JAMES K. RUBLE SEMINAR

Ruble Graduate Seminar

Pennsylvania
June 10-11, 2025

JAMES K. RUBLE SEMINAR
Ruble Graduate Seminar
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RISK & INSURANCE
EDUCATION ALLIANCE

A Letter from William J. Hold, President/CEO

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

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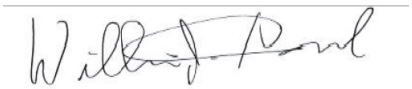
Have no doubt that your success is our priority. Whether you are new to your career, or a seasoned professional, you are about to embark on a wonderful professional development journey. Thank you for choosing the Risk & Insurance Education Alliance as your guide toward a thriving career.

Let's take the first step.



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

James K. Ruble Seminar

a proud member of Risk & Insurance Education Alliance

Section 1

Construction Court Cases and Issues

Welcome!

CONSTRUCTION ISSUES and COURT CASES

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LYON CONSULTING
SERVICES, LLC

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

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

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

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

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Is Faulty Workmanship an "Occurrence"?

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"Occurrence"

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

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Is Faulty Workmanship an Occurrence?

- Jurisdictional
  - Depends on the State
  - Accident- Unexpected and Unintended from the standpoint of the insured
- Construction Defect Issues
  - Is there Bodily Injury
    - Is the BI to others ?
  - Is there Property Damage
    - Is the damage contained just to your work, or has it damaged a third party's work
- Damage to your Work
  - Excluded
  - Exception to Exclusion for work performed on your behalf by subs
  - CG 2294 Exclusionary Endorsement
  - Many states have problems with the exception, if no occurrence
- Damage to your Product
  - Excluded
  - No Exception to Exclusion

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50 State Surveys

Defective Construction as an "Occurrence"

DATE POSTED

THURSDAY, SEPTEMBER 19, 2024 DOWNLOAD PDF

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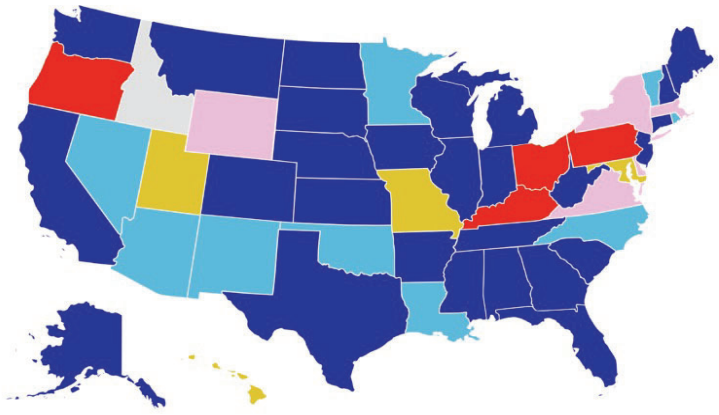

Defective Construction as an "Occurrence"

- Highest Court found defective construction be an occurrence (or by state statute).
- Tending towards coverage; only lower state court or federal court authority exists.
- Highest Court has found defective construction not to be an occurrence.
- Tending against coverage; only lower state court or federal court authority exists.
- Unclear, cases/legislation conflict.
- No decision.

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STATE	POLICYHOLDER IMPACT	RELEVANT AUTHORITY
Alabama	Favorable	*Owners Ins. Co. v. Jim Carr Homebuilder, LLC*, 157 So.3d 148 (Ala. 2014).
Alaska	Favorable	*Fejes v. Alaska Ins. Co.*, 984 P.2d 519 (Alaska 1999).
Arizona	Favorable	*Lennar Corp. v. Auto-Owners Ins. Co.*, 151 P.3d 538 (Ariz. Ct. App. 2007).
Arkansas	Favorable	Ark. Code Ann. § 23-79-155; *J-McDaniel Co., Inc. v. Mid-Continent Cas. Co.*, 761 F.3d 916 (8th Cir. 2014); *Lexicon, Inc. v. Ace Am. Ins. Co.*, 634 F.3d 423 (8th Cir. 2011); *Essex Ins. Co. v. Holder*, 261 S.W.3d 456 (Ark. 2008).
California	Favorable	*Navigators Specialty Ins. Co. v. Moorefield Constr., Inc.*, 6 Cal. App. 5th 1258 (2016); *Anthem Elecs., Inc. v. Pac. Employers Ins. Co.*, 302 F.3d 1049 (9th Cir. 2002); but see *Hogan v. Midland Nat'l Ins. Co.*, 476 P.2d 825 (Cal. 1970).
Colorado	Favorable	*Greystone Constr. Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272 (10th Cir. 2011); Colo. Rev. Stat. § 13-20-808 (2010).
Connecticut	Favorable	*Capstone Bldg. Corp. v. Am. Motorists Inc. Co.*, 67 A.3d 961 (Conn. 2013); *Scottsdale Ins. Co. v. R.I. Pools Inc.*, 710 F.3d 488 (2d Cir. 2013).
Delaware	Unfavorable	*Builders, Inc. v. Harleysville Mut. Ins. Co.*, 137 F. Supp.2d 517 (D. Del. 2001), aff'd 2003 WL 146486 (3rd Cir. Jan. 21, 2003).
District of Columbia	Favorable	*Commonwealth Lloyds Ins. Co. v. Marshall, Neal & Pauley, Inc.*, 32 F. Supp.2d 14 (D.D.C 1998).

