "your" "data records" or "proprietary programs" of confidential information through the observation of the "data records" or "proprietary programs" by accessing covered "hardware" or "your" computer network without any alteration or other physical loss or damage to the records or programs. Confidential information includes, but is not limited to, customer information, processing methods, or trade secrets; and
 - 4) except as provided under the Supplemental Income Coverages, denial of access to or services from "your" "hardware" or "your" computer network.
- c. **Limit** -- The most "we" pay in any one occurrence under this Supplemental Coverage is \$5,000.

The most "we" pay for all covered losses under this Supplemental Coverage during each separate 12-month period of this policy is \$10,000.

INCOME COVERAGE EXTENSIONS

Provisions That Apply To Income Coverage Extensions -- The following Income Coverage Extensions indicate an applicable "limit" or limitation. This "limit" or limitation may also be shown on the "schedule of coverages".

If a different "limit" or limitation is indicated on the "schedule of coverages", that "limit" or limitation will apply instead of the "limit" or limitation shown below.

The following Income Coverage Extensions are part of and not in addition to the applicable Income Coverage "limit".

1. **Interruption by Civil Authority** --
 - a. **Coverage** -- "We" extend "your" coverage for earnings and extra expense to include loss sustained while access to premises described on the "schedule of coverages" is specifically denied by an order of civil authority.
 - b. **Coverage Limitation** -- The order of civil authority must be a result of direct physical loss of or damage to property, other than at a premises described on the "schedule of coverages" and must be caused by a covered peril.
 - c. **Time Limitation** -- Unless otherwise indicated on the "schedule of coverages", this coverage extension is limited to 30 consecutive days from the date of the order.
2. **Period of Loss Extension After Business Resumes** --
 - a. **Coverage** -- "We" extend "your" coverage for earnings to cover loss from the date the covered property that incurred the loss is rebuilt, repaired, or replaced and "your" data processing operations are resumed until:
 - 1) the end of 30 consecutive days (unless otherwise indicated on the "schedule of coverages"); or
 - 2) the date "you" could reasonably resume "your" "business" to the conditions that would generate the earnings amount that would have existed had no loss or damage occurred,whichever is earlier.
 - b. **Coverage Limitation** -- Loss of earnings must be caused by direct physical loss of or damage to property at a premises described on the "schedule of coverages" as a result of a covered peril.

SUPPLEMENTAL INCOME COVERAGES

Provisions That Apply To Supplemental Income Coverages -- Unless otherwise indicated, the following Supplemental Income Coverages apply separately to each premises described on the "schedule of coverages".

The following Supplemental Income Coverages indicate an applicable "limit". This "limit" may also be shown on the "schedule of coverages".

If a different "limit" is indicated on the "schedule of coverages", that "limit" will apply instead of the "limit" shown below.

Unless otherwise indicated, a "limit" for a Supplemental Income Coverage provided below is separate from, and not part of, the applicable Income Coverage "limit". The "limit" available for coverage described under a Supplemental Income Coverage:

- a. is the only "limit" available for the described coverage; and
- b. is not the sum of the "limit" indicated for a Supplemental Income Coverage and the Income Coverage "limit".

The "limit" provided under a Supplemental Income Coverage cannot be combined or added to the "limit" for any other Supplemental Income Coverage or Income Coverage Extension.

1. **Acquired Locations** --

- a. **Coverage** -- "We" extend "your" coverage for earnings and extra expense to include direct physical loss to covered property while at locations that "you" acquire during the policy period.
- b. **Time Limitation** -- This coverage applies for up to 60 days from the date "you" acquire the location or until "you" report the acquired location to "us", whichever occurs first.

However, this coverage does not go beyond the end of the policy period.

- c. **Additional Premium** -- "You" must pay any additional premium due from the date "you" acquire the location.
 - d. **Limit** -- The most "we" pay in any one occurrence for loss of earnings and incurred extra expense at each newly acquired location is \$25,000.
2. **Earthquake Coverage** -- If coverage is indicated on the "schedule of coverages", "we" cover direct physical loss caused by earthquake and volcanic eruption to covered property while at a premises described on the "schedule of coverages".
 3. **Flood Coverage** -- If coverage is indicated on the "schedule of coverages", "we" cover direct physical loss caused by "flood" to covered property while at a premises described on the "schedule of coverages".
 4. **Off Premises Utility Service Interruption** --
 - a. **Coverage** -- Coverage for earnings and/or extra expense is extended to loss of earnings or extra expenses that "you" incur during the "restoration period" when "your" data processing operations are interrupted due to the interruption of an off premises utility services when the interruption is a result of direct physical loss or damage by a covered peril to property that is not located at a premises described on the "schedule of coverages" and that is owned by a utility, a landlord, or another supplier who provides "you" with:
 - 1) power, gas;
 - 2) telecommunications, including but not limited to Internet access; or
 - 3) water.

b. **Overhead Transmission Lines Exclusion**
-- If the "schedule of coverages" indicates that overhead transmission lines are excluded, coverage under this extension does not include loss to overhead transmission lines that deliver utility service to "you". Overhead transmission lines include, but are not limited to:

- 1) overhead transmission and distribution lines;
- 2) overhead transformers and similar equipment; and
- 3) supporting poles and towers.

c. **Waiting Period Limitation** -- Unless otherwise indicated on the "schedule of coverages", "we" do not pay for "your" loss of earnings under this Supplemental Income Coverage until after the first 24 hours following the direct physical loss of or damage to the property owned by a utility, a landlord, or another supplier. This waiting period does not apply to extra expenses that "you" incur.

d. **Limit** -- The most "we" pay in any one occurrence under this Supplemental Income Coverage is \$10,000.

5. **Property In Transit** --

a. **Coverage** -- Coverage for earnings is extended to loss of earnings during the "restoration period" when "your" "business" is interrupted as a result of a direct physical loss, caused by a covered peril, to covered property in transit.

b. **Limit** -- The most "we" pay in any one occurrence under this Supplemental Income Coverage is \$5,000.

6. **Sewer Backup and Water Below the Surface** -

- If coverage is indicated on the "schedule of coverages", "we" extend "your" coverage for earnings and extra expense to include direct physical loss to covered property caused by:

a. water that backs up through a sewer or drain; or

b. water below the surface of the ground, including but not limited to water that exerts pressure on or flows, seeps, or leaks through or into a described premises.

7. **Virus and Hacking Coverage** --

a. **Coverage** -- Coverage for earnings and/or extra expense is extended to loss of earnings or extra expenses caused by a "computer virus" or by "computer hacking" that results in:

- 1) direct physical loss or damage to covered "software" and "hardware"; or
- 2) denial of access to or services from "your" "hardware" or "your" computer network.

b. **We Do Not Cover** -- "We" do not cover loss of earnings or extra expenses under this Supplemental Income Coverage that results from:

- 1) loss of exclusive use of any "data records" or "proprietary programs" that have been copied, scanned, or altered;
- 2) loss of or reduction in economic or market value of any "data records" or "proprietary programs" that have been copied, scanned, or altered;
- 3) theft from "your" "data records" or "proprietary programs" of confidential information through the observation of the "data records" or "proprietary programs" by accessing covered "hardware" or "your" computer network without any alteration or other physical loss or damage to the records or programs.

Confidential information includes, but is not limited to customer information, processing methods, or trade secrets.

- c. **Waiting Period Limitation** -- Unless otherwise indicated on the "schedule of coverages", "we" do not pay for "your" loss of earnings under this Supplemental Income Coverage until after the first 24 hours following the direct physical loss of or damage to "your" data processing operations. This waiting period does not apply to extra expenses that "you" incur.
- d. **Limit** -- The most "we" pay in any one occurrence under this Supplemental Income Coverage is \$5,000.

The most "we" pay for all covered losses under this Supplemental Income Coverage during each 12-month period of this policy is \$15,000.

PERILS COVERED

"We" cover risks of direct physical loss unless the loss is limited or caused by a peril that is excluded.

PERILS EXCLUDED

1. "We" do not pay for loss or damage caused directly or indirectly by one or more of the following excluded causes or events. Such loss or damage is excluded regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded causes or events.
- a. **Civil Authority** -- "We" do not pay for loss caused by order of any civil authority, including seizure, confiscation, destruction, or quarantine of property.

"We" do pay for loss resulting from acts of destruction by the civil authority to prevent the spread of fire, unless the fire is caused by a peril excluded under this coverage.

- b. **Earth Movement** -- Except as provided under Supplemental Coverages - Earthquake Coverage, "we" do not pay for loss caused by any earth movement (other than "sinkhole collapse") or caused by eruption, explosion, or effusion of a volcano. Earth movement includes, but is not limited to: earthquake; landslide; mudflow; mudslide; mine subsidence; or sinking, rising, or shifting of earth.

"We" do cover direct loss by fire, explosion, or "volcanic action" resulting from either earth movement or eruption, explosion, or effusion of a volcano.

- c. **Flood** -- Except as provided under Supplemental Coverages - Flood Coverage, "we" do not pay for loss caused by "flood". However, "we" do cover the resulting loss if fire, explosion, or sprinkler leakage results.
- d. **Nuclear Hazard** -- "We" do not pay for loss caused by or resulting from a nuclear reaction, nuclear radiation, or radioactive contamination (whether controlled or uncontrolled; whether caused by natural, accidental, or artificial means). Loss caused by nuclear hazard is not considered loss caused by fire, explosion, or smoke. Direct loss by fire resulting from the nuclear hazard is covered.

- e. **Sewer Backup and Water Below the Surface** -- Except as provided under Supplemental Coverages - Sewer Backup and Water Below the Surface, "we" do not pay for loss caused by or resulting from:
- 1) water that backs up through a sewer or drain; or
 - 2) water below the surface of the ground, including but not limited to water that exerts pressure on or flows, seeps, or leaks through or into a building or structure.

But if sewer backup and water below the surface results in fire, explosion, or sprinkler leakage, "we" cover the loss or damage caused by that fire, explosion, or sprinkler leakage.

f. **War and Military Action** -- "We" do not pay for loss caused by:

- 1) war, including undeclared war or civil war; or
- 2) a warlike action by a military force, including action taken to prevent or defend against an actual or expected attack, by any government, sovereign, or other authority using military personnel or other agents; or
- 3) insurrection, rebellion, revolution, or unlawful seizure of power including action taken by governmental authority to prevent or defend against any of these.

With regard to any action that comes within the "terms" of this exclusion and involves nuclear reaction, nuclear radiation, or radioactive contamination, this War and Military Action Exclusion will apply in place of the Nuclear Hazard Exclusion.

2. "We" do not pay for loss or damage that is caused by or results from one or more of the following:

a. **Computer Virus or Computer Hacking** -- Except as provided under Supplemental Coverages - Virus and Hacking Coverage and Supplemental Income Coverages - Virus and Hacking Coverage, "we" do not pay for:

- 1) any direct or indirect loss or damage; or
- 2) loss of access, loss of use, or loss of functionality

caused by a "computer virus" or by "computer hacking".

b. **Criminal, Fraudulent, or Dishonest Acts** -- "We" do not pay for loss caused by or resulting from criminal, fraudulent, dishonest, or illegal acts alone or in collusion with another by:

- 1) "you";
- 2) others who have an interest in the property;
- 3) others to whom "you" entrust the property;
- 4) "your" partners, officers, directors, trustees, or joint adventurers; or
- 5) the employees or agents of 1), 2), 3), or 4) above, whether or not they are at work.

This exclusion does not apply to acts of destruction by "your" employees, but "we" do not pay for theft by employees.

This exclusion does not apply to covered property in the custody of a carrier for hire.

c. **Electrical and Power Supply Disturbance** -- "We" do not pay for loss caused by "electrical disturbance" or "power supply disturbance" if the cause of such disturbance took place more than 500 feet from the premises where the loss occurred.

However, if disturbance coverage beyond 500 feet is indicated on the "schedule of coverages", then the Electrical and Power Supply Disturbance exclusion described above is deleted.

d. **Loss of Use** -- "We" do not pay for loss caused by or resulting from loss of use, business interruption, delay, or loss of market.

This exclusion does not apply to the coverages described under Income Coverages, Income Coverage Extensions, and Supplemental Income Coverages.

e. **Pollutants** -- "We" do not pay for loss caused by or resulting from release, discharge, seepage, migration, dispersal, or escape of "pollutants" unless the release, discharge, seepage, migration, dispersal, or escape is caused by a "specified peril". "We" do pay for any resulting loss caused by a "specified peril".

f. **Temperature/Humidity** -- Except as provided under Utility Interruption, "we" do not pay for loss to covered property caused by:

- 1) dryness, dampness, humidity; or
- 2) changes in or extremes of temperature.

However, "we" do pay for loss to covered property that results from a direct physical loss, caused by a covered peril, to the air conditioning system that services covered "hardware".

g. **Voluntary Parting** -- Except as provided under Coverage Extensions - Fraud and Deceit, "we" do not pay for loss caused by or resulting from voluntary parting with title to or possession of any property because of any fraudulent scheme, trick, or false pretense.

3. "We" do not pay for loss or damage if one or more of the following exclusions apply to the loss. But if loss by a covered peril results, "we" will pay for the resulting loss.

a. **Contamination, Deterioration, Rust, or Corrosion** -- "We" do not pay for loss caused by contamination or deterioration including corrosion, decay, fungus, mildew, mold, rot, rust, or any quality, fault, or weakness in covered property that causes it to damage or destroy itself.

This exclusion does not apply to loss caused by "mechanical breakdown".

b. **Wear and Tear or Obsolescence** -- "We" do not pay for loss caused by wear and tear, depreciation, or obsolescence.

4. "We" do not pay for loss of earnings or extra expenses, as described under Income Coverage, caused by or resulting from one or more of the following:

- a. **Error or Omission In Programming** -- "We" do not pay for extra expense caused by an error or omission in programming or incorrect instructions to "hardware".
- b. **Leases, Licenses, Contracts, or Orders** -- "We" do not cover any increase in loss due to the suspension, lapse, or cancellation of leases, licenses, contracts, or orders.

However, "we" do cover loss during the "restoration period" if the suspension, lapse, or cancellation results directly from the interruption of "your" "business".

"We" do not cover any extra expense caused by the suspension, lapse, or cancellation of leases, licenses, contracts, or orders beyond the "restoration period".

- c. **Strikes, Protests, and Other Interference** - - "We" do not cover any increase in loss due to interference by strikers or other persons at a premises described on the "schedule of coverages". This applies to interference with rebuilding, repairing, or replacing the property or with resuming "your" "business".
- d. **Utility Failure** -- Except as provided under Supplemental Income Coverages - Off Premises Utility Service Interruption, "we" do not pay for loss caused by or resulting from the failure of a utility to supply electrical power or other utility service to a described premises, if the failure takes place away from the described premises. "We" do not pay for loss caused by or resulting from the failure of a utility to supply service regardless of the cause of failure.

- e. **Interruption of Web Site** -- "We" do not pay for loss caused by or resulting from the interruption of "your" Web site. "We" do not pay for loss caused by or resulting from the interruption of "your" Web site regardless of the cause of the interruption.

- b. other policies of insurance that may cover the loss;
- c. "your" interest and the interests of all others in the property involved, including all mortgages and liens;
- d. changes in title of the covered property during the policy period; and
- e. estimates, specifications, inventories, and other reasonable information that "we" may require to settle the loss.

WHAT MUST BE DONE IN CASE OF LOSS

1. **Notice** -- In case of a loss, "you" must:
 - a. give "us" or "our" agent prompt notice, including a description of the property involved ("we" may request written notice); and
 - b. give notice to the police when the act that causes the loss is a crime.
2. **You Must Protect Property** -- "You" must take all reasonable steps to protect covered property at and after an insured loss to avoid further loss.
 - a. **Payment of Reasonable Costs** -- "We" do pay the reasonable costs incurred by "you" for necessary repairs or emergency measures performed solely to protect covered property from further damage by a peril insured against if a peril insured against has already caused a loss to covered property. "You" must keep an accurate record of such costs.
 - b. **We Do Not Pay** -- "We" do not pay for such repairs or emergency measures performed on property which has not been damaged by a peril insured against. This does not increase "our" "limit".
3. **Proof of Loss** -- "You" must send "us", within 60 days after "our" request, a signed, sworn proof of loss. This must include the following information:
 - a. the time, place, and circumstances of the loss;
4. **Intent To Continue Business - Income Coverage** -- If "you" intend to continue "your" "business", "you" must resume all or part of "your" "business" as soon as possible.
5. **Examination** -- "You" must submit to examination under oath in matters connected with the loss as often as "we" reasonably request and give "us" sworn statements of the answers. If more than one person is examined, "we" have the right to examine and receive statements separately and not in the presence of others.
6. **Records** -- "You" must produce records, including tax returns and bank microfilms of all canceled checks relating to value, loss, and expense and permit copies and extracts to be made of them as often as "we" reasonably request.
7. **Damaged Property** -- "You" must exhibit the damaged and undamaged property as often as "we" reasonably request and allow "us" to inspect or take samples of the property.
8. **Volunteer Payments** -- "You" must not, except at "your" own expense, voluntarily make any payments, assume any obligations, pay or offer any rewards, or incur any other expenses except as respects protecting property from further damage.
9. **Abandonment** -- "You" may not abandon the property to "us" without "our" written consent.

10. **Cooperation** -- "You" must cooperate with "us" in performing all acts required by this policy.

VALUATION

1. **Hardware** -- The following is the value of "hardware":
- a. **Replacement Cost** -- The value of "hardware" will be based on replacement cost without any deduction for depreciation unless Actual Cash Value is indicated on the "schedule of coverages".
 - 1) **Replacement Cost Limitation** -- The replacement cost is limited to the cost of repair or replacement with similar materials on the same site and used for the same purpose. The payment will not exceed the amount "you" spend to repair or replace the damaged or destroyed property.
 - 2) **Replacement Cost Does Not Apply Until Repair or Replacement** -- Replacement cost valuation does not apply until the damaged or destroyed property is repaired or replaced.
 - 3) **Time Limitation** -- "You" may make a claim for actual cash value before repair or replacement takes place, and later for the replacement cost if "you" notify "us" of "your" intent within 180 days after the loss.
 - b. **Actual Cash Value** -- When Actual Cash Value is indicated on the "schedule of coverages", the value of "hardware" will be based on the actual cash value at the time of the loss with a deduction for depreciation.
2. **Software** -- The following is the value of "software":
- a. **Programs and Applications** --
 - 1) **Cost To Reinstall** -- The value of "programs and applications" will be based on the cost to reinstall the "programs or applications" from the licensed discs that were originally used to install the programs or applications.
 - 2) **If The Original Discs Are Lost** -- If the original licensed discs are lost, damaged, or can no longer be obtained, the value of "programs and applications" will be based on the cost of the most current version of the "programs or applications".
 - b. **Proprietary Programs** --
 - 1) **Cost of Reproduction** -- The value of "proprietary programs" will be based on the cost of reproduction from duplicate copies. The cost of reproduction includes, but is not limited to, the cost of labor to copy or transcribe from duplicate copies.
 - 2) **If Duplicate Copies Do Not Exist** -- If duplicate copies do not exist, the value of "proprietary programs" will be based on the cost of research or other expenses necessary to reproduce, replace, or restore lost "proprietary programs".
 - c. **Data Records** --
 - 1) **Cost of Reproduction** -- The value of "data records" will be based on the cost of reproduction from duplicate copies. The cost of reproduction includes, but is not limited to, the cost of labor to copy or transcribe from duplicate copies.
 - 2) **If Duplicate Copies Do Not Exist** -- If duplicate copies do not exist, the value of "data records" will be based on the cost of research or other expenses necessary to reproduce, replace, or restore lost files, documents, and records.

- d. **Media** -- The value of "media" will be based on the cost to repair or replace the "media" with material of the same kind or quality.
3. **Pair or Set** --
- a. **Reasonable Proportion of Value** -- The value of a lost or damaged article which is part of a pair or set is based on a reasonable proportion of the value of the entire pair or set. The loss is not considered a total loss of the pair or set.
- b. **Provision Does Not Apply To Software** -- The Pair or Set provision does not apply to "software" that comes in sets. If part of a "software" set cannot be replaced, the loss is considered a total loss of the set.
4. **Loss To Parts** -- The value of a lost or damaged part of an item that consists of several parts when it is complete is based on the value of only the lost or damaged part or the cost to repair or replace it.
5. **Earnings** --
- a. **Determining An Earnings Loss** -- In determining an earnings loss "we" consider:
- 1) the experience of "your" "business" before the loss and the probable experience during the time of interruption had no loss occurred;
 - 2) "your" continuing operating expenses normally incurred by "your" "business", including, but not limited to, payroll expense necessary to resume "business" to a similar level of service that existed before the occurrence of direct physical loss or damage; and
 - 3) pertinent sources of information and reports including:
 - a) "your" accounting procedures and financial records;
 - b) bills, invoices, and other vouchers;
 - c) contracts, deeds, and liens;
 - d) reports on feasibility and status; and
 - e) records documenting "your" budget and marketing objectives and results.
- b. **Conditions For Non-Payment of Increased Loss** -- "We" do not pay for any increase in loss due to "your" failure to use reasonable efforts to resume all or part of "your" "business". This includes making use of other locations and property to reduce the loss.
- c. **Loss Payment If You Do Not Resume Your Business** -- If "your" "business" is not resumed as soon as possible, or if it is not resumed at all, the value of loss payment is based on the period of time it would have otherwise taken to resume "your" "business" as soon as possible.
6. **Extra Expense** -- In determining extra expenses that "you" have incurred, "we" consider the salvage value of any property bought for temporary use during the "restoration period" and it will be deducted from the amount of loss determined for extra expense.
-

HOW MUCH WE PAY

1. **Insurable Interest** -- "We" do not cover more than "your" insurable interest in any property.
2. **Earthquake Period** -- All earthquakes or volcanic eruptions that occur within a 168-hour period will be considered a single event. This 168-hour period is not limited by the policy expiration.
3. **Deductible** -- "We" pay only that part of "your" loss over the deductible amount indicated on the "schedule of coverages" in any one occurrence.

The deductible may be shown as either an amount or a percentage. When shown as a percentage, the deductible is that percentage of the value of the covered property at the time of the loss.

4. **Loss Settlement Terms** -- Subject to paragraphs 1., 2., 3., 5., 6., 7., 8., 9., and 10. under How Much We Pay, "we" pay the lesser of:
 - a. the amount determined under Valuation;
 - b. the cost to repair, replace, or rebuild the property with material of like kind and quality to the extent practicable; or
 - c. the "limit" that applies to the covered property.
5. **Coinsurance, Hardware, and Software** --
 - a. **When Coinsurance Applies** -- "We" only pay a part of the loss if the "limit" is less than the percentage of the value of the covered property that is indicated on the "schedule of coverages".
 - b. **How We Determine Our Part of The Loss** -- "Our" part of the loss is determined using the following steps:
 - 1) multiply the percent indicated on the "schedule of coverages" by the value of the covered property at the time of loss;
 - 2) divide the "limit" for covered property by the result determined in 5.a. above;
 - 3) multiply the total amount of loss, after the application of any deductible, by the result determined in 5.b. above.

The most "we" pay is the amount determined in 5.c. above or the "limit", whichever is less. "We" do not pay any remaining part of the loss.

- c. **If There Is More Than One Limit** -- If there is more than one "limit" indicated on the "schedule of coverages" for this coverage part, this procedure applies separately to each "limit".
 - d. **If There Is Only One Limit** -- If there is only one "limit" indicated on the "schedule of coverages" for this coverage, this procedure applies to the total of all covered property to which the "limit" applies.
 - e. **When Coinsurance Does Not Apply** -- Conditions for coinsurance do not apply unless a coinsurance percentage is indicated on the "schedule of coverages".
6. **Coinsurance, Income Coverage Part** --
 - a. **When Coinsurance Applies** -- "We" pay only a part of the loss if the "limit" is less than the coinsurance percentage multiplied by the sum of:
 - 1) "your" net income (net profit or loss before income taxes); and
 - 2) continuing operating expenses

projected for the 12 months following the inception of this policy or the last previous anniversary date of this policy (whichever is later), normally earned by "your" "business".

- b. **How We Determine Our Part of The Loss** -- "Our" part of the loss is determined using the following steps:
 - 1) multiply the coinsurance percentage by the sum of "your" net income and continuing operating expenses projected for the 12 months following the inception of this policy or the last previous anniversary date of this policy;
 - 2) divide the "limit" by the figure determined in 1) above;

- 3) multiply the total amount of loss by the figure determined in 2) above.

"We" pay the amount determined in 3) above or the "limit", whichever is less. "We" do not pay any remaining part of the loss.

- c. **When Coinsurance Does Not Apply --** Conditions for coinsurance do not apply:

- 1) unless a coinsurance percentage is indicated on the "schedule of coverages"; and
- 2) to coverage for extra expense.

7. **Insurance Under More Than One Coverage --** If more than one coverage of this policy insures the same loss, "we" pay no more than the actual claim, loss, or damage sustained.

8. **Insurance Under More Than One Policy --**

- a. **Proportional Share --** "You" may have another policy subject to the same "terms" as this policy. If "you" do, "we" will pay "our" share of the covered loss. "Our" share is the proportion that the applicable "limit" under this policy bears to the "limit" of all policies covering on the same basis.
- b. **Excess Amount --** If there is another policy covering the same loss, other than that described above, "we" pay only for the amount of covered loss in excess of the amount due from that other policy, whether "you" can collect on it or not. But "we" do not pay more than the applicable "limit".

9. **Income Coverage Limit --** "We" pay no more than the Income Coverage "limit" indicated on the "schedule of coverages" for any one loss. Payment for earnings and extra expense combined does not exceed the "limit".

10. **Waiting Period --**

- a. **Waiting Period Limitation --** If an Income Coverage waiting period is indicated on the "schedule of coverages", "we" do not pay for "your" loss of earnings until after the first 24 hours (unless otherwise indicated on the "schedule of coverages") following the direct physical loss of or damage to covered property caused by a covered peril.

This waiting period does not apply to extra expenses that "you" incur.

- b. **Waiting Period Limitation For Civil Authority --** As regards coverage under Interruption by Civil Authority, coverage under this extension begins:

- 1) for earnings, 24 hours (unless otherwise indicated on the "schedule of coverages") after the time the order is issued and ends 30 consecutive days and 24 hours from the date of the order; and
- 2) for extra expense, immediately after the time the order is issued, and ends 30 consecutive days and 24 hours from the date of the order.

- c. **Other Waiting Period Limitations --** The waiting period described under Off Premises Utility Service Interruption and Virus and Hacking Coverage is not deleted nor replaced by the terms of this provision.

LOSS PAYMENT

1. **Loss Payment Options --**

- a. **Our Options --** In the event of loss covered by this coverage form, "we" have the following options:

- 1) pay the value of the lost or damaged property;

- 2) pay the cost of repairing or replacing the lost or damaged property;
- 3) rebuild, repair, or replace the property with other property of equivalent kind and quality, to the extent practicable, within a reasonable time; or
- 4) take all or any part of the property at the agreed or appraised value.

- b. **Notice of Our Intent To Rebuild, Repair, or Replace** -- "We" must give "you" notice of "our" intent to rebuild, repair, or replace within 30 days after receipt of a duly executed proof of loss.

2. **Your Losses** --

- a. **Adjustment and Payment of Loss** -- "We" adjust all losses with "you". Payment will be made to "you" unless another loss payee is named in the policy.

- b. **Conditions For Payment of Loss** -- An insured loss will be payable 30 days after:

- 1) a satisfactory proof of loss is received; and
- 2) the amount of the loss has been established either by written agreement with "you" or the filing of an appraisal award with "us".

3. **Property of Others** --

- a. **Adjustment and Payment of Loss To Property of Others** -- Losses to property of others may be adjusted with and paid to:

- 1) "you" on behalf of the owner; or
- 2) the owner.

- b. **We Do Not Have To Pay You If We Pay The Owner** -- If "we" pay the owner, "we" do not have to pay "you". "We" may also choose to defend any suits arising from the owners at "our" expense.

OTHER CONDITIONS

1. **Appraisal** -- If "you" and "we" do not agree on the amount of the loss or the actual cash value of covered property, either party may demand that these amounts be determined by appraisal.

If either makes a written demand for appraisal, each will select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, "you" or "we" can ask a judge of a court of record in the state where the property is located to select an umpire.

The appraisers will then determine and state separately the amount of each loss.

The appraisers will also determine the value of covered property items at the time of the loss, if requested.

If the appraisers submit a written report of any agreement to "us", the amount agreed upon will be the amount of the loss. If the appraisers fail to agree within a reasonable time, they will submit only their differences to the umpire. Written agreement so itemized and signed by any two of these three sets the amount of the loss.

Each appraiser will be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire will be paid equally by "you" and "us".

2. **Income Coverage (Appraisal)** -- If "you" and "we" do not agree on the amount of net income (net profit or loss before income taxes), payroll expense, and operating expenses, these amounts may be determined by appraisal in accordance with the provisions described above under 1. Appraisal.

3. **Benefit To Others** -- Insurance under this coverage will not directly or indirectly benefit anyone having custody of "your" property.
4. **Conformity With Statute** -- When a condition of this coverage is in conflict with an applicable law, that condition is amended to conform to that law.
5. **Estates** -- This provision applies only if the insured is an individual.
 - a. **Your Death** -- On "your" death, "we" cover the following as an insured:
 - 1) the person who has custody of "your" property until a legal representative is qualified and appointed; or
 - 2) "your" legal representative.

This person or organization is an insured only with respect to property covered by this coverage.
 - b. **Policy Period Is Not Extended** -- This coverage does not extend past the policy period indicated on the declarations.
6. **Misrepresentation, Concealment, or Fraud** -- This coverage is void as to "you" and any other insured if, before or after a loss:
 - a. "you" or any other insured have willfully concealed or misrepresented:
 - 1) a material fact or circumstance that relates to this insurance or the subject thereof; or
 - 2) "your" interest herein.
 - b. there has been fraud or false swearing by "you" or any other insured with regard to a matter that relates to this insurance or the subject thereof.
7. **Policy Period** -- "We" pay for a covered loss that occurs during the policy period.
8. **Recoveries** -- If "we" pay "you" for the loss and lost or damaged property is recovered, or payment is made by those responsible for the loss, the following provisions apply:
 - a. "you" must notify "us" promptly if "you" recover property or receive payment;
 - b. "we" must notify "you" promptly if "we" recover property or receive payment;
 - c. any recovery expenses incurred by either are reimbursed first;
 - d. "you" may keep the recovered property but "you" must refund to "us" the amount of the claim paid, or any lesser amount to which "we" agree; and
 - e. if the claim paid is less than the agreed loss due to a deductible or other limiting "terms" of this policy, any recovery will be pro rated between "you" and "us" based on "our" respective interest in the loss.
9. **Restoration of Limits** -- Except as indicated under Virus and Hacking Coverage, a loss "we" pay under this coverage does not reduce the applicable "limits".
10. **Subrogation** -- If "we" pay for a loss, "we" may require "you" to assign to "us" "your" right of recovery against others. "You" must do all that is necessary to secure "our" rights. "We" do not pay for a loss if "you" impair this right to recover.

"You" may waive "your" right to recover from others in writing before a loss occurs.
11. **Suit Against Us** -- No one may bring a legal action against "us" under this coverage unless:
 - a. all of the "terms" of this coverage have been complied with; and

- b. the suit has been brought within two years after "you" first have knowledge of the loss.

If any applicable law makes this limitation invalid, then suit must begin within the shortest period permitted by law.

12. **Territorial Limits** -- "We" cover property while it is in the United States of America, its territories and possessions, Canada, and Puerto Rico.

IM 7201 10 02

F. Business Interruption – CP 00 30 10 00

1. Extra Expense (CP 00 50 • Extra Expense can be written separately)

- PERIOD OF RESTORATION ONLY
- RENTING, MOVING TO AND EQUIPPING A TEMPORARY LOCATION
- HIRING A SUBCONTRACTOR TO FULFILL A CONTRACT
- OVERTIME WAGES TO EXPEDITE
- PAYMENT OF ABOVE MARKET PRICES FOR MERCHANDISE
- TO THE EXTENT IT REDUCES THE LOSS

2. Extra Expense

- a. Extra Expense coverage is provided at the premises described in the Declarations only if the Declarations show that Business Income coverage applies at that premises.
- b. Extra Expense means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss.

We will pay Extra Expense (Other than the expense to repair or replace property) to:

- (1) Avoid or minimize the "suspension" of business and to continue "operations" at the described premises; or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location.
- (2) Minimize the "suspension" of business if you cannot continue "operations."

We will pay any Extra Expense to repair or replace any property, but only to the extent it reduces the amount of loss that otherwise would have been payable under this Coverage Form.

2. Additional Limitation – Interruption of Computer Operations

- BUSINESS INCOME EXCLUSION

- EXTRA EXPENSE EXCLUSION

- DEFINITION OF ELECTRONIC DATA

- COVERS ELECTRONIC DATA IN BUILDING EQUIPMENT

4. Additional Limitation – Interruption of Computer Operations

- a. Coverage for Business Income does not apply when a “suspension” of “operations” is caused by destruction or corruption of electronic data, or any loss or damage to electronic data, except as provided under the Additional Coverage, Interruption of Computer Operations.
- b. Coverage for Extra Expense does not apply when action is taken to avoid or minimize a “suspension” of “operations” caused by destruction or corruption of data, or any loss or damage to electronic data, except as provided under the Additional Coverage, Interruption of Computer Operations.
- c. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs., tapes, drives, cells, data processing devices or any other repositories of computer software used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data.
- d. This Additional Limitation does not apply when loss or damage to electronic data involves only electronic data which is integrated in and operates or controls a building’s elevator, lighting, heating, ventilation, air conditioning or security system.

3. Computer Operations

- INCLUDED IN THE LIMITS

- NAMED PERIL COVERAGE

- \$2,500 limit

d. Interruption of Computer Operations

- (1) Under this Additional Coverage, electronic data has the meaning described under Additional Limitation – Interruption of Computer Operations.
- (2) Subject to all provisions of this Additional Coverage, you may extend the insurance that applies to Business Income and Extra Expense to apply to a “suspension” of “operations” caused by an interruption in computer operations due to destruction or corruption of electronic data due to a Covered Cause of Loss. However, we will not provide coverage under this Additional Coverage when the Additional Limitation – Interruption Of Computer Operations does not apply based on Paragraph **A.4.d.** therein.
- (3) With respect to the coverage provided under this Additional Coverage, the Covered Causes of Loss are subject to the following:
 - (a) If the Causes Of Loss – Special Form applies, coverage under this Additional Coverage, Interruption of Computer Operations, is limited to the “specified causes of loss” as defined in that form and Collapse as set forth in that form.
 - (b) If the Causes Of Loss – Broad Form applies, coverage under this Additional Coverage, Interruption of Computer Operations, includes Collapse as set forth in that Form.
 - (c) If the Causes Of Loss form is endorsed to add a Covered Cause of Loss, the additional Covered Causes of Loss does not apply to the coverage provided under this Additional Coverage, Interruption of Computer Operations.
 - (d) The Covered Causes of Loss include a virus, harmful code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But there is no coverage for an interruption related to manipulation of a computer system (including electronic data) by any employee, including a temporary or leased employee, or by an entity retained by you to inspect, design, install, maintain, repair or replace the system.
- (4) The most we will pay under this Additional Coverage, Interruption Of Computer Operations is \$2,500 (unless a higher limit is shown in the Declarations) for all loss sustained and expense incurred in any one premises, locations or computer systems involved. If loss payment relating to the first interruption does not exhaust this amount, then the balance is available for loss or expense sustained or incurred as a result of subsequent interruptions in that policy year. A balance remaining at the end of a policy year does not increase the amount of insurance in the next policy year. With respect to any interruption which begins in one policy year and continues or results in additional loss or expense in a subsequent policy year(s), all loss and expense is deemed to be sustained or incurred in the policy year in which the interruption began.
- (5) This Additional Coverage, Interruption Of Computer Operations, does not apply to loss sustained or expense incurred after the end of the “period of restoration”, even if the amount of insurance stated in (4) above has not been exhausted.

ELECTRONIC COMMERCE (E-COMMERCE)

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART

SCHEDULE

Description Of Business:
Location Of Business:
Annual Aggregate Limit Of Insurance:
Anti-Virus Waiver: <input type="checkbox"/>
Section I – Deductible: \$
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. INTRODUCTION

1. Under this endorsement, the business of e-commerce and e-commerce activity mean commerce conducted via the internet or other computer-based interactive communications network. This includes business-to-business commerce conducted in that manner.
2. As used in this endorsement, electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data.
3. As used in this endorsement, loss or damage to electronic data means destruction or corruption of electronic data.
4. As used in this endorsement:
 - a. The term employee includes a leased or temporary employee; and
 - b. The term contractor, which includes an employee or any agent of the contractor, means an entity that has a written agreement with you to inspect, design, install, test, maintain, repair or replace any part of your computer system including electronic data.
5. In this endorsement, reference to your computers or your computer system means those which are owned by you or licensed or leased to you.

B. SECTION I – ELECTRONIC DATA COVERAGE

1. The coverage provided under Section I of this endorsement is limited to electronic data which is owned by you or licensed or leased to you, originates and resides in computers located in the Coverage Territory, and is used in the e-commerce activity of your business described in the Schedule.

Under Section I of this endorsement, electronic data does not include your electronic data that is licensed, leased or rented to others.

2. We will pay for the cost to replace or restore electronic data which has suffered loss or damage by a Covered Cause of Loss as described in Section III of this endorsement, subject to the valuation provisions in **B.3.** below.
3. The **Valuation** Condition is replaced by the following with respect to the coverage provided under Section I of this endorsement.
 - a. Loss or damage to electronic data will be valued at the cost of restoration or replacement, including the cost of data entry, re-programming, and computer consultation services. But we will not pay the cost to duplicate research that led to the development of your electronic data or any propriety or confidential information or intellectual property in any form. To the extent that electronic data is not replaced or restored, the loss will be valued at the cost of replacement of media on which the electronic data was stored, with blank media of substantially identical type.
 - b. If you recover, from a licensor or lessor, for loss or damage to electronic data, our loss payment to you will be reduced to the extent of such recovery.

C. SECTION II – TIME ELEMENT COVERAGE

1. Coverage

We will pay for the actual loss of Business Income you sustain and/or Extra Expense you incur due to the necessary suspension (slow-down or cessation) of the e-commerce activity of your business described in the Schedule, for the applicable period of time specified in **C.2.** The suspension must be caused by:

- a. A loss covered under Section I of this endorsement; or
- b. Interruption in normal computer network service or function caused by a Covered Cause of Loss as described in Section III of this endorsement.

Income or expense from outside the Coverage Territory, generated by or pertaining to the e-commerce activity of the business described in the Schedule, is not covered under this endorsement.

2. Period of Coverage

- a. If the suspension of e-commerce activity is caused by a loss covered under Section I of this endorsement, then the period of coverage begins 24 hours after the time of such loss and ends on the earliest of:
 - (1) The time when e-commerce activity is resumed;
 - (2) The time when the electronic data is restored; or
 - (3) 90 days after the date of the loss covered under Section I of this endorsement.
- b. If the suspension of e-commerce activity is caused solely by an interruption described in C.1.b. above, then the period of coverage begins 24 hours after the interruption begins. Under this endorsement, the interruption in service is deemed to begin when service to your Web site is interrupted. The period of coverage ends on the earliest of:
 - (1) The time when your e-commerce activity is resumed;
 - (2) The time when service is restored to you; or
 - (3) Two weeks after the interruption began.
- c. The time periods expressed un 2.a. and 2.b. above (including the 24-hour waiting period) apply to the coverage under Section II of this endorsement and are not affected by any provision in any form or endorsement relating to or modifying business income coverage.

3. Business Income

- a. Business Income means the:
 - (1) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
 - (2) Continuing normal operating expenses incurring, including payroll.
- b. The amount of Business Income loss will be determined based on consideration of the following, b.(1) through b.(4). However, the amount of loss will be reduced to the extent that the reduction in the volume of business from the affected e-commerce activity is offset by an increase in the volume of business from other channels of commerce.
 - (1) The Net Income of the business of e-commerce before the loss or damage or interruption in service or function occurred;

- (2) The likely Net Income of the business of e-commerce if no loss or damage or interruption in service had occurred, but not including any Net Income that would likely have been earned as a result of an increase in the volume of business due to favorable business conditions caused by the impact of the Covered Cause of Loss on customers or on other businesses;
- (3) The operating expenses, including payroll, necessary to resume e-commerce activity with the same quality of service that existed before the loss or damage or interruption in service or function; or
- (4) Other relevant sources of information, including your financial records and accounting procedures, bills, invoices and other vouchers, and deeds, liens and contracts.

4. Extra Expense

- a. Extra Expense means necessary expenses you incur:
 - (1) During the period of coverage set forth in C.2. of this endorsement, that you would not have incurred if there had been no loss or damage or interruption in service or function, subject to (2) below:
 - (2) To avoid or minimize the suspension of e-commerce activity.
- b. The amount of Extra Expense will be determined based on:
 - (1) Necessary expenses that exceed the normal operating expenses that would have been incurred in the course of e-commerce activity during the period of coverage if no loss or damage or interruption in service or function had occurred. We will deduct from the total of such expenses the salvage value that remains of any property bought for temporary use during the period of coverage, once e-commerce activity is resumed; and
 - (2) Necessary expenses that reduce the Business Income loss that otherwise would have been incurred during the period of coverage.

5. Resumption of E-Commerce Activity

- a. We will reduce the amount of your Business Income loss to the extent that you can resume e-commerce activity, in whole or in part, by using damaged or undamaged equipment or electronic data at the described premises or elsewhere.
- b. We will reduce the amount of your Extra Expense loss to the extent that you can return e-commerce activity to normal and discontinue Extra Expense.
- c. If you do not resume e-commerce activity, or do not do so as quickly as possible, we will pay based on the length of time it would have taken to resume such activity as quickly as possible.

D. SECTION III – CAUSES OF LOSS

1. The provisions of this endorsement do not supersede or in any way affect the application of the EXCLUSION OF CERTAIN COMPUTER-RELATED LOSSES if such exclusion is endorsed to or otherwise made part of the Commercial Property Coverage Part. The exclusion addresses the inability of a computer system to correctly recognize, process, distinguish, interpret or accept one or more dates or times.
2. The Causes of Loss – Special Form, by means of exclusions and limitations stated therein and all modifications stated in **D.2.** through **D.4.** of this endorsement, provides the Covered Causes of Loss, applicable to Section I and Section II of this endorsement.
 - a. The Utility Services Exclusion does not apply with respect to power or communications supply services, provided that there is an interruption in utility service which is caused by a “specified cause of loss” as defined in the Causes of Loss – Special Form.
 - b. The exclusion of artificially generated electrical, magnetic or electromagnetic energy does not apply.
 - c. The exclusion of mechanical breakdown does not apply with respect to the breakdown of your computers and their related equipment, but his exception is limited to the effect of such mechanical breakdown on electronic data.

- d. The following exclusions are added. We will not pay for loss or damage caused by or resulting from:

- (1) A virus, malicious code or similar instruction introduced into or enacted on a computer system (including electronic data) or a network to which it is connected, designed to damage or destroy any part of the system or disrupt its normal operation. But this exclusion does not apply if your e-commerce activity is conducted via a computer system that is equipped with virus-scanning or anti-virus software, or if the Anti-Virus Waiver is indicated as applicable in the Schedule. When this exclusion does not apply, then coverage also extends to shut-down of the computer system if the shut-down is undertaken in response to the detection of a virus or other incident by virus-scanning software, to mitigate or avoid attack, infiltration or infection of the system;
- (2) Unauthorized viewing, copying or use of electronic data (or any proprietary or confidential information or intellectual property in any form) by any person, even if such activity is characterized as theft;
- (3) Errors or omissions in programming or processing electronic data;
- (4) Errors or deficiency in design, installation, maintenance, repair or modification or your computer system or any computer system or network to which your system is connected or on which your system depends (including electronic data);
- (5) Manipulation of your computer system, including electronic data, by an employee, volunteer worker or contractor, for the purpose of diverting electronic data or causing fraudulent or illegal transfer of any property;
- (6) Interruption in normal computer function or network service or function due to insufficient capacity to process transactions or to an overload of activity on the system or network. But this exclusion does not apply if such incident is caused by a virus, malicious code or similar instruction introduced into or enacted on a computer system or network provided Exclusion (1) also does not apply;

- (7) Unexplained or indeterminable failure, malfunction or slowdown of a computer system, including electronic data and the inability to access or properly manipulate the electronic data;
 - (8) Complete or substantial failure, disablement or shut-down of the entire Internet, regardless of the cause.
- 3. The Covered Causes of Loss include removal of electronic data from your system in an act of thievery by someone other than an employee, volunteer worker or contractor. Removal means that the electronic data is no longer on your computer system. Removal does not mean viewing, copying or use of electronic data (or any proprietary or confidential information or intellectual property in any form). Coverage for removal does not include transfer of funds, securities or similar property which is designated in the Coverage Form as Property Not Covered, even is eliminated from Property Not Covered by endorsement.
- 4. An endorsement(s) which adds or eliminates a Covered Cause of Loss from the Causes of Loss – Special Form also applies to coverage under this endorsement, unless such other endorsement contains a specific provision to the contrary or is made inapplicable to this endorsement via its Schedule or the Declarations.

E. SECTION IV – OTHER PROVISIONS

1. General

The coverage under this endorsement is limited as described, and does not extend or modify any coverage provided under any other form or endorsement in this policy.

2. Claim-Related Fees

We will not pay for costs, fees or other expenses you incur in establishing the amount of your claim.

3. Coinsurance

The Coinsurance Condition does not apply to the coverage provided under this endorsement.

4. Limit of Insurance – Annual Aggregate

The applicable Limit of Insurance shown in the Schedule is the most we will pay under this endorsement, for the total of all losses covered under Sections I and II of this endorsement and sustained in any one policy year, regardless of the number of occurrences of loss or damage or the number of premises, locations or computer systems involved. If loss or payment on the first occurrence does not exhaust the applicable Limit of Insurance, then the balance of that Limit is available for subsequent loss sustained in but not after the policy year. With respect to an occurrence which begins in one policy year and continues or results in additional loss or damage in a subsequent policy year(s), all loss or damage is deemed to be sustained in the policy year in which the occurrence began.

5. Deductible

The Deductible shown in the Schedule applies to loss covered under Section I of this endorsement. We will not pay for loss in any one occurrence until the amount of loss exceeds the Deductible. We will then pay the amount of loss in excess of the Deductible, subject to the available limit of the Limit of Insurance.

6. Coverage Territory

With respect to the coverage provided under this endorsement, the following is added to the **Coverage Territory** Condition:

A computer virus or other incident that occurs on the Internet or other computer-based interactive communications network may originate anywhere in the world. However, even if an incident that originates outside the Coverage Territory results in coverage under this endorsement, the coverage is limited to the Coverage Territory (United States of America, its territories and possessions, and Puerto Rico and Canada) in accordance with the provision of Paragraphs **B.1.** and **C.1.** of this endorsement.

G. Commercial General Liability – CG 00 01

1. Insuring Agreement

- PROPERTY DAMAGE

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

2. Property Damage

- Physical injury

17. "Property damage" means:

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

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

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

- SEAGATE TECHNOLOGY v ST. PAUL FIRE AND MARINE (C-94-1999) – Coding fails to qualify as PD

3. Electronic Data Exclusion

- Added to clarify THAT COVERAGE FOR ELECTRONIC DATA IS NOT PROVIDED UNDER THE CGL

p. Electronic Data

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

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

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

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ELECTRONIC DATA LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Loss Of Electronic Data Limit:
\$
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

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

2. Exclusions

This insurance does not apply to:

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

Damages arising out of:

- (1) Any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information; or
- (2) The loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate "electronic data" that does not result from physical injury to tangible property.

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

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

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

2. Exclusions

This insurance does not apply to:

Access Or Disclosure Of Confidential Or Personal Information

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

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

C. The following paragraph is added to Section III – Limits Of Insurance:

Subject to 5. above, the Loss of Electronic Data Limit shown in the Schedule above is the most we will pay under Coverage A. for "property damage" because of all loss of "electronic data" arising out of any one "occurrence".

D. The following definition is added to the **Definitions** section:

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

E. For the purposes of the coverage provided by this endorsement, the definition of “property damage” in the **Definitions** section is replaced by the following:

17. “Property damage” means:

- a.** Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it;

- b.** Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it; or

- c.** Loss of, loss of use of, damage to, corruption of, inability to access, or inability to properly manipulate “electronic data”, resulting from physical injury to tangible property. All such loss of “electronic data” shall be deemed to occur at the time of the “occurrence” that caused it.

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

SAMPLE

ELECTRONIC DATA LIABILITY COVERAGE FORM

THIS FORM PROVIDES CLAIMS-MADE COVERAGE.
PLEASE READ THE FORM CAREFULLY.

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words “we”, “us” and “our” refer to the company providing this insurance.

The word “insured” means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section VI – Definitions.

SECTION I – COVERAGES

DAMAGE TO ELECTRONIC DATA LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “loss of electronic data” 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 to which this insurance does not apply. We may, at our discretion, investigate 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 – Limit Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

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

- b. This insurance applies to “loss of electronic data” only if:

- (1) The “loss of electronic data”
 - (a) Is caused by an “electronic data incident”;
 - (b) Takes place in the “coverage territory”; and
 - (c) Did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and

- (2) A claim for damages because of the “loss of electronic data” is first made against any insured, in accordance with Paragraph c. below, during the policy period or any Extended Reporting Period we provide under Section V – Extended Reporting Period.

- c. A claim by a person or organization seeking damages will be determined 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 us, whichever comes first; or
- (2) When we make a settlement in accordance with Paragraph a. above.

All claims for damages because of “loss of electronic data” arising out of an “electronic data incident” shall be deemed to have been made at the time the first of those claims is made against any insured.

A claim received and recorded by the insured within 30 days after the end of the policy period will be considered to have been received within the policy period. However, this 30-day period does not apply to claims that are covered under any subsequent insurance you purchase, or that would be covered but for the exhaustion of the amount of insurance applicable to such claims.

2. Exclusions

a. Expected Or Intended Loss

“Loss of electronic data” expected or intended from the standpoint of the insured.

b. Contractual Liability

“Loss of electronic data” 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 that the insured would have in the absence of the contract or agreement.

c. Computer Products Or Services Exclusion

“Loss of electronic data” arising out of a negligent act, error or omission, by or for you, or anyone acting on your behalf in providing “computer products or services”.

d. Bodily Injury, Property Damage Or Personal And Advertising Injury

Damages that are “bodily injury”, “property damage” or “personal and advertising injury”.

e. Damage To Your Data

“Loss of electronic data” that:

- (1) Is owned by you;
- (2) Was developed by or for you; or
- (3) Is “your work” or “your product”.

f. Performance Of A Contract

“Loss of electronic data” arising out of a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

g. Infringement Of Intellectual Property Rights

“Loss of electronic data” arising out of or resulting from the actual or alleged infringement of trademark, copyright, patent, trade secret or other intellectual property rights.

h. Unauthorized Use Of Electronic Data

“Loss of electronic data” arising out of theft or unauthorized viewing, copying, use, corruption, manipulation or deletion, of “electronic data” by any named insured, past or present “employee”, “temporary worker” or “volunteer worker” of the named insured.

i. Violation Of An Antitrust Law

Any claim for damages arising out of the violation of an antitrust law.

j. Criminal Or Fraudulent Acts

“Loss of electronic data” arising out of a criminal or fraudulent act committed by or at the direction of the insured.

SUPPLEMENTARY PAYMENTS

We will pay, with respect to any claim we investigate or settle, or any “suit” against an insured we defend:

- 1. All expenses we incur.
- 2. The cost of 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 \$250 a day because of time off from work.
- 4. All court costs taxed against the insured in the “suit”. However, these payments do not include attorneys’ fees or attorneys’ expenses taxed against the insured.
- 5. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
- 6. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or 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.

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.

2. Each of the following is also an insured:
 - a. Your “volunteer workers” only while performing duties related to the conduct of your business, or your “employees”, other than either your “executive officers” (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.
 - b. Any person (other than your “employee” or “volunteer worker”), or any organization while acting as your real estate manager.
 - c. Any person or organization having proper temporary custody of your property if you die, but only until your legal representative has been appointed.
 - d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no similar insurance available to that organization. However:
 - a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier.
 - b. Coverage does not apply to “loss of electronic data” that occurred before you acquired or formed the organization.

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

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; or
 - c. Persons or organizations making claims or bringing “suits”.
2. The Aggregate Limit is the most we will pay for the sum of all damages because of “loss of electronic data”.

3. Subject to Paragraph 2. above, the Each Electronic Data Incident Limit is the most we will pay for the sum of all damages because of the “loss of electronic data” arising out of any one “electronic data incident”.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – ELECTRONIC DATA LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured’s estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of An Electronic Data Incident

- a. You must see to it that we are notified as soon as practicable once you, or any insured listed under Paragraph 1. of Section II – Who Is An insured, known or suspect that an “electronic data incident” has occurred, which may result in a claim. To the extent possible, notice should include:

- (1) How, when and where the known or suspected “electronic data incident” took place;
- (2) The name and address of any person or organization whose “electronic data” was lost or damaged; and
- (3) The nature and location of any damage arising out of the known or suspected “electronic data incident”.

Notice of a known or suspected “electronic data incident” is not notice of a claim.

- b. If a claim is received by any insured, you must:
 - (1) Immediately record the specifics of the claim and the date received; and
 - (2) Notify us as soon as practicable.
- c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or “suit”;
 - (2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which be liable to the insured because of injury or damage to which this insurance may apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms has been fully complied with.

A person or organization may sue us to recover on an agreement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If any other valid and collectible insurance is available to the insured for a loss we cover under this Coverage Part, this insurance is excess over such other insurance, unless that other insurance was bought specifically to apply in excess of the Limit of Insurance shown in the Declarations of this Coverage Part.

When this insurance is excess, we will have no duty to defend the insured against any "suit" if any other insurer as a duty to defend the named insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

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

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, 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.

9. When We Do Not Renew

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

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

SECTION V – EXTENDED REPORTING PERIOD

1. You will have the right to purchase an Extended Reporting Period from us if:
 - a. This Coverage Part is cancelled or not renewed for any reason; or
 - b. We renew or replace this Coverage Part with insurance that:
 - (1) Has a Retroactive Date later than the date shown in the Declarations of this Coverage Part' or
 - (2) Does not apply to "loss of electronic data" on a claims-made basis.
2. An Extended Reporting Period, as specified in Paragraph 1. above, lasts three years and is available only by endorsement and for an additional charge.

You must give us a written request for the Extended Reporting Period Endorsement within 30 days after the end of the policy period. The Extended Reporting Period will not go into effect unless you pay the additional premium promptly when due and any premium or deductible you owe us for the coverage period provided under this policy. Once in effect, the Extended Reporting Period may not be canceled.

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

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

The additional premium will not exceed 100% of the annual premium for this policy.

3. The Extended Reporting Period starts with the end of the policy period and does not extend the policy period or change the scope of coverage provided. It applies only to claims to which the following applies:
 - a. The claim is first made during the Extended Reporting Period.
 - b. The "loss of electronic data" occurs before the end of the policy period; and
 - c. The "loss of electronic data" did not commence before the Retroactive Date, if any.

4. The Extended Reporting Period Endorsement applicable to this coverage shall set forth the terms, not inconsistent with this section, applicable to the Extended Reporting Period, including a provision to the effect that the insurance afforded for claims first received during such period is excess over any other valid and collectible insurance available under policies in force after the Extended Reporting Period starts.
5. The Extended Reporting Period does not reinstate or increase the Limits of Insurance.

SECTION VI – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
 - a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
 - b. Regarding web sites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.
2. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
3. "Coverage territory" means all parts of the world provided 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. "Computer products or services" means:
 - a. Manufacturing, developing, designing, creating, selling, handling, marketing, distributing, licensing, or disposing of computer or electronic goods, by you or on your behalf. Computer or electronic goods includes, but is not limited to:
 - (1) Computer software or computer programming;
 - (2) Electronic or computer equipment, components or peripherals;
 - (3) Communications or broadcasting equipment; or
 - (4) Industrial or robotic equipment;and any containers (other than vehicles), materials, parts or equipment furnished in connection with such computer or electronic goods, by you or on your behalf; or

- b. Computer related services performed by you or on your behalf, including but not limited to:
 - (1) Installation, testing, service, maintenance, technical support, repair, integration, networking, consulting or analysis of or training for:
 - (a) Computer software or computer programming;
 - (b) Electronic or computer equipment, components or peripherals;
 - (c) Communications or broadcasting equipment; or
 - (d) Industrial or robotic equipment;
 - (2) Processing, storage, transmission or other handling of "electronic data" for others; or
 - (3) Provision of broadcasting or communication services for others, or consulting, evaluating or advising on such services, including but not limited to broadcasts or communications via television, cable satellite, radio, Internet, wireless transmissions or cellular transmissions.
- 5. "Electronic data" means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.
- 6. "Electronic data incident" means an accident, or a negligent act, error or omission or a series of causally related accidents, negligent acts, or errors or omissions, which results in "loss of electronic data".
- 7. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
- 8. "Executive officer" means a person holding the officer positions created by your charter, constitution, by-laws or any other similar governing document.
- 9. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
- 10. "Loss of electronic data" means damage to, loss of, loss of use of, corruption of, inability to access, or inability to properly manipulate, "electronic data".
- 11. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
 - a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 - d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
 - f. The use of another's advertising idea in your "advertisement"; or
 - g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".
- 12. "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 "electronic data incident" that caused it.

For the purposes of this insurance, "electronic data" is not tangible property.
- 13. "Suit" means a civil proceeding in which damages because of "loss of electronic data" 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 are claimed and to which the insured submits with our consent.
- 14. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.
- 15. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

16. "Your product":

a. Means:

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

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

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

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

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

17. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work" and

(2) The providing of or failure to provide warnings or instructions.

SAMPLE

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXTENDED REPORTING PERIOD ENDORSEMENT FOR ELECTRONIC DATA LIABILITY COVERAGE

This endorsement modifies insurance provided under the following:

ELECTRONIC DATA LIABILITY COVERAGE FORM

- A.** An Extended Reporting Period Endorsement is provided, as described in Section **V** – Extended Reporting Period.
- B.** The following is added as Paragraph **1.d.** of Section **I** – Coverages:
- d.** A claim first made within three years after the end of the policy period will be deemed to have been made on the last day of the policy period, provided that the claim is for damages because of “loss of electronic data” that occurred before the end of the policy period (but not before any applicable Retroactive Date).
- C.** The following is added to Paragraph **4. Other Insurance** of Section **IV** – **Electronic Data Liability Conditions**:
- This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis whose policy period begins or continues after the Extended Reporting Period Endorsement takes effect.
- D.** This endorsement will not take effect unless you pay the additional premium for it when due, as set forth in Section **V**, and any premium or deductible you owe us for coverage provided under this policy. If that premium is paid when due, this endorsement may not be cancelled.

4. Personal and Advertising Liability

- PUBLICATION VIA E-MAIL OR WEB-SITE

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

a) *Defamation*

(1) Web site

(2) BBS – chat rooms (content)

(3) Linking/framing

b) *Invasion of privacy*

c) *Customer credit card numbers or other customer information (maintaining privacy of information)*

(1) Most courts do not deem theft to be “property damage”

(2) Most courts consider this tangible property

d) *Business Exclusion*

- BETTER COVERED UNDER A SPECIALTY policy

- SPECIFIC REFERENCE

- WEB DESIGN

- INTERNET SERVICE PROVIDER

- LINKS ARE AN EXCEPTION TO THE EXCLUSION

j. Insureds In Media And Internet Type Businesses

“Personal and advertising injury” committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of web -sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b. and c.** of “personal and advertising injury” under the Definitions section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

❖ **What does “in the business of” mean?**

✓ **Web site with information about the company**

✓ **Online catalogue**

✓ **Web site with links to other web sites**

✓ **Banner advertising**

e) *Hijacking from web site*

- MISLEADING DOMAIN NAMES OR METATAGS

2. Exclusions.

This insurance does not apply to:

I. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

f) *The CGL is not a solution for the chat room or BBS exposure*

(1) Forms are changing and limiting coverage

(2) Some companies are issuing the CGL with "Cyberspace" exclusions

- LUMNEY v Prodigy SERVICES Co., 94 N.Y.2d 242, 701 N.Y.S.2d 684, 727 N.E.2d 539 (1999)

2. Exclusions.

This insurance does not apply to:

k. Electronic Chatrooms or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

❖ **Various court cases suggest that if an entity hosts a chat room or bulletin board, then it may be held liable for damages as a publisher**

g) *Provide a specific technology based product that addresses these issues specifically on a global basis*

(1) Look at the policy territory

(2) Look at the policy definitions

(3) Look at the company approach

(a) Endorsement

(b) Separate insuring agreement

h) *Provide trade secrets coverage in the event of theft by an employee (CNA)*

5. Advertiser's Liability

- Now includes INTERNET AND OTHER ELECTRONIC PUBLICATIONS
- Applies TO ADVERTISING MATERIAL ONLY ON THE WEB SITE, NOT ALL MATERIAL

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
 - a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
 - b. Regarding web -sites, only that part of a web -site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

- a) *Use of web site – linking/framing with other industries*
- b) *Revenues*
- c) *Coverage is readily available in many of the Cyberspace policies*
- d) *Provide an E&O policy for this exposure*
- e) *The CGL/Umbrella does not cover this exposure*

6. Intellectual Property

- a) *Copyright infringement*
 - (1) Original expression of graphics, words, music, video
- b) *Patent infringement*
 - (1) Icons
 - (2) Business methods
- c) *Trade Mark – Trade Name/Service Mark – Service name infringement*
 - (1) Domain name
 - (2) Frequency loss
 - (3) Anti-cybersquatting bill passed last year by Congress and signed into law by the President

d) *Trade Dress Infringement*

(1) The style or design of the Website

e) *Trade Secret – theft*

(1) Third parties

(2) Employees

f) *Average defense costs*

(1) Copyright infringement - \$248,000

(2) Trademark infringement - \$300,000

(3) Trade secret - \$500,000

(4) Patent infringement - \$1,500,000

(5) Fortune 1000 firms lost \$45,000,000,000 from trade secret theft

- Likelihood of this type of claim is INCREASING
- 4 MAIN CATEGORIES LISTED, WITH GENERAL REFERENCE TO OTHER RIGHTS
- ADVERTISING EXCEPTION

2. Exclusions.

This insurance does not apply to:

i. Infringement Of Copyright, Patent, Trademark or Trade Secret

“Personal and advertising injury” arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another’s advertising idea in your “advertisement”.

However, this exclusion does not apply to infringement in your “advertisement”, of copyright, trade dress or slogan.

g) *Provide a Cyberspace policy that includes as many of the named issues as possible*

(1) The policies differ in this area

(2) Very few offer patent infringement coverage

(3) The majority are for defense coverage and damages only

(4) A couple provide pursuit fund coverage

h) Provide a Cyberspace policy that provides protection for loss of trade secret

(1) Some cyberspace policies include both third party and employee theft

(2) Some only cover non-employee theft

i) D&O policies have responded to some of these suits if entity coverage is provided

7. Coverage Territory

- PROVIDE A FOREIGN liability policy
- LOOK TO INSURANCE COMPANIES ADMITTED IN FOREIGN COUNTRIES
- PROVIDE A TRUE UMBRELLA WITH WORLD WIDE COVERAGE FOR CLAIMS AND SUITS

4. "Coverage territory" means:

- a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
- b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in **a.** above; or
- c. All other parts of the world if the injury or damage arises out of:
 - (1) Goods or products made or sold by you in the territory described in **a.** above;
 - (2) 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; or
 - (3) "Personal and advertising injury" offenses that takes place through the Internet or similar electronic means of communication;

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PROFESSIONAL LIABILITY EXCLUSION – COMPUTER SOFTWARE

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** and **Section I – Coverage B – Personal And Advertising Injury Liability**:

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of the rendering of or failure to render any service by you or on your behalf in connection with the selling, licensing, franchising or furnishing of your computer software including electronic data processing programs, designs, specifications, manuals and instructions.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring or others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage”, or the offense which caused the “personal and advertising injury”, involved the rendering of or failure to render any service described above.

- B. With respect to the rendering of or failure to render any service by you or on your behalf in connection with the selling, licensing, franchising or furnishing of your computer software including electronic data processing programs, designs, specifications, manuals and instructions, Exclusion **2.b. – Contractual Liability** under **Section I – Coverage A – Bodily Injury and Property Damage Liability** is replaced by the following:

2. Exclusions

This insurance does not apply to:

- b. “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 ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PROFESSIONAL LIABILITY EXCLUSION – COMPUTER DATA PROCESSING

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** and Paragraph 2., **Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability**:

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of any act, error or omission with respect to data processing services rendered by, or that should have been rendered by:

1. The insured; or
2. Any person or organization:
 - a. For whose acts, errors or omissions the insured is legally responsible; or
 - b. From whom the insured assumed liability by reason or a contract or agreement.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring or others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage”, or the offense which caused the “personal and advertising injury”, involved any act, error or omission with respect to data processing services as described above.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PROFESSIONAL LIABILITY EXCLUSION – ELECTRONIC DATA PROCESSING SERVICES AND COMPUTER CONSULTING OR PROGRAMMING SERVICES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of the rendering of, or failure to render, electronic data processing, computer consulting or computer programming services, advice or instruction by:

1. The insured; or

2. Any person or organization:

- a. For whose acts, errors or omissions the insured is legally responsible; or
- b. From whom the insured assumed liability by reason or a contract or agreement.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring or others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage”, or the offense which caused the “personal and advertising injury”, involved the rendering of or failure to render electronic data processing, computer consulting or computer programming services, advice or instruction as described above.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION –TELECOMMUNICATIONS EQUIPMENT OR SERVICE PROVIDERS ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2. **Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability** and Paragraph 2. **Exclusion of Section I – Coverage B – Personal And Advertising Injury Liability:**

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

- a. An error, omission, defect or deficiency in any evaluation, consultation or advice given by or on behalf of any insured concerning telecommunications equipment or services;

- b. Any advice, consultation, evaluation, inspection, supervision, quality control or phone network set-up, including central office cabling, done by you on a project which you serve as a telecommunication equipment or service provider; or

- c. The failure of any insured to adequately provide telecommunication services.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring or others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage”, or the offense which caused the “personal and advertising injury”, involved that which is described in Paragraph a., b. or c.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – INTERNET SERVICE PROVIDERS AND INTERNET ACCESS PROVIDERS ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

2. Exclusions

This insurance does not apply to “bodily injury” or
“property damage” arising out of:

- a. An error, omission, defect or deficiency in any
evaluation, consultation or advice that is
given by or on behalf of any insured

concerning Internet service or Internet
access; or

- b. The failure of any insured to adequately
provide Internet services or Internet access.

This exclusion applies even if the claims against
any insured allege negligence or other
wrongdoing in the supervision, hiring,
employment, training or monitoring or others by
that insured, if the “occurrence” which caused the
“bodily injury” or “property damage”, involved that
which is described in Paragraph a. or b.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PROFESSIONAL LIABILITY EXCLUSION – WEB SITE DESIGNERS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

2. Exclusions

This insurance does not apply to “bodily injury” or “property damage” arising out of any act, error or omission with respect to web-site designer or consultant services, rendered by or that should have been rendered by:

- a. The insured; or
- b. Any person or organization:
 - (1) For whose acts, errors or omissions the insured is legally responsible; or

- (2) From whom the insured assumed liability by reason of contract or agreement.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring or others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage” involved any act, error or omission with respect to web site designer or consultant services described above.

A. Distribution of Material In Violation of Statutes

- EXCLUDES INTRUSIVE ELECTRONIC MARKETING TECHNIQUES
- FEDERAL, STATE AND LOCAL LAWS PROHIBIT THESE TECHNIQUES

q. Recording And Distribution Of Material Or Information In Violation Of Law

“Bodily injury” or “property damage” arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or
- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003, or FCRA and their amendments and additions, that addresses, prohibits or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

H. Crime – CR 00 21

1. Money

16. "Money" means:
- a. Currency, coins and bank notes in current use and having a face value; and
 - b. Traveler's checks and money orders held for sale to the public; and
 - c. In addition, includes:
 - (1) Under Insuring Agreements **A.1.** and **A.2.** deposits in your account at any "financial institution"; and
 - (2) Under Insuring Agreement **A.6.**, deposits in your account at a "financial institution" as defined in Paragraph **F.9.b.**

2. Securities

- INSTRUMENTS THAT REPRESENT MONEY
- DOES NOT apply TO CARDS ISSUED by INSURED

22. "Securities" means negotiable and non-negotiable instruments or contracts representing either "money" or property and includes:
- a. Tokens, tickets, revenue and other stamps (whether represented by actual stamps or unused value in a meter) in current use; and
 - b. Evidences of debt issued in connection with credit or charge cards, which cards are not issued by you;
- but does not include money.

3. Virtual Currency Exclusion

- k. **Virtual Currency**
- Loss involving virtual currency of any kind, by whatever name known, whether actual or fictitious including, but not limited to, digital currency, crypto currency, or any other type of electronic currency.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

INCLUDE VIRTUAL CURRENCY AS MONEY

This endorsement modifies insurance provided under the following:

- COMMERCIAL CRIME COVERAGE FORM
- COMMERCIAL CRIME POLICY
- GOVERNMENT CRIME COVERAGE FORM
- GOVERNMENT CRIME POLICY

SCHEDULE

Insuring Agreement	Virtual Currency Limit Of Insurance
<input type="checkbox"/> Employee Theft	\$
<input type="checkbox"/> Computer And Funds Transfer Fraud	\$
Virtual Currency	
Name:	
Exchange:	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

With respect to this Include Virtual Currency As Money endorsement, the provisions of the Coverage Form or Policy to which this endorsement is attached apply, unless modified by endorsement.

A. Under The Commercial Crime Coverage Form And Commercial Crime Policy:

1. Exclusion D.1.k. Virtual Currency is replaced by the following:

k. Virtual Currency

Loss involving virtual currency of any kind, by whatever name known, whether actual or fictitious including, but not limited to, digital currency, crypto currency or any other type of electronic currency. However if a Virtual Currency Limit Of Insurance is shown in the Schedule, we will pay up to that amount for loss of virtual currency shown in the Schedule. That amount is part of, not in addition to, the Limit Of Insurance shown in the Declarations for the applicable Insuring Agreement.

2. Paragraph (1) of the Valuation – Settlement Condition is replaced by the following:

(1) Money

(a) Other Than Virtual Currency

Loss of “money”, other than virtual currency, but only up to and including its face value. We will, at your option, pay for loss of “money” issued by any country other than the United States of America:

- (i)** At face value in the “money” issued by that country; or
- (ii)** In the United States of America dollar equivalent, determined by the rate of exchange published in The Wall Street Journal on the day the loss was “discovered”.

(b) Virtual Currency

Loss of “money” in the form of virtual currency but only up to and including its value at the close of business on the day the loss was “discovered” as determined by the rate of exchange published by the Exchange shown in the Schedule. We may, at our option, pay the value of the virtual currency in the United States of America dollar equivalent or replace it in kind.

3. In Section **F. Definitions**, the definition of “money” is replaced by the following:

“Money” means:

- a. Currency, coins and bank notes in current use and having a face value;
- b. Traveler’s checks and money orders held for sale to the public;
- c. Virtual currency shown in the Schedule; and
- d. In addition, includes:
 - (1) Under Insuring Agreements **A.1.** and **A.2.**, deposits in your account at any financial institution”; and
 - (2) Under Insuring Agreement **A.6.**, deposits in your account at a “financial institution” as defined in Paragraph **F.9.b.**

- B. Under the Government Crime Coverage Form And Government Crime Policy:

1. Exclusion **D.1.k. Virtual Currency** is replaced by the following:

k. Virtual Currency

Loss involving virtual currency of any kind, by whatever name known, whether actual or fictitious including, but not limited to, digital currency, crypto currency or any other type of electronic currency. However if a Virtual Currency Limit Of Insurance is shown in the Schedule, we will pay up to that amount for loss of virtual currency shown in the Schedule. That amount is part of, not in addition to, the Limit Of Insurance shown in the Declarations for the applicable Insuring Agreement.

2. Paragraph (1) of the **Valuation – Settlement Condition** is replaced by the following:

(1) Money

(a) Other Than Virtual Currency

Loss of “money”, other than virtual currency, but only up to and including its face value.

(b) Virtual Currency

Loss of “money” in the form of virtual currency but only up to and including its value at the close of business on the day the loss was “discovered” as determined by the rate of exchange published by the Exchange shown in the Schedule. We may, at our option, pay the value of the virtual currency in the United States of America dollar equivalent or replace it in kind.

3. In Section **F. Definitions**, the definition of “money” is replaced by the following:

“Money” means:

- b. Currency, coins and bank notes in current use and having a face value;
- b. Traveler’s checks and money orders held for sale to the public;
- c. Virtual currency shown in the Schedule; and
- d. In addition, includes:
 - (1) Under Insuring Agreements **A.1.**, **A.2.** and **A.3.** deposits in your account at any financial institution”; and
 - (2) Under Insuring Agreement **A.7.**, deposits in your account at a “financial institution” as defined in Paragraph **F.8.b.**

4. Financial Institution

- INSIDE THE PREMISES – THEFT OF MONEY AND SECURITIES
- COMPUTER AND FUNDS TRANSFER FRAUD

9. "Financial institution" means:
- a. With regard to Insuring Agreement **A.3.**
 - (1) A bank, savings bank, savings and loan association, trust company, credit union or similar depository institution;
 - (2) An insurance company.
 - b. With regard to Insuring Agreement **A.6.:**
 - (1) A bank, savings bank, savings and loan association, trust company, credit union or similar depository institution;
 - (2) An insurance company.
 - (3) A stock brokerage firm or investment company.
 - c. Other than Insuring Agreements **A.3.** and **A.6.**, any financial institution.

5. Other Property

- COMPUTER DATA NOT OTHER PROPERTY

18. "Other property" means any tangible property other than "money" and "securities" that has intrinsic value. "Other property" does not include "computer programs", "electronic data" or any property specifically excluded under this insurance.

6. Computer Program

- COMPUTER INSTRUCTIONS

1. "Computer program" means a set of related electronic instructions, which direct the operation and function of a computer or devices connected to it, which enable the computer or devices to receive, process, store or send "electronic data".

7. Electronic Data

- FACTS, IMAGES

6. "Electronic data" means information, facts, images or sounds stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software) on data storage devices, including hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESTRUCTION OF ELECTRONIC DATA OR COMPUTER PROGRAMS

This endorsement modifies insurance provided under the following:

COMMERCIAL CRIME COVERAGE FORM
COMMERCIAL CRIME POLICY
GOVERNMENT CRIME COVERAGE FORM
GOVERNMENT CRIME POLICY

PROVISIONS

With regard to this Destruction Of Electronic Data Or Computer Programs Endorsement, the provisions of the Coverage Form or Policy to which this endorsement is attached apply, unless modified by this endorsement.

A. The following insuring agreement is added to Section A. Insuring Agreements:

We will pay for costs that you incur to restore or replace damaged or destroyed "electronic data" or "computer programs" stored within any "computer system" owned, leased or operated by you resulting directly from:

1. A virus designed to damage or destroy "electronic data" or "computer programs"; or
2. Vandalism by an "employee"; or
3. Vandalism by a person who has gained unauthorized access to your "computer system";

including reasonable costs that you incur to restore your "computer system" to the level of operational capability that existed before the virus or vandalism occurred.

B. Under Section D. Exclusions:

1. The following exclusions do not apply to loss covered under Paragraph A.2.:
 - a. The Acts Committed By Your Employees, Managers, Directors, Trustees Or Representatives Exclusion in Commercial Crime Coverage Form and the Commercial Crime Policy; and
 - b. The Acts Committed By Your Officials, Employees Or Representatives Exclusion in the Government Crime Coverage Form or Government Crime Policy.

2. The following exclusions are added:

The Insuring Agreement does not cover:

- a. Loss resulting from errors or omissions in the design of "computer programs".
- b. Loss resulting from errors or omissions in the programming or processing of "electronic data".

C. Under Section F. Definitions, the following is added to the definition of "occurrence":

1. As respects Paragraph A.1., all covered costs incurred by you between the time the damage or destruction is discovered and the time your "computer system" is restored to the level of operational capability that existed before the virus occurred. Recurrence of the same virus after your "computer system" has been restored shall constitute a separate occurrence.
2. As respects Paragraph A.2. and A.3.:
 - (1) An individual act or event;
 - (2) The combined total of all separate acts or events whether or not related; or
 - (3) A series of acts or events whether or not related;

committed by a person acting alone or in collusion with other persons, or not committed by any person, during the Policy Period shown in the Declarations, before such Policy Period or both.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UNAUTHORIZED REPRODUCTION OF COMPUTER SOFTWARE BY EMPLOYEES

This endorsement modifies insurance provided under the following:

COMMERCIAL CRIME COVERAGE FORM
COMMERCIAL CRIME POLICY
GOVERNMENT CRIME COVERAGE FORM
GOVERNMENT CRIME POLICY

PROVISIONS

With regard to this Unauthorized Reproduction Of Computer Software By Employees Endorsement, the provisions of the Coverage Form or Policy to which this endorsement is attached apply, unless modified by endorsement.

A. The following insuring agreement is added to Section **A. Insuring Agreements**:

We will pay for fines and penalties that you incur resulting directly from the unauthorized reproduction of computer software by an "employee", in violation of a licensing agreement with a third party vendor, provided the unauthorized reproduction is done:

1. Without your knowledge;
2. Without the knowledge of any partner, "member", officer or director;
3. Without the knowledge of any other person having responsibility for compliance with the terms of the software licensing agreement;

and you are legally liable for the loss.

B. Under Section **D. Exclusions**:

This Insuring Agreement does not cover:

1. The Acts Committed By Your Employees, Managers, Directors, Trustees Or Representatives Exclusion in the Commercial Crime Coverage Form and Commercial Crime Policy; and
2. The Acts Committed By Your Officials, Employees Or Representatives Exclusion in the Government Crime Coverage Form and Government Crime Policy.

C. Under Section **E. Conditions**:

Paragraph **(1)** of the **Duties In The Event of Loss** Condition is replaced by the following:

- (1)** Notify us as soon as possible.

D. Under Section **F. Definitions**, the following is added to the definition of "occurrence":

"Occurrence" means:

- (1)** An individual act;
- (2)** The combined total of all separate acts whether or not related; or
- (3)** A series of acts whether or not related;

committed by an "employee" acting alone or in collusion with other persons, during the Policy Period shown in the Declarations, before such Policy Period or both.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

IDENTITY FRAUD EXPENSE

This endorsement modifies insurance provided under the following:

COMMERCIAL CRIME COVERAGE FORM
COMMERCIAL CRIME POLICY

SCHEDULE

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

With regard to this Identity Fraud Expense endorsement, the provisions of the Coverage Form or Policy to which this endorsement is attached apply, unless modified by endorsement.

A. The following insuring agreement is added to Section A. Insuring Agreements:

We will pay for "expenses" incurred by:

1. You; or
2. Any insured person;

Resulting from "identity fraud".

B. The following exclusion is added to Section D. Exclusions:

This Insuring Agreement does not cover:

"Expenses" due to "theft" or any other dishonest act committed by:

1. You;
2. Any "insured person"; or
3. Any person shown in the Schedule;

whether acting alone or in collusion with other persons.

C. The Legal Fees, Costs And Expenses Exclusion is replaced by the following:

Legal Fees, Costs And Expenses

Fees, costs and expenses incurred by you which are related to any legal action, except when covered under Insuring Agreement A.2. or this Insuring Agreement.

D. The following is added to the Duties In The Event Of Loss Condition:

You must send to us, within 60 days after our request, receipts, bills or other records that support any claim for "expenses" covered under this Insuring Agreement.

E. The following definitions are added to Section F. Definitions:

1. "Expenses" means:

- a. Advertising and public relations expenses incurred by you to restore your business reputation as a result of an "identity fraud";
- b. Costs incurred by you or any "insured person" for notarizing affidavits or similar documents attesting to fraud required by financial institutions or similar credit grantors or credit agencies;
- c. Costs incurred by you or any "insured person" for certified mail to law enforcement agencies, credit agencies, financial institutions or similar credit grantors;
- d. Costs incurred by you or any "insured person" for obtaining credit reports;
- e. Lost income incurred by you or any "insured person" resulting from time taken off work to complete fraud affidavits, meet with or talk to law enforcement agencies, credit agencies, and/or legal counsel, up to a maximum payment of \$250 per day. Total payment for lost income is not to exceed \$10,000 or the Limit Of Insurance shown in the Declarations, whichever is less;

- f. Loan application fees incurred by you or any “insured person” for reapplying for a loan when the original application is rejected solely because the lender received incorrect credit information;
 - g. Reasonable attorney fees to:
 - (1) Defend lawsuits brought against you by merchants, vendors, suppliers, financial institutions or their collection agencies;
 - (2) Remove any criminal or civil judgments wrongly entered against you; and
 - (3) Challenge the accuracy or completeness of any information in a consumer credit report for you;
 - h. Charges incurred by you or any “insured person” for long distance telephone calls to merchants, vendors, suppliers, customers, law enforcement agencies, financial institutions or similar credit grantors, or credit agencies to report or discuss an actual “identity fraud”; and
 - i. Any other reasonable expenses incurred by you or any “insured person” with our written consent.
2. “Identity fraud” means the act of knowingly transferring or using without lawful authority, a means of identification of:
- a. Your business as shown in the Declarations; or
 - b. Any “insured person”,
with the intent to commit, or to aid or abet another to commit, any unlawful activity that constitutes a violation of federal law or a felony under any applicable state or local law.
3. “Insured person” means:
- a. Any director, trustee, partner, “member”, “manager” or “employee” of any insured; and
 - b. Any spouse, child under the age of 18 or relative residing in the household of any “insured person” defined in Paragraph 3.a.;
- unless excluded as shown in the Schedule.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TELEPHONE TOLL FRAUD

This endorsement modifies insurance provided under the following:

COMMERCIAL CRIME COVERAGE FORM
COMMERCIAL CRIME POLICY
GOVERNMENT CRIME COVERAGE FORM
GOVERNMENT CRIME POLICY

SCHEDULE

Number Of Days:

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.
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With regard to this Telephone Toll Expense endorsement, the provisions of the Coverage Form or Policy to which this endorsement is attached apply, unless modified by endorsement.

A. The following insuring agreement is added to Section A. Insuring Agreements:

We will pay for loss from long distance telephone toll call charges incurred by you resulting directly from fraudulent use or fraudulent manipulation of an "account code" or "system password" required to gain access to your "voice computer system", provided such loss did not result from the failure to:

1. Install and maintain in operating condition a call disconnect feature to terminate a caller's access after three unsuccessful attempts to enter an "account code";
2. Incorporate a "system password"; or
3. Change a "system password" within the number of days shown in the Schedule.

B. The following exclusion is added to Section E. Conditions:

We will pay for loss resulting from toll charges made on telephone lines directly controlled by one "voice computer system" occurring for a period of not more than 30 days inclusive of the date on which the first such toll call charges were made.

C. The following definitions are added to Section F. Definitions:

1. "Account code" means a confidential and protected string of characters that identifies or authenticates a person and permits that person to gain access to your "voice computer system" for the purpose of making long distance toll calls or utilizing voice mailbox messaging capabilities or similar functional features of the system.
2. "System administration" means the performance of any security function including, but not limited to:
 - a. Defining authorized persons to access the system;
 - b. Adding, deleting or changing "account codes" or passwords;
 - c. Installing or deleting any system option which directs telephone call routing or adds, drops or moves telephone lines; or
 - d. Any other activity allowed by a hardware- or software-based system that has been incorporated by a manufacturer or a vendor into a "voice computer system" provided the system is not intended for the sole use of the manufacturer or vendor.

3. "System maintenance" means performing hardware and software installation, diagnostic and connection and similar activities that are performed in the usual custom and practice by a manufacturer or vendor to establish or maintain the basic operational functionality of a "voice computer system".
4. "System password" means a confidential and protected string of characters that identifies or authenticates a person and permits that person to gain access to your "voice computer system" to perform "system administration" or a component thereof.
5. "Voice computer system" means a "computer system" installed in one location which functions as a private branch exchange (PBX) voice mail processor, automated call attendant or provides a similar capability used for the direction or routing of telephone calls in a voice communications network.

SAMPLE

8. Fraudulent Instruction

- INSTRUCTIONS TO THE BANK TO TRANSFER FUNDS
- ISSUED by SOMEONE ELSE WITHOUT THE KNOWLEDGE OF THE INSURED

12. "Fraudulent instruction" means:

a. With regard to Insuring Agreement **A.6.a.(2)**:

- (1) A computer, telefacsimile, telephone or other electronic instruction directing a "financial institution" to debit your "transfer account" and to transfer, pay or deliver "money" or "securities" from that "transfer account", which instruction purports to have been issued by you, but which in fact was fraudulently issued by someone else without your knowledge or consent.
- (2) A written instruction (other than those covered under Insuring Agreement **A.2.**) issued to a "financial institution" directing the "financial institution" to debit your "transfer account" and to transfer, pay or deliver "money" or "securities" from that "transfer account", through an electronic funds transfer system at specified times or under specified conditions, which instruction purports to have been issued by you, but which in fact was issued, forged or altered by someone else without your knowledge or consent.

b. With regard to Insuring Agreement **A.6.b.**:

A computer, telefacsimile, telephone or other electronic, written or voice instruction directing an "employee" to enter or change "electronic data" or "computer programs" within a "computer system" covered under the Insuring Agreement, which instruction in fact was fraudulently issued by your computer software contractor.

9. Transfer Account

- INSURED CAN INITIATE TRANSFER
- ELECTRONIC INSTRUCTIONS
- WRITTEN INSTRUCTIONS

24. "Transfer account" means an account maintained by you at a "financial institution" from which you can initiate the transfer, payment or delivery of "money" or "securities":

- a. By means of computer, telefacsimile or telephone or other electronic instructions; or
- b. By means of written instructions (other than those covered under Insuring Agreement **A.2.**) establishing the conditions under which such transfers are to be initiated by such "financial institution" through an electronic funds transfer system.

10. Business Income Exclusion

- BUSINESS INCOME EXCLUDES ALSO
- LIABILITY DAMAGES, EXCEPT COMPENSATORY
- CR 25 40 INCLUDE EXPENSES INCURRED TO ESTABLISH AMOUNT OF LOSS

g. Indirect Loss

Loss that is an indirect result of an "occurrence" covered by this insurance including, but not limited to, loss resulting from:

- (1) Your inability to realize income that you would have realized had there been no loss of or damage to "money", "securities" or "other property".
- (2) Payment of damages of any type for which you are legally liable. But we will pay compensatory damages arising directly from a loss covered under this insurance.
- (3) Payment of costs, fees or other expenses you incur in establishing either the existence or amount of loss under this insurance.

11. First versus Third Party Coverage

- OWNED PROPERTY
- CLIENTS' PROPERTY CR 04 01 COVERS CLIENTS' PREMISES

I. Ownership Of Property; Interests Covered

The property covered under this insurance is limited to property:

- (1) That you own or lease;
- (2) That is held by you in any capacity; or
- (2) For which you are legally liable, provided you were liable for the property prior to the time the loss was sustained.

However, this insurance is for your benefit only. It provides no rights or benefits to any other person or organization. Any claim for loss that is covered under this policy must be presented by you.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CLIENTS' PROPERTY

This endorsement modifies insurance provided under the following:

COMMERCIAL CRIME COVERAGE FORM
COMMERCIAL CRIME POLICY
EMPLOYEE THEFT AND FORGERY POLICY

With regard to this Clients' Property Endorsement, the provisions of the coverage form or policy to which this endorsement is attached apply, unless modified by this endorsement.

A. The following insuring agreement is added to Section A. Insuring Agreements:

We will pay for loss of or damage to "money", "Securities" and "other property" sustained by your "client" resulting directly from "theft" committed by an identified "employee", acting alone or in collusion with other persons.

B. Under Section D. Exclusions in the Commercial Crime Coverage Form and Commercial Crime Policy, the Acts Committed By Your Employees, Managers, Directors, Trustees or Representatives Exclusion does not apply to this Insuring Agreement.

C. Under Section E. Conditions:

1. Paragraph (1) of the **Duties in the Event of Loss** Condition is replaced by the following:

(1) Notify us as soon as possible.

2. The **Ownership of Property; Interests Covered** Condition is replaced by the following:

The property covered under this Insuring Agreement is limited to property:

a. That your "client" owns or leases;

b. That your "client" holds for others in any capacity; or

c. For which your "client" is legally liable, provided your "client" was liable for the property prior to the time the loss was sustained.

However, this insurance is for your benefit only. It provides no rights or benefits to any other person or organization, including your "client". Any claim for loss that is covered under this Insuring Agreement must be presented by you.

D. Under Section F. Definitions:

1. The following definitions are added;

a. "Client" means any entity for whom you perform services under a written contract.

b. "Occurrence" means:

(1) An individual act;

(2) The combined total of all separate acts whether or not related; or

(3) A series of acts whether or not related;

committed by an "employee", acting alone or in collusion with other persons, during the Policy Period shown in the Declarations, before such Policy Period, or both.

2. The following definition of "theft" is replaced by the following:

"Theft" means the unlawful taking of property to the deprivation of your "client".

12. Impersonation by 3rd parties

- a) *False identity*
- b) *Creates a fraudulent credit line*
- c) *Provide a false credit card*

I. Computer and Funds Transfer Fraud

<p>6. Computer And Funds Transfer Fraud</p> <p>a. We will pay for:</p> <p>(1) Loss resulting directly from a fraudulent:</p> <ul style="list-style-type: none">(a) Entry of “electronic data” or “computer program” into; or(b) Change of “electronic data” or “computer program” within: <p>any “computer system” owned, leased or operated by you, provided the fraudulent entry or fraudulent change causes, with regard to Paragraphs 6.a.(1)(a) and 6.a.(1)(b):</p> <ul style="list-style-type: none">(i) “Money”, “securities” or “other property” to be transferred, paid or delivered; or(ii) Your account at a “financial institution” to be debited or deleted. <p>(2) Loss resulting directly from a “fraudulent instruction” directing a “financial institution” to debit your “transfer account” and to transfer, pay or deliver “money” or “securities” from that account.</p> <p>b. As used in Paragraph 6.a.(1), fraudulent entry or fraudulent change of “electronic data” or “computer program” shall include such entry or change made by an “employee” acting, in good faith, upon a “fraudulent instruction” received from a computer software contractor who has a written agreement with you to design, implement or service “computer programs” for a “computer system” covered under this insuring agreement.</p>
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J. Additional Exclusions

1. Authorized Access

4. Insuring Agreement **A.6.** does not cover:
- a. Authorized Access**
- Loss resulting from a fraudulent:
- (1) Entry of “electronic data” or “computer program” into;
or
- (2) Change of “electronic data” or “computer program”
within:
- any “computer system” owned, leased or operated by
you by a person or organization with authorized access
to that “computer system”, except when covered under
Insuring Agreement **A.6.b.**

2. Credit Card Transactions

4. Insuring Agreement **A.6.** does not cover:
- b. Credit Card Transactions**
- Loss resulting from the use or purported use of credit,
debit, charge, access, convenience, identification,
stored-value or other cards or information contained on
such cards.

3. Exchanges or Purchases

4. Insuring Agreement **A.6.** does not cover:
- c. Exchanges Or Purchases**
- Loss resulting from the giving or surrendering of property
in any exchange or purchase.

4. Fraudulent Instructions

<p>4. Insuring Agreement A.6. does not cover:</p> <p>d. Fraudulent Instructions</p> <p>Loss resulting from an “employee” or “financial institution” acting upon any instruction to:</p> <p>(1) transfer, pay or deliver “money”, “securities” or “other property”; or</p> <p>(2) Debit or delete your account:</p> <p>which instruction proves to be fraudulent, except when covered under Insuring Agreement A.6.a.(2) or A.6.b.</p>

5. Inventory Shortages

<p>4. Insuring Agreement A.6. does not cover:</p> <p>e. Inventory Shortages</p> <p>Loss, or that part of any loss, the proof of which as to its existence or amount is dependent upon:</p> <p>(1) An inventory computation; or</p> <p>(2) A profit and loss computation.</p>
--

K. Additional Conditions

- SPECIAL limits of INSURANCE FOR SPECIFIED PROPERTY - INCREASE - CR 35 04

<p>5. Conditions Applicable To Insuring Agreement A.6.</p> <p>a. Special Limit Of Insurance For Specified Property</p> <p>We will only pay up to \$5,000 for any one “occurrence” of loss of or damage to manuscripts, drawings, or records of any kind or the cost of reconstructing them or reproducing any information contained in them.</p> <p>b. Territory</p> <p>We will cover loss you sustain resulting directly from an “occurrence” taking place anywhere in the world. The Territory Condition E.1.q. does not apply to Insuring Agreement A.6</p>

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FRAUDULENT IMPERSONATION

This endorsement modifies insurance provided under the following:

- COMMERCIAL CRIME COVERAGE FORM
- COMMERCIAL CRIME POLICY
- GOVERNMENT CRIME COVERAGE FORM
- GOVERNMENT CRIME POLICY

SCHEDULE

Check the appropriate box(es):		
I. Fraudulent Impersonation Of "Employees" Included:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<input type="checkbox"/> A. Verification is Required For All "Transfer Instructions"		
<input type="checkbox"/> B. Verification is Required For All "Transfer Instructions" In Excess Of \$		
<input type="checkbox"/> C. Verification Of "Transfer Instructions" Is Not Required		
II. Fraudulent Impersonation Of "Customers" And "Vendors" Included:	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<input type="checkbox"/> A. Verification is Required For All "Transfer Instructions"		
<input type="checkbox"/> B. Verification is Required For All "Transfer Instructions" In Excess Of \$		
<input type="checkbox"/> C. Verification Of "Transfer Instructions" Is Not Required		
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

With respect to this Fraudulent Impersonation endorsement, the provisions of the Coverage Form or Policy to which this endorsement is attached apply, unless modified by endorsement.

A. The following Insuring Agreement is added to Section A. Insuring Agreements:

Fraudulent Impersonation

1. "Employees" (if indicated in Section I. of the Schedule)

We will pay for loss resulting directly from your having, in good faith, transferred "money", "securities" or "other property" in reliance upon a "transfer instruction" purportedly issued by:

- a. An "employee", or any of your partners, "members", "managers", officers, directors or trustees, or you (if you are a sole proprietorship) if coverage is written under the Commercial Crime Coverage Form or Commercial Crime Policy; or

- b. An “employee”, or any of your officials if coverage is written under the Government Crime Coverage Form or Government Crime Policy;

but which “transfer instruction” proves to have been fraudulently issued by an imposter with the knowledge or consent of the person in Paragraph 1.a. or 1.b.

2. “Customers” And “Vendors” (if indicated in Section II. of the Schedule)

We will pay for loss resulting directly from your having, in good faith, transferred “money”, “securities” or “other property” in reliance upon a “transfer instruction” purportedly issued by your “customer” or “vendor”, but which “transfer instruction” proves to have been fraudulently issued by an imposter without the knowledge or consent of the “customer” or “vendor”.

3. Verification

- a. The following is a precondition to coverage under this Insuring Agreement:
 - (1) If option I.A. and/or II.A. is selected in the Schedule, you shall verify all “transfer instructions”; or
 - (2) If option I.B. and/or II.B. is selected in the Schedule, you shall verify all “transfer instructions” in excess of the amount shown;

according to a pre-arranged callback, or other established verification procedure before acting upon any such “transfer instruction.

- b. If option I.C. and/or II.C. is selected in the Schedule, verification of “transfer instructions” is not a precondition to coverage under the insuring agreement.

B. Under Section E. Conditions:

The **Territory** Condition is replaced by the following:

/Territory

We will cover loss that you sustain resulting directly from an “occurrence” taking place anywhere in the world.

C. The following definitions are added to Section F. Definitions:

- 1. “Customer” means an entity or individual to whom you sell goods or provide services under a written contract.
- 2. “Transfer instruction” means an instruction directing you to transfer “money”, “securities” or “other property”.
- 3. “Vendor” means an entity or individual from whom you purchase goods or receive services under a written contract.

1. Money Orders and Counterfeit Money – Insuring Agreement 8

a) *Definition*

3. “Counterfeit money” means an imitation of “money” that is intended to deceive and to be taken as genuine.

b) *Covered Cause of Loss*

7. Money Orders And Counterfeit Paper Currency

We will pay for loss resulting directly from your having accepted in good faith, in exchange for merchandise, “money” or services:

- a. Money orders issued by any post office, express company or bank that are not paid upon presentation; or
- b. “Counterfeit money” that is acquired during the regular course of business.

M. Directors and Officers Coverage

1. Check the territory limitation

- a) *Any insured operating on the Web must be offered a world-wide policy*
- b) *Any insured linked to other systems must be offered the same*

2. Entity Coverage

3. Applicable Exclusions

4. Negligent Acts

N. Computers and EDP Coverage

1. Used for information and business practices

- a) *Accounting*
- b) *Proprietary*

2. Internal use and maintenance of records

- a) *Competitive*
- b) *Supplier*
- c) *Customer and vendor transactions*

3. Accounts receivable coverage

4. Include extra expense in the EDP

- a) *Check for virus coverage*
- b) *May not cover acts of employees*

5. Cover legal fees under a Cyberspace policy or Intellectual Property policy

6. The EDP policy may cover if loss is due to a covered peril

O. Down time

1. Impact within hours or minutes

- a) *Virus*
- b) *Sabotage – internal and external*
- c) *Fraud – employees*
- d) *Power outage – on or off premises*
- e) *Programming errors*
- f) *Operator system crash*
- g) *Customer/vendor access violations*

h) Denial of service

i) Server overload

2. Uninterruptible power supply

a) AC current becomes stored in a large battery collection system, which is a DC backup

b) Powered by on-site generator

c) Servers or PCs are linked to this power supply

d) When outside power supplies become interrupted – DC system will take the place of outside power and can last several hours

e) Can also link the UPS to another battery system if the power outage lasts for a longer period of time

3. Off-premises Utilities Service Interruption Coverage – direct damage and time element

a) Can be added by endorsement to the Commercial Property Form and the Business Income/Extra Expense Form

(1) Time deductible

(2) Some perils specific to computers are excluded

b) Should be included in the Difference in Conditions coverage – both direct and indirect coverage

c) Is often included in Boiler and Machinery and EDP coverages – but with an off-premises foot limitation as well as a time deductible for the BI/EE coverage

4. Trade Disruption Insurance

a) Royal/SunAlliance USA

b) Covers loss of earnings or extra expense resulting from disruption of trade flow

c) Covers an aggregate of property, marine and political risks

d) Physical damage is not required as the proximate cause of loss

5. Dependent property coverage is being offered on a few of the Cyberspace policies

- a) *Non-specific location coverage*
- b) *No (or very short) time deductible*
- c) *Only named perils, such as virus or third party (ISP) shut down*

P. Computer Data

1. Improper transmittal of data

2. Loss of data

- a) *Procedures*
- b) *Hackers*
 - (1) *System damage*
 - (2) *Computer fraud*
- c) *Theft or destruction of data by employees*
- d) *Customers/vendors – potential loss of future revenue*
- e) *Electronic signals – interference (EMI – electromagnetic interference)*
- f) *Virus*

3. Provide coverage under a Cyberspace policy

4. Fiduciary/EBL policies might cover some of this exposure

- a) *Due to an error or omission by insured*

5. Routine audits performed on services

6. Have outside service verify firewall construction for adequacy

- a) *Procedures have changed greatly in just the last year or so*

7. EDP form can include virus protection as well as loss caused by employee actions

a) Look for any exclusions for improper procedures

8. Computer fraud coverage for hacker exposure

a) Will not respond for lost revenue or extra expense

9. Check geographic area for power transformers or other businesses that might create EMI situations

Q. Extortion

1. Product

2. Web site

3. Product extortion coverage

a) Specialty form from a few carriers

4. Some Cyberspace policies cover this exposure

a) The extortion payment

b) Public relations coverage

c) Loss control services

R. Telecommunication and Internet Construction

1. Using an independent contractor

2. Hiring IT employees

3. Require independent contractor to provide evidence of insurance for 3rd party loss

a) CGL impaired property exclusion would lead to denial of coverage

b) Loss of income/extra expense needed

c) May take the form of E&O coverage

4. It is possible, depending on the peril, that the EDP form could respond for BI as well as EE

a) There must be direct loss or damage to trigger that form

b) An error by the programmer may not cause direct loss, but rather the network just doesn't function correctly

5. Require a performance bond to be provided by the programming company

6. Include liquidated damages in the contract

7. Require the contractor to provide a builders risk form, including soft costs

8. Verify when hiring employees that they will not be using any proprietary information belonging to anyone else on the job

a) Programming

b) Source code

c) Object code

S. Employee Related Exposures

1. E-mail and voicemail – invasion of privacy (brought by employee against insured)

2. E-mail – mass mailing from one or more employees to others

3. Off-site telemarketing

4. Labor strikes (shut down of system)

5. Harassment/Cyberstalking/Cybersabotage

6. Libel – (Cyberlibel or Cybersmearing)/ invasion of privacy (brought against insured by 3rd party due to remarks created by employee)

7. Cyberblackmail (employee vs. employer)

8. Fiduciary liability – ERISA

9. EBL (on line enrollment) – group health

10. Be sure the EPLI coverage includes invasion of privacy suits

a) Look for worldwide form

11. Review employee handbook for specific issues being addressed to employee

12. Review EDP policy for exception to employee theft exclusion to cover acts of destruction

13. Provide coverage as part of a fiduciary liability or EBL coverage form or as part of a Cyberspace policy

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

2. Exclusions

This insurance does not apply to:

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

Damages arising out of:

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

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

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

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

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

2. Exclusions

This insurance does not apply to:

Access Or Disclosure Of Confidential Or Personal Information

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

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



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Section 4

Mergers, Acquisitions and Joint Ventures

MERGERS, ACQUISITIONS AND JOINT VENTURES

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I. Short History of Mergers and Acquisitions

A. First Wave – Consolidation of Existing Industries

1. 1860 – Consolidation and Andrew Carnegie

- a) *250 small steel firms in the United States*
- b) *By 1885, controlled the majority of exports and over half of the domestic production*
- c) *Combines*
 - (1) Emerging technology
 - (2) Purchasing competitors with structural inefficiencies
- d) *Recent telecommunications mergers follow this model*

2. Rockefeller and Vertical Integration

- a) *1862 – Standard Oil was a small refinery*
- b) *Acquired related industries*
- c) *Aligned transportation and distribution with production*
- d) *Resulted in competitive pricing and driving competitors out of business*

3. 1866 – Erie Railroad and the “poison pill defense”

- a) *Cornelius Vanderbilt tried to acquire*
- b) *Railroad issued stock as Vanderbilt purchased*
- c) *Increased the cost of takeover*

4. 1893 – Reorganization efforts of J. P. Morgan

- a) *Panic of 1893 and the following recession*
- b) *25% of the combined railroad capital in 192 insolvent railroads*
- c) *Costs slashed and profits assured*

B. Second Wave – Holding Companies

1. 1900 – William Durant and the creation of General Motors

- a) *Carriage maker who saw what automobiles would become*
- b) *Acquired David Buick’s automobile company in 1904*
- c) *1908 attempted to merge with Reo, Ford, and Maxwell-Briscoe*
- d) *Founded General Motors as a holding company*

2. Purpose was not to produce a product, but to own companies who would

3. Aligned in a vertical structure

- a) *Spark plugs*
- b) *Bodies*
- c) *Axles*

4. Acquired Cadillac Motor Car Company

5. Chevrolet entered as a competitor

- a) *New partner and capital brought in*
- b) *Chevrolet acquired*
- c) *Fisher Body Company acquired*

C. The Third Wave – Diversification

1. 1960s through the early 1970s

2. Reasons for the push

- a) *Concentration as prohibited under the Sherman and Clayton Acts*
- b) *Business schools taught business and management skills interchangeable between industries*
- c) *Financial markets demanded financial results*

3. Outgrowth

- a) *Loss of jobs for efficiency and profit*
- b) *Foreign competition rose*
- c) *Small innovative firms prospered*

D. The Fourth Wave – The Raiders of the 1980s

1. 22,000 merger and acquisition transactions were announced

2. Hostile takeover reemerged

E. The Fifth Wave – Strategic Alliances of the 1990s

1. Trend to merge rather than acquire

2. 90% of the mergers were in electronics and transportation

3. Underlying rationale has evolved

- a) ***From** belief in growth through extension of core activities*
- b) ***To** expansion of core operations*
- c) ***To** current belief that innovation and creation of synergy is preferred over building from ground up*

II. Merger and Acquisition Primer

A. Most states require that the majority of shareholders approve these combinations

B. Could result in a state transfer tax liability

C. Merger

1. Combination of two or more corporations

2. Only one corporation survives

3. Described in two basic ways

a) Operational

(1) Operating

(2) Financial

(a) Statutory merger

(b) Purchase of assets

b) Business purpose

(1) Horizontal

(2) Vertical

(3) Conglomerate

D. Operational Merger Descriptions

1. Operating Mergers

a) Actual operations of the companies are integrated

b) Desired outcome of actual blending of the companies

E. Financial Mergers

1. Two companies do not merge their actual day-to-day operations

2. Statutory Merger

a) Executed under the laws of the state of incorporation

b) Stock of target firm directly exchanged for the stock of the acquiring firm

(1) Stock for stock

(2) Cash or securities for stock, then as only shareholder, stock for stock

3. Purchase of Assets

- a) *Purchases all the assets of the target corporation with cash or securities*
- b) *Cash or securities received by the target firm distributed to stockholders as a dividend*
- c) *Target corporation formally dissolved*

F. By Business Purpose

1. Horizontal Mergers

- a) *Merger between competitors, generally in the same field of supply*
- b) *Companies integrate their operations*
- c) *Because of same product lines, duplicative personnel exist after the merger*
- d) *Personnel is one of the main concerns in this type of merger*

2. Vertical Mergers

- a) *Combination of two companies, one of which is the customer of the other*
- b) *Target company is usually eliminated*
- c) *Depending on the products or services*

(1) Combined in total

(2) Separate divisions maintained

3. Conglomerate Mergers

- a) *Companies involved neither compete nor are related as a customer or supplier in any line of commerce*
- b) *One entity emerges with a very diverse product line*
- c) *Financial merger with no combination of operations*

G. Merger Concerns

1. End result is a new corporation is formed

2. Clayton Act of 1914

- a) *Focuses when two competitors in the same field of supply merge*
- b) *Courts presume such a merger is illegal*
 - (1) Produces an undue percentage of the market
 - (2) Increases market concentration

3. Sherman Act of 1890

- a) *Deals with any business that has a substantial economic effect on interstate commerce*
- b) *Restricts combination of two or more businesses that:*
 - (1) Would monopolize or attempt to monopolize
 - (2) A particular product or service
- c) *Does not apply if market share obtained by*
 - (1) Superior product
 - (2) Skill
 - (3) Quality
 - (4) Foresight
- d) *Applies if competition would be*
 - (1) Reduced
 - (2) Eliminated

H. Consolidation

- 1. Combines two or more corporations into one new corporation**
- 2. Generally two companies of same size and market share**
- 3. Neither corporation exists after this combination**
- 4. All rights and liabilities from the original corporations are acquired by the new corporation**
- 5. Successor liability and consolidations**
 - a) *Courts look to see if the two businesses have continued*
 - b) *Liability attaches if continuity of*
 - (1) Management
 - (2) Shareholders
 - (3) Assets
 - (4) Property

I. Stock-for-Stock Exchange

- 1. Acquiring corporation purchases stock of the target corporation solely in exchange for its own stock**
 - a) Only voting stock of acquiring corporation may be used*
 - b) Acquiring corporation must have 80% of the target corporation*
 - c) Above requirements limit the acquiring corporation from combining with the target corporation*
- 2. Acquiring corporation must control target corporation's stock**
- 3. Both corporations survive**
- 4. Parent-subsidary relationship created**

J. Assets-For-Stock Exchange

- 1. Acquiring corporation obtains all of the assets of the target corporation**
 - a) Exchange for voting stock*
 - b) Exchange for stock and a limited amount of other property*
- 2. Target corporation liquidates by distributing to shareholders**
- 3. May be preferable**
 - a) State laws less complex than for mergers, consolidations or stock-for-stock exchanges*
 - b) Target corporation stockholders vote instead of all stockholders*
- 4. Acquiring corporation may choose which liabilities to assume or assume none**

K. Takeover

- 1. Can be hostile or friendly**
- 2. Acquiring company makes a tender offer to purchase**
- 3. Hostile Takeover**
 - a) Target company opposes*
 - (1) Tender offer too low
 - (2) Management concerned about job security
 - (3) Target company prefers to remain independent
 - b) Options to avoid takeover*
 - (1) Convince shareholders that it is not in the best interest
 - (2) Match the buy-out of the acquiring company
 - (3) Solicit a "white-knight" to act as rescuer and turn into a friendly takeover

(4) File a lawsuit based on the anti-trust laws

4. Friendly Takeover

- a) *Acquiring and target company agree it is in the best interests to merge*
- b) *If tender offer is made, Williams Amendment to the Securities Exchange Act of 1934 requires within 10 days, a declaration made to the stockholders stating*

(1) Accept the offer

(2) Reject the offer

(3) No opinion

(4) Unable for whatever reason stated to take a position on the viability of the offer

- c) *If shareholders accept the offer, the takeover is accomplished*

5. Takeover Concerns

- a) *Some states have a waiting period before a takeover can occur*
- b) *Securities Exchange Act of 1934*

(1) Regulates the transfer or sale of securities after the initial sale

(2) Any security sold on a national stock exchange be registered with the Securities Exchange Commission prior to the sale

(3) Certain other documents affecting the sale or transfer of securities be filed with the SEC

- c) *Williams Amendment of the 1934 Act*

(1) Required to file a tender offer statement with the SEC and the target company

(2) Registration statement must include

(a) Name of offerer

(b) Source of funding for the offer

(c) Plans for the company if the takeover is successful

(d) Number of shares now owned by the acquiring company

(3) Shareholder, after receipt, has seven days to accept or reject the offer

(4) Parties involved can not purchase or sell stock until 15 days after the tender offer was filed with the SEC and the target company

(5) If offer changes, shareholders must be notified

(6) If offerer changes price, shareholders have 10 days to accept the new price,

even if they sold their shares at a lower price

d) *Civil and criminal penalties could apply*

(1) Williams Amendment of the 1934 Act

(2) Acquiring company uses fraudulent, deceptive or manipulative practices in making the offer

(3) Company omits or misstates a material fact in the tender offer materials

L. Corporate Division

1. Separation of an existing corporation

2. One or more new corporations are formed to receive part or all of the new corporation

a) *Original corporation transfers assets to the new corporation*

b) *Original corporation receives controlling stock, usually at least 80 percent, of the new corporation*

3. Stock of the new corporation distributed to the shareholders of the new corporation

4. Spin-Off

a) *Existing corporation creates a new corporation*

b) *Existing corporation exchanges assets for controlling stock in the new corporation*

c) *New corporation stock is distributed to the shareholders of the new corporation*

5. Split-Off

a) *Formation of a new corporation*

b) *Existing corporation exchanges assets for controlling stock in the new corporation*

c) *New corporation's shareholders surrender their stock for stock in the new corporation*

6. Split-Up

a) *Liquidation of the existing corporation*

b) *All assets of the existing corporation are exchanged for stock representing control of the new corporation*

M. Acquisition

- 1. Purchase of a business's assets**
- 2. Does not change the structure of the existing corporation**
- 3. Not normally subject to shareholder approval under the Securities Exchange Act of 1934**
- 4. Could raise Clayton Act issues if undue percentage of the market share or market concentration occurs**

N. Joint Ventures

- 1. Two or more companies combine**
 - a) Limited purpose*
 - b) Limited time*
- 2. Could raise issues of Sherman Act violations**
- 3. Courts look to a "rule of reason"**
 - a) Is it reasonable to allow the combination?*
 - b) Would the combination create a monopoly that would violate the Sherman Act?*
- 4. Courts look to benefits and potential harm**
 - a) Marketplace*
 - b) Competitors*

III. Successor Liability

A. Common Law Concept

- 1. Acquiring company who acquires assets is not liable**

B. Exceptions to the General Rule

- 1. When the purchaser explicitly or implicitly agrees to assume some or all of the debts and liabilities of the seller**
- 2. When the transaction is really a de facto merger**
 - a) Continuity of shareholders*
 - b) Prompt dissolution of the selling corporation*
- 3. When the buying corporation is a mere continuation of the selling corporation**
 - a) Transfer of stock*
 - b) Continuity of ownership or corporate structure*
 - (1) Buyer's use of seller's name
 - (2) Buyer's use of seller's location
 - (3) Buyer's use of seller's employees

c) *Common identity*

(1) Stockholders

(2) Directors

4. When a transaction is entered into fraudulently to evade liability for debts

C. Attempts to Expand the Exceptions – Minority View

1. Continuity of Enterprise Exception

a) *Turner v. Bituminous Casualty Co., 244 N.W.2d 873 (MI, 1976)*

b) *Variation of Continuation of Selling Corporation*

c) *Transfer of cash*

2. Product Line Exception

a) *Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977)*

b) *Acquiring a manufacturing business*

c) *Continues the output of its line of products*

d) *Strict liability*

(1) Same product line

(2) Previously manufactured

3. Successor Failure to Warn Exception

a) *Knapp v. North American Rockwell Corp., 506 F2d 361 (3rd Cir. 1974)*

b) *Failure to warn customers of defects in the predecessor's products*

(1) Continues the line of products that were manufactured by the selling company

(2) Continues the customer relationships established by the selling company

c) *Choice of law given to the place where the injury occurred*

D. Resource Conservation and Recovery Act (RCRA) - 1976

- 1. First comprehensive federal program to regulate essentially all hazardous waste from their beginning to end (cradle-to-grave)**
 - a) Imposes strict waste management requirements on generators and transporters of hazardous wastes*
 - b) Imposes strict waste management requirements on hazardous waste treatment, storage, and disposal (TSD) facilities, including cleanup requirements*
 - c) Regulates underground storage tanks, medical wastes, and nonhazardous solid wastes.*
- 2. Regulates both solid waste and hazardous waste – non-hazardous solid waste largely left to state and local governments**
 - a) Waste oil exception*
 - b) High volume, low-toxicity exception*
 - (1) Mine wastes
 - (2) Incinerator ash
- 3. Waste generators must manage hazardous wastes in accordance with detailed regulations**
 - a) Containers, labels, record keeping, storage, spill prevention and control, employee training*
 - b) On-site storage is limited both in respect to amounts and time*
 - c) Shipments require completion of a manifest that ensures disposal only at proper facilities*
- 4. RCRA regulates facilities that treat, store, or dispose of hazardous wastes**
 - a) TSD facilities must meet specific technological standards and conduct regular groundwater monitoring*
 - b) TSD facilities must perform waste analyses on incoming wastes, provide security, take precautions to prevent accidents, and maintain contingency plans to deal with spills or releases*
- 5. Basis of Liability**
 - a) RCRA is the first environmental law to require proof of financial responsibility*

6. Owners of TSD facilities are required to demonstrate their financial ability to pay for third-party claims resulting from the release of contaminants and for closure/post closure care costs

- a) *Violator contributed to the past or present handling, storage, treatment, transportation, or disposal of hazardous waste*
- b) *There is an imminent and substantial endangerment to human health or the environment*

7. Underground Storage Tank (UST) – regulation provided in 1984 amendments to RCRA

- a) *Exposure*
- b) *Regulations*
- c) *By whom*

(1) Hazardous substances – Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)

(2) Petroleum products – state regulation

d) *Technical Requirements*

(1) Financial responsibilities – 1986 amendments

(a) April 26, 1991 13 - 99 Tanks

(b) October 26, 1991 1 - 13 Tanks

E. Comprehensive Environmental Responsibility Clean-up Liability Act (CERCLA) - 1980

1. Known as the “Superfund”

2. Passed in 1980 to facilitate the cleanup of any abandoned or uncontrolled sites containing hazardous substances, including old dump sites

3. RCRA regulations only cover active sites, not abandoned waste disposal sites

4. The EPA is allowed to clean up sites where there is a release or threat of release of a hazardous substance into the environment

- a) *The EPA can recover the cleanup costs from liable parties*
- b) *The EPA can force liable parties to conduct the cleanup*
- c) *Private companies may conduct a cleanup voluntarily and, under appropriate circumstances, recover the costs from other liable parties*

5. Potentially Responsible Parties (PRPs)

- a) *Current owners / operators of contaminated property*
- b) *Owners / operators at time of disposal of hazardous materials at the site*
- c) *Generators of waste materials disposed of at the site*
- d) *Transporter of waste who selected a site and hauled waste to it*
- e) *Others*
 - (1) Parent corporations
 - (2) Lessees as “operators”
 - (3) Lenders as “owners” or “operators”
 - (4) Individuals, such as corporate officers or shareholders
 - (5) Bankrupt parties

6. Damages established under the CERCLA

- a) *Clean up pollution*
- b) *Injury / destruction / loss of natural resources*
- c) *Third-party liability*
- d) *Government reimbursement*

7. Strict liability

- a) *Whatever the cost the Responsible Party pays*
- b) *If there is joint responsibility, the Responsible Parties split the cost*
- c) *If one Responsible Party contests, other Responsible Parties must pay their portion*
- d) *Law is retroactive to past sites*
- e) *CERCLA provides an express right of contribution*
 - (1) A private CERCLA recovery action against any liable party regardless of federal action
 - (2) Parties that settle with the government are not liable for contribution

8. Defenses

- a) *Acts of God*
- b) *Acts of war*
- c) *Acts of an unrelated third party*

- (1) "An act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant."
- (2) Rarely applied, and is largely intended to be limited to such occurrences such as the unanticipated acts of vandals

9. Funding mechanism

- a) *85% of the money is received from a 1% tax on gas and oil*
- b) *15% of the money is from the general fund*

10. State supervises the clean-up

- a) *10% contributed by the State Government*
- b) *90% contributed by the Federal Government*

11. First 15 years of CERCLA existence

- a) *The EPA has investigated over 40,000 potential Superfund Sites between 1980 and 1995*
- b) *Sites targeted for cleanup*
 - (1) 1,300 Superfund National Priority List sites
 - (2) 3,500 state programs similar to CERCLA sites
- c) *Average cost to cleanup a site on the National Priority List is approximately \$30 million*
 - (1) Transaction costs are in addition
 - (2) They are substantial

F. Other Issues to Consider

- 1. Intermediate Successor Corporations**
- 2. Punitive Damages**

IV. Risk Manager's Due Diligence Primer

A. The Due Diligence Team

- 1. Chief Executive Officer**
- 2. Chief Financial Officer**
- 3. Vice President of Human Resources**
- 4. Risk Manager**
- 5. Attorney(s)**
- 6. Accountant(s)**
- 7. Insurance Broker(s)**

B. Suggested Steps for the Risk Manager

- 1. Request information that the company to be acquired gives to its customers**
- 2. Obtain a copy of the company's annual report, if it is a public corporation**
- 3. Research the industry of the company to obtain a working knowledge of the risks involved**
- 4. Arrange for an on-site visit including a walk around the facilities**
- 5. Obtain permission to talk to the company's insurance broker(s) and get the claims information directly from that source**
- 6. Present a request for a list of necessary documents and arrange for a convenient time to have them available for review**
- 7. After reviewing the information collected, prepare and present a list of follow-up questions**

C. Due Diligence Process

1. Insurance Program Details

- a) Can they be combined?*
- b) Any insurance policies in the acquired company that are particularly beneficial?*

2. Information Formats

- a) Must be in a format that can be used*
- b) Discuss the format in the first meeting*

3. Litigation Profile

- a) *Current and potential liabilities of the company being acquired*
 - (1) Insurance claims
 - (2) Outstanding litigation
- b) *Assessment of active litigation*
- c) *Any known circumstances that could give rise to liability and future litigation?*
- d) *Discuss problems with the Human Resources Department*
 - (1) Problems often first known here
 - (2) Approach from a liability, not employee benefits basis

4. Contract Review

- a) *Awareness of assumption of liability and indemnification in contracts*
- b) *Identify mandatory use of alternative dispute settlement proceedings*

5. Environmental Exposures

- a) *Standard to have a Phase I Environmental Site Assessment*
- b) *Phase II Environmental Site Assessment may be necessary*
- c) *Establishes a baseline*
- d) *Existing pollution is cleaned up*

6. Follow-Up Activities

- a) *Answers to questions may require further legal advice*
- b) *Reserving practices for liabilities must be understood*
- c) *Procedures to handle continuing claims*

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. Inspections And Surveys

1. We have the right to:
 - a. Make inspections and surveys at any time;

- b. Give you reports on the conditions we find; and
- c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:

- a. Are safe or healthful; or
- b. Comply with laws, regulations, codes or standards.

3. Paragraphs 1. and 2. of this condition apply not only to us, but also any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

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.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

A. Commercial Property

1. Newly Acquired Property

- BUILDINGS

① BEING BUILT

② ACQUIRED AT
OTHER LOCATIONS

③ SIMILAR USE

④ WAREHOUSE

⑤ UP TO \$250,000

- PERSONAL
PROPERTY

① ACQUIRED
LOCATIONS

② ACQUIRED
LOCATIONS AT
DESCRIBED
LOCATIONS

④ UP TO
\$100,000

a. Newly Acquired or Constructed Property

(1) Buildings

If this policy covers Building, you may extend that insurance to apply to:

(a) Your new buildings while being built on the described premises; and

(b) Buildings you acquire at locations other than the described premises, intended for:

(i) Similar use as the building described in the Declarations; or

(ii) Use as a warehouse.

The most we will pay for loss or damage under this Extension is \$250,000 at each building.

(2) Your Business Personal Property

(a) If this policy covers Your Business Personal Property, you may extend that insurance to apply to:

(i) Business personal property, including such property that you newly acquire, at any location you acquire other than at fairs, trade shows or exhibitions; or

(ii) Business personal property, including such property that you newly acquire, located at your newly constructed or acquired buildings at the location described in the Declarations.

The most we will pay for loss or damage under this Extension is \$100,000 at each building.

2. Newly Acquired Property Continued

- Excludes PERSONAL PROPERTY of OTHERS

- ① INSTALLING OR PERFORMING WORK
- ② MANUFACTURING OR WHOLESALING

- Will END

- ① EXPIRATION
- ② 30 days
- ③ REPORT of VALUES

a. Newly Acquired or Constructed Property

(b) This Extension does not apply to:

- (i) Personal property of others that is temporarily in your possession in the course of installing or performing work on such property; or
- (ii) Personal property of others that is temporarily in your possession in the course of your manufacturing or wholesaling activities.

(3) Period of Coverage

With respect to insurance provided under this Coverage Extension for Newly Acquired Or Constructed Property, coverage will end when any of the following first occurs:

- (a) This policy expires.
- (b) 30 days expire after you acquire the property or begin construction of that part of the building that would qualify as covered property; or
- (c) You report values to us.

We will charge you additional premium for values reported from the date you acquire the property or begin construction that would qualify as covered property.

B. Commercial General Liability

1. Named Insured

- INDIVIDUAL AND SPOUSE
- PARTNERSHIP, MEMBERS AND SPOUSE
- LIMITED LIABILITY COMPANIES
- CORPORATION OR ASSOCIATION
- OFFICERS & DIRECTORS
- TRUSTS AND TRUSTEES

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.

a) Executive Officer defined

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

b) Definition of Employee

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

c) Definition of Leased Worker

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

d) Definition of Temporary Worker

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

2. Application of coverage

- BI OR PD
- CAUSED BY AN OCCURRENCE
- COVERAGE TERRITORY
- DURING THE policy PERIOD

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
- (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 "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

(1) Unknown Injury Applicability

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.

(2) When Insured Has Knowledge

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 Section II – Who Is An Insured or any employee authorized by you to give notice of an occurrence or claim:

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

3. Newly Acquired Entity

- NO OTHER INSURANCE
- 90days
- NO BI OR PD BEFORE ACQUIRED
- NO PI OR AI COMMITTED BEFORE ACQUIRED
- PAST PARTNERSHIPS AND JOINT VENTURES MUST BE DECLARED

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AUTOMATIC INSURED STATUS FOR NEWLY ACQUIRED OR FORMED LIMITED LIABILITY COMPANIES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Paragraph 3. Under Section II– Who Is An Insured is replaced by the following:

3. Any organization you newly acquire or form, other than a partnership or joint venture, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization.

However:

- a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
- b. Coverage **A** does not apply to “bodily injury” or “property damage” that occurred before you acquired or formed the organization; and

- c. Coverage **B** does not apply to “personal and advertising injury” arising out of an offense committed before you acquired or formed the organization.

B. The last paragraph of Section II – Who Is An Insured is replaced by the following:

No person or organization is an insured with respect to the conduct of any current or past:

1. Partnership or joint venture; or
2. Limited liability company, unless Paragraph **A.** above applies;

that is not shown as a Named Insured in the Declarations.

4. Definition of "Your Product"

- Acquired ORGANIZATIONS

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

5. Definition of Your Work

- WORK PERFORMED
- BY INSURED
- FOR INSURED
- MATERIALS FURNISHED BY INSURED CONNECTED WITH WORK
- WARRANTIES

22. "Your work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

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

6. Contractual Exclusion

- CONTRACTUAL EXCLUSION
- *COVERS* DEFINED CONTRACTS
- DEFENSE

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.

7. Separation of Insureds

- SEPARATE limits do NOT apply
- ONE NAMED INSURED CAN SUE ANOTHER

7. Separation Of Insureds.

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

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – INTERCOMPANY PRODUCTS SUITS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS COVERAGE PART

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

- *“Gross sales” is the basis of premium for manufacturing and processing accounts.*
- *It includes all sales of goods of products from one company to another including those sales from one named insured to another named insured.*
- *This endorsement excludes claims resulting from the Named Insured suing another Named Insured for products-completed operations.*
- *Inter- Insured sales are then excluded from “gross sales”, thus reducing the premium.*

8. Pollution

a) Definition of Pollution

15. "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.

b) Definition of Hostile Fire

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

c) Exclusion

- BI AND PD EXCLUSION
- AT OR FROM THE PREMISES
- HEATING, COOLING AND DEHUMIDIFYING EQUIPMENT COVERAGE
- CONTRACTORS COVERAGE
- HOSTILE FIRE COVERAGE
- WASTE TREATMENT SITE

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 or originating from equipment 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;

d) Pollution Exclusion Continued

- TRANSPORTED, HANDLED, PROCESSED, ETC.

- AT THE JOB SITE IF YOU ARE *WORKING* (PRODUCTS AND COMPLETED OPERATIONS COVERED)

- IF POLLUTANTS ARE *BROUGHT ON TO THE SITE*, EXCLUDED

- MOBILE EQUIPMENT EXCEPTION

- CONTRACTORS OPERATIONS VAPOR COVERAGE

- CONTRACTORS HOSTILE FIRE COVERAGE

- PROFESSIONAL CLEAN UP EXCLUSION

(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 are 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 to 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 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".

e) Pollution Exclusion Continued

- CLEAN UP EXCLUSION

(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 or regulatory requirement, or such claim or “suit” by or on behalf of a governmental authority.

C. Crime Insurance

1. Consolidation and Merger

- NO COVERAGE FOR NEWLY FORMED
- MUST MODIFY NAMED INSURED FOR COVERAGE
- AUTOMATIC COVERAGE
- 90 day limit

c. Consolidation – Merger Or Acquisition

If you consolidate or merge with, or purchase or acquire the assets or liabilities of, another entity:

- (1) You must give us written notice as soon as possible and obtain our written consent to extend this insurance to such consolidated or merged entity or such purchased or acquired assets or liabilities. We may condition our consent upon payment of an additional premium; but
- (2) For the first 90 days after the effective date of such consolidation, merger or purchase or acquisition of assets or liabilities, any insurance provided by this insurance shall apply to such consolidated or merged entity or such purchased or acquired assets or liabilities, provided that all “occurrences” causing or contributing to a loss involving such consolidation, merger or purchase or acquisition of assets or liabilities, must take place after the effective date of such consolidation, merger or purchase or acquisition of assets or liabilities.

2. Joint Insured

- VAGUE LANGUAGE THAT COULD SERVE TO DENY COVERAGE

- DEFUNCT OR SOLD ENTITY SHOULD CONTINUE AS A NAMED INSURED

h. Joint Insured

- (1) If more than one Insured is named in the Declarations, the first Named Insured will act for itself and for every other Insured for all purposes of this insurance. If the first Named Insured ceases to be covered, then the next Named Insured will become the first Named Insured.
- (2) If any Insured or partner, “member” or officer of that Insured has knowledge of any information relevant to this insurance, that knowledge is considered knowledge of every Insured.
- (3) An “employee” of any Insured is considered to be an “employee” of every Insured.
- (4) If this insurance or any of its coverages are cancelled as to any Insured, loss sustained by that Insured is covered only if it is “discovered” by you:
 - (a) No later than one year from the date of that cancellation. However, this extended period to “discover” loss terminates immediately upon the effective date of any other insurance obtained by that Insured, whether from us or another insurer, replacing in whole or in part the coverage afforded under this insurance, whether or not such other insurance provides coverage for loss sustained prior to its effective date.
 - (b) No later than one year from the date of that cancellation with regard to any “employee benefit plans”.
- (5) We will not pay more for loss sustained by more than one Insured than the amount we would pay if all such loss had been sustained by one Insured.
- (6) Payment by us to the first Named Insured for loss sustained by any Insured, or payment by us to any “employee benefit plan” for loss sustained by that Plan, shall fully release us on account of such loss.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**INCLUDE JOINT VENTURE OR PARTNERSHIP
AS INSURED(S)**

This endorsement modifies insurance provided under the following:

COMMERCIAL CRIME COVERAGE FORM
COMMERCIAL CRIME POLICY
EMPLOYEE THEFT AND FORGERY POLICY

Schedule*

Joint Venture Or Partnership
* Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

- 1. Each joint venture shown in the Schedule is added as a Named Insured.
- 2. For any joint venture or partnership shown in the Schedule in which you have an interest, we will pay;
 - (a) Up to the Limit of Insurance if you are legally liable for loss sustained by the joint venture or partnership; or
 - (b) Up to the Limit of Insurance based upon the proportion that your ownership interest in the joint venture or partnership bears to the total interest of all owners, if you are not legally liable for loss sustained by the joint venture or partnership.

VI. Impact on the D&O Policy

A. Modifications Based on Mergers and Acquisitions

- 1. Acquisitions of Operating Units, or Assets from another Company**
 - a) *Do not require the modification of the D&O policy*
 - b) *If a “brand name” or operating name is acquired, coverage needs to be reviewed*
- 2. Acquisition of Creation of a New Entity**
 - a) *Purchasing all or part of another company*
 - b) *D&O coverage must be reviewed*
- 3. Divestiture of a Corporate Entity**
 - a) *Spin-Off or selling of an existing subsidiary company*
 - b) *D&O coverage must be reviewed*
 - c) *Closing of an operating unit or sale of assets does not impact coverage*
- 4. Mergers**
 - a) *One or more of the former companies cease to exist*
 - b) *D&O coverage always needs review*
 - c) *New D&O coverage is needed for the surviving entity*

B. Definitions Impacted by Mergers and Acquisitions

- 1. Insured Company and Insured Persons**
 - a) *Every policy specifically defines this*
 - b) *May or may not include subsidiaries*

- Definition of subsidiary DETERMINES if NEW ENTITY MEETS definition

<p>A. Company means:</p> <p>(1) the Parent Company, and</p> <p>(2) any subsidiary</p> <p>B. Parent Company means the entity named in Item A. of the Declarations.</p> <p><i>SPMI form DOCR92</i></p>
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- ENTITY LISTED ON THE DECLARATIONS PAGE ONLY

Parent Organization means:

The organization designated in item 1 of the Declarations of this policy.

Insured Organization means:

Collectively, those organizations designated in Item 5. of the Declarations for this coverage section.

Chubb Insurance Company form 14-02-0943 (1/92)

2. Definition of Subsidiary

a) Automatic

- OWNED AT INCEPTION
- AUTOMATIC MUST FALL BELOW CERTAIN ASSET SIZE

- OTHER THAN AUTOMATIC REPORTING REQUIREMENT

- PREMIUM PAYMENT REQUIREMENT

- Subsidiary defined

Subsidiary means:

- (1) Any corporation of which Named Corporation owns on or before the inception of the Policy Period more than 50% of the issued and outstanding voting stock either directly, or indirectly through one or more of its subsidiaries;
- (2) Automatically any corporation whose assets total less than 10% of the total consolidated assets of the Corporation as of the inception date of this policy, which corporation becomes a Subsidiary during the policy period. The Named Corporation shall provide the Insurer with full particulars of the new Subsidiary before the end of the Policy Period;
- (3) Any corporation which becomes a Subsidiary during the Policy Period (other than a corporation described in paragraph (2) above) but only upon the condition that within 90 days of its becoming a Subsidiary the Named Corporation shall have provided the insurer with full particulars if the new Subsidiary and agreed to any additional premium and/or amendment of the provisions of this policy required by the Insurer relating to such new Subsidiary. Further, coverage as shall be afforded to the new Subsidiary is conditioned upon the Named Corporation paying when due any additional premium required by the Insurer relating to such new Subsidiary.

A corporation becomes a Subsidiary when the Named Corporation owns more than 50% of the issued and outstanding and voting stock, either directly, or indirectly through one or more of its Subsidiaries. A corporation ceases to be a Subsidiary when the Named Corporation ceases to own more than 50% of the issued and outstanding voting stock, either directly, or indirectly through one or more of its Subsidiaries.

In all events, coverage as is afforded under this policy with respect to any Claim made against a Subsidiary or any Director or Officer thereof shall only apply to wrongful acts committed or allegedly committed after the effective date that such Subsidiary became a Subsidiary and prior to time that such Subsidiary ceased to be a Subsidiary.

National Union Insurance Company – 5/95

b) May require payment of additional premium to activate coverage

- 90 day NOTIFICATION
- PAYMENT of PREMIUM

(1) Any corporation which becomes a Subsidiary during the Policy Period (other than a corporation described in paragraph (2) above) but only upon the condition that within 90 days of its becoming a Subsidiary the Named Corporation shall have provided the insurer with full particulars of the new Subsidiary and agreed to pay any additional premium and/or amendment of the provisions of this policy required by the Insurer relating to such new Subsidiary. Further, coverage as shall be afforded to the new Subsidiary is conditioned upon the Named Corporation paying when due any additional premium required by the Insurer relating to such new Subsidiary.

National Union Insurance Company – 5/95

c) May not meet the definition of subsidiary

(1) If the Insured Organization (i) acquires securities or voting rights in another organization or creates another organization, which as a result of such acquisition or creation becomes a Subsidiary, or (ii) acquires any organization by merger into or consolidation with an Insured Organization, such organization and its Insured Persons shall be Insureds under this coverage section but only with respect to Wrongful Acts committed, attempted, or allegedly committed or attempted, after such acquisition or creation unless the Company agrees, after a presentation of a complete application and all appropriate information, to provide coverage by endorsement for Wrongful Acts committed, attempted, or allegedly committed or attempted, by such Insured Persons prior to such acquisition or creation.

(2) If the fair value of all cash, securities, assumed indebtedness and other consideration paid by the Insured Organization for any such acquisition or creation exceeds 10% of the total assets of the Parent Organization as reflected in the Parent Organization's most recent audited consolidated financial statements, the Parent Organization shall give written notice of such acquisition or creation to the Company and shall pay any reasonable additional premium required by the Company.

Chubb Insurance Company form 14-02-0943 (1/92)

C. Clauses Impacted by Mergers and Acquisitions

1. Change of Control Clauses

a) Known by various names

(1) Change of Control of Named Corporation

(2) Adjustment Clause

(a) Exclusion

Underwriters shall not be liable . . .

J. based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving, any Wrongful Act actually or allegedly committed subsequent to a Corporate Takeover.

SPMI form DOCR92

(b) Definition of Corporate Takeover

Corporate Takeover means:

- (1)** the acquisition by any person or entity of more than 50% of the outstanding securities of the Parent Company representing the present right to vote for the election of directors, or
- (2)** the merger of the Parent Company into another such that the Parent Company is not the surviving entity, or
- (3)** the consolidation of the Parent Company with another entity or the acquisition of substantially all of the assets of the Parent Company by another entity, or
- (4)** the appointment of a conservator, receiver or administrator to manage the affairs of the Parent Company, or
- (5)** the Parent Company ceasing to be publicly held.

SPMI form DOCR92

(3) Change in Exposure

Acquisition of Parent Organization by another Organization if (i) the Parent Organization merges into or consolidates with another organization, or (ii) another organization or person or group of organizations and/or persons acting in concert acquires securities or voting rights which result in ownership or voting control by the other organization(s) or person(s) of more than 50% of the outstanding securities representing the present right to vote for the election of directors of the Parent Organization, coverage under this coverage section shall continue until termination of this coverage section, but only with respect to Claims or Wrongful Acts committed, attempted, or allegedly committed or attempted, by Insured Persons prior to such merger, consolidation or acquisition to the Company as soon as practicable together with such information as the Company may require.

Chubb Insurance Company form 14-02-0943 (1/92)

- RUN-off COVERAGE
until policy
EXPIRATION

- b) *Some grant an affirmative run off clause for the acquired company*
- c) *Some exclude claims on based on acts subsequent to a corporate takeover*

2. Discovery Clauses

- a) *Known by various names*

- (1) Optional Extension Period
- (2) Extended Reporting Period

- b) *Specify the conditions under which the policyholder may purchase an extended reporting period*

D. Mergers and the Need for Run-Off Coverage

- 1. Original policyholder may not exist after merger**
- 2. New entity has a new D&O policy**
- 3. Former entity needs to purchase for acts prior to the merger date**
- 4. Should be maintained to coincide with the appropriate statute of limitations**

- a) *Grant of Coverage*

Change in Control of Named Corporation

If during the Policy Period:

- a. the Named Corporation shall consolidate with or merge into, or sell all or substantially all of its assets to any other person or entity or group of persons and/or entities acting in concert; or
- b. any person or entity or group of persons and/or entities acting in concert shall acquire an amount of the outstanding securities representing more than 50% of the voting power for the election of Directors of the Named Corporation, or acquires the voting rights if such an amount of such securities; (either of the above events herein referred to as the "Transaction")

then this policy shall continue in full force and effect as to Wrongful Acts occurring prior to the effective time of the transaction, but there shall be no coverage afforded by any provision of this policy for any actual or alleged Wrongful Act occurring after the effective time of the Transaction. This policy may not be cancelled after the effective time if the Transaction and the entire premium for this policy shall be deemed earned as of such time. The Named Corporation shall also have the right to an offer by the insurer of a Discovery Period described in Clause 10 of the policy.

National Union Insurance Company – 5/95

b) Discovery clause

In the event of a Transaction, as defined in Clause 12, the Named Corporation shall have the right, within 30 days before the end of the Policy Period, to request an offer from the Insurer of a Discovery Period (with respect to Wrongful Acts occurring prior to the effective time of the Transaction) for a period of no less than three years or for such longer or shorter period as the Named Corporation may request. The Insurer shall offer such Discovery Period pursuant to such terms, conditions and premium as the Insurer may reasonably decide. In the event of a Transaction, the right to a Discovery Period shall not otherwise exist except as indicated in this paragraph.

The additional premium for the Discovery Period shall be fully earned at the inception of the Discovery Period. The Discovery Period is not cancelable. This clause and the rights contained herein shall not apply to any cancellation resulting from non-payment of premium.

National Union Insurance Company – 5/95

E. Exclusions to Review

- 1. Deliberate fraud**
- 2. Illegal personal profit**
- 3. Directors and officers while acting for any entity other than the named insured**
 - a) Will come into play in the event of a merger*
 - b) Entity acquired does not meet the definition of subsidiary*

F. Acquisitions and Coverage for Past Acts

- 1. How does the policy interact with claims reported to a previous D&O insurer?**

The insurer shall not be liable:

- (d)** alleging, arising out of, based upon or attributable to the facts alleged, or in the same or related Wrongful Acts alleged or contained, in any claim which has been reported, or in any circumstances of which notice has been given, under any policy of which this policy is a renewal or replacement or which may succeed in time.

National Union Insurance Company – 5/95

- 2. Do you need prior acts coverage?**
- 3. Did the acquired firm purchase run-off coverage?**

VII. Insurance Tools For Mergers and Acquisitions

A. Representation and Warranty Insurance

1. Coverage

- a) *Protects against a breach of the representation and warranties made by the seller in a merger, acquisition or divestiture*
- b) *Manuscript policy*
- c) *Coverage can be granted for most representations*
 - (1) Corporate authority
 - (2) Title to assets
 - (3) Litigation
 - (4) The absence of undisclosed liabilities
 - (5) Taxes
 - (6) Regulation
- d) *Environmental representations will be reviewed with close scrutiny*
- e) *Outside counsel will be employed by the carrier to review the due diligence performed by the buyer's advisors*

2. Limits and Retention

- a) *Some insureds buy coverage equal to the escrow placed*
- b) *Some insureds buy coverage equal to the value of the most critical representation*
- c) *Limits up to \$250 million are available*
- d) *The retention is determined by the underwriter and the insured*
- e) *Normally the retention relates to the materiality threshold in the underlying purchase and sale agreement*
- f) *Most policies utilize a "basket" retention to simplify data capture in the case of multiple breaches*

3. Key Policy Wordings

- a) *Terms*
 - (1) Policy term can be up to seven years and cannot be cancelled by underwriters
 - (2) An insured can be the buyer or seller
- b) *Exclusions*
 - (1) Any event of circumstance that occurs after the inception date

- (2) Failure of any party to the merger agreement to perform any obligation, except for breach of a representation or warranty
- (3) Failure of any insured to perform any covenant made or by falsely making an inaccurate representation
- (4) Events, facts, or circumstances that the insured had knowledge of on or prior to the inception date not disclosed to underwriters
- (5) Any changes to the operative documents unless consented to by underwriters
- (6) A change in law

c) Conditions

- (1) Other insurance – excess unless specifically endorsed to the contrary
- (2) Arbitration – disputes between the insured and insurer are settled with binding arbitration
- (3) Subrogation – underwriters reserve the right to subrogate against any of the parties in the transaction

4. Process and Information

a) Policy needs to be finalized before the transaction closes

b) Takes about 10 days to obtain a quotation

c) Underwriters will need

- (1) A copy of the merger and acquisition agreement, in draft or final form
- (2) Financials of the buyer and seller
- (3) Copies of the due diligence information requested or received
- (4) A summary of the transaction, including purpose, limits, parties involved, advisors and timing

5. Pricing

a) Premium range is 3 to 10 percent of the policy limit

b) Underwriters will provide an estimate of pricing

c) A required deposit premium (non-refundable) will move to process to a firm quotation

d) If underwriters do not meet the pricing range indicated, the deposit will be refunded

B. Tax Liability Insurance

1. **Allows the potential buyer to reduce uncertainty associated with the seller's tax strategy**
2. **Helps the buyer develop a business valuation model**
 - a) *The owner could be funding losses with loan arrangements to the corporation*
 - b) *The corporation takes an interest deduction for the loan on their tax return*
 - c) *The IRS could view the transaction as an equity transaction, and disallow the interest deduction after the sale*
 - d) *This contingent liability can be insured through this product*
3. **Buyers normally obtain a tax opinion from a tax advisor before the sale**
 - a) *A **Will** opinion asserts that the transaction is almost certainly going to withstand regulatory review*
 - b) *A **Should** opinion suggests that the transaction has a 75 percent or greater chance of withstanding regulatory review*
 - c) *A **More Likely Than Not** opinion suggests the transaction has a 50 percent or greater chance of withstanding regulatory review*
4. **Coverage**
 - a) *Provides protection against IRS or other non-U.S. regulatory authorities successfully challenging a tax position*
 - b) *Written on an indemnity basis*
 - (1) Loss owed to the IRS
 - (2) Contest expenses (costs associated with appealing the revenue authority's decision)
 - (3) Gross-up costs (pays the taxes on the loss proceeds)
 - (4) Fines, penalties, and interest (where insurable by law)
 - c) *Normally for federal taxes but can be packaged to include state and local taxes*
 - d) *Underwritten based on the opinion from the external tax advisor*
 - e) *Areas that make underwriters uncomfortable*
 - (1) Lack of business purpose
 - (a) Company only wants protection for their tax strategy
 - (b) Merger and acquisition transactions are a business purpose
 - (2) Valuation risks
 - (a) Valuation of a business is subjective
 - (b) The IRS has a broad ability to disallow the valuation

(3) Loopholes

- (a) Technically sound based on a literal interpretation of the tax code
- (b) Uninsurable because they clearly defy the intent of the code

(4) Change in law

- (a) Purpose of the policy is to insure interpretation of the tax code, not a law change
- (b) Coverage could be available if there is enough information to draw a conclusion

5. Limits and Retention

- a) *Exposures are well quantified because of the tax opinion*
- b) *Typically no retention*
- c) *Limits up to \$400 million are available*

6. Key Policy Wordings

a) Key terms

- (1) Crafted to the statute of limitations, normally seven years
- (2) The insured must contest the proposed or final adjustment up to the U.S. Circuit Court of Appeals
- (3) Selecting tax counsel and review decisions for appeal will be made by the insured with the insurer's consent

b) Key exclusions

- (1) Inability to realize the economic benefit of the insured tax benefit, in the absence of an insured loss
- (2) Application of the alternative or minimum tax
- (3) Failure of the insured to follow proper tax procedures
- (4) Changes in the documents submitted and forming a part of the insurance policy
- (5) A change in law

c) Key conditions

- (1) Arbitration – the parties agree to final arbitration in case of policy dispute
- (2) Subrogation
 - (a) Underwriters reserve the right to subrogate against the tax advisor
 - (b) It would be difficult to do because the carrier has their own tax counsel who failed to recognize the issue

7. Pricing

- a) *Dependent on the underwriters view of the risk*
- b) *Ranges from 3 to 9 percent of the limits purchased*

8. Process And Information

- a) *Can be obtained after the completion of the merger or acquisition transaction*
- b) *Pricing indication can be given within 10 days of receipt of the submission*
- c) *Binding quotation could take a couple of weeks*
- d) *It is important to ask who will fund the outside counsel's review before moving to the binding quotation phase*

e) Information required

(1) Description of the proposed transaction

- (a) Parties involved
- (b) Lawyers and accountants

(2) Description of the various steps, sequence of events, and contractual arrangements involved in the submission

(3) Copy of the final or draft tax opinion or tax memo

(4) Copies of all the draft documents associated with the transaction

(5) Limits requested

- (a) Tax loss
- (b) Supplemental insurance for interest, penalties, and state or local taxes

C. Aborted Bid Cost Insurance

1. Coverage

a) Assists in defraying fees paid to external professional advisors in a failed merger or acquisition transaction

(1) Incurred between the date the transaction commences and its termination date

(2) Break-up fees are excluded in the definition

b) Circumstances beyond the insured's control must cause the transaction to fail

(1) Other party could accept a higher bid

(2) Failure to receive regulatory approval

(3) Loss of financing

- (4) Withdrawals by the other party
- c) *Can be purchased as soon as the agreement in principle is reached*
- d) *Reimburses the insured for covered expenses due to a defined event during the policy period*
 - (1) A government or legal court ruling that materially restricts, prevents, or prohibits the transaction
 - (2) A competing transaction entered into by the second party that terminates the deal as long as the insured does not reenter into an agreement with the second party or competing transaction within one year
 - (3) Second-party stockholder final vote of disapproval
 - (4) Non satisfaction of second party for conditions outlined in the letter of intent

2. Limits and Retention

- a) *Policy limits are determined by the transactions size*
- b) *One percent of the purchase price is a benchmark*

3. Key Policy Terms

a) *Terms*

- (1) Private companies need to incept coverage within 5 days of signing the letter of intent
- (2) Public companies need to purchase within 5 days of announcement of the deal or signing the letter of intent

b) *Exclusions*

- (1) Withdrawal of a second party due to
 - (a) Non satisfaction by insured of any condition precedent to the consummation of the transaction
 - (b) Proximately caused by an act or omission of the insured
 - (c) Material changes not notified to the underwriters
 - (d) Any transaction other than the agreed transaction
 - (e) Collusion, dishonest, fraudulent, or criminal act or omission of the insured
- (2) Claims arising from material changes not notified to underwriters
- (3) Any transaction other than the agreed transaction
- (4) Collusion, dishonest, fraudulent, or criminal act or omission of the insured

c) *Key Conditions and Pricing*

- (1) Insured needs to inform underwriters of any material changes to the transaction
- (2) Average cost is about 5 percent of the limit purchased

D. Alternative Litigation Risk Solutions

1. Liability Cap Coverage

- a) *Provide excess coverage above preexisting coverage or significant self-insured retentions*
- b) *Underwriters determine a probable maximum loss for all claims*
- c) *For a one time premium, an umbrella is provided over a buffer layer*
 - (1) Product litigation is valued at \$45 million
 - (2) Available insurance is \$28 million
 - (3) Underwriter will offer a \$50 million cap coverage
 - (a) Primary of \$28 million
 - (b) Buffer of \$2 million

2. Risk Arbitrage

- a) *After determining the maximum possible loss, underwriters will assume the entire liability*
- b) *Cost of capital may be higher than the discount rate offered by the insurance carrier*
- c) *The tax ramifications should be fully explored*

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