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Florida	Favorable	*Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241 (Fla. 2008); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007).
Georgia	Favorable	*Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., Inc.*, 707 S.E.2d 369 (Ga. 2011).
Hawaii	Unclear	*Evanston Ins. Co. v. Nagano*, 891 F. Supp. 2d 1179 (D. Haw. 2012); Haw. Rev. Stat. § 431:1-217 (2011); *State Farm Fire & Cas. Co. v. Vogelgesang*, 834 F. Supp. 2d 1026 (D. Haw. 2011); *Group Builders, Inc. v. Admiral Ins. Co.*, 231 P.3d 67 (Haw. 2010); *Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940 (9th Cir. 2004).
Idaho	No authority	N/A
Illinois	Favorable	*ACUITY, a Mut. Ins. Co. v. MI Homes of Chicago, LLC, et al.*, 234 N.E.3d 97 reh'g denied (Jan. 22, 2024)
Indiana	Favorable	*Sheehan Constr. Co., Inc. v. Cont'l Cas. Co.*, 935 N.E.2d 160 (Ind. 2010).
Iowa	Favorable	*Nat'l Sur. Corp. v. Westlake Invs.*, 880 N.W.2d 724 (Iowa 2016).
Kansas	Favorable	*Wilson v. Farmers Ins. Exch.*, 233 P.3d 767 (Kan. Ct. App. 2010); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486 (Kan. 2006).

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STATE	POLICYHOLDER IMPACT	RELEVANT AUTHORITY
 Kentucky	Unfavorable	*Martin/Elias Properties, LLC v. Acuity*, 544 S.W.3d 639 (Ky. 2018), *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69 (Ky. 2010); but see *Bituminous Cas. Co. v. Kenway Contracting Inc.*, 240 S.W.3d 633 (Ky. 2007).
 Louisiana	Favorable	*Broadmoor Anderson v. Nat'l Union Fire Ins. Co. of Louisiana*, 912 So.2d 400 (La. Ct. App. 2005); *McMath Constr. Co. v. Dupuy*, 897 So.2d 677 (La. Ct. App. 2005).
 Maine	Favorable	*Baywood Corp. v. Maine Bonding & Cas. Co.*, 628 A.2d 1029 (Me. 1993); *Peerless Ins. Co. v. Brennon*, 564 A.2d 383 (Me. 1989).
 Maryland	Unclear	*French v. Assurance Co. of Am.*, 448 F.3d 693 (4th Cir. 2006); *Lerner Corp. v. Assurance Co. of Am.*, 707 A.2d 906 (Md. Ct. Spec. App. 1998); but see *Harbor Court Assocs. v. Kiewit Constr. Co.*, 6 F. Supp. 2d 449 (D. Md. 1998).
 Massachus...	Unfavorable	*All Am. Ins. Co. v. Lampasona Concrete Corp.*, 120 N.E.3d 1258, 1261-62 (Mass. App. Ct. 2019); *Am. Home Assurance Co. v. AGM Marine Contractors, Inc.*, 379 F. Supp.2d 134 (D. Mass. 2005); *Davenport v. U.S. Fid. & Guar. Co.*, 778 N.E.2d 1038 (Mass. App. Ct. 2002).
 Michigan	Favorable	*Skanska USA Building Inc. v. MAP Mechanical Contractors, Inc.*, 939 N.W.2d 446, (Mich. 2020); *Radenbaugh v. Farm Bureau Gen. Ins. Co. of Michigan*, 610 N.W.2d 272 (Mich. Ct. App. 2000).
 Minnesota	Favorable	*King's Cove Marina, LLC v. Lambert Commer. Constr. LLC*, 937 N.W.2d 458 (Minn. Ct. App. 2019); *Aten v. Scottsdale Ins. Co.*, 511 F.3d 818 (8th Cir. 2008); *O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99 (Minn. Ct. App. 1996).
 Mississippi	Favorable	*Architex Ass'n v. Scottsdale Ins. Co.*, 27 So.3d 1148 (Miss. 2010).
 Missouri	Unclear	*Am. Family Mut. Ins. Co. v. Mid-American Grain Distributors, LLC*, No. 19-2050, 958 F.3d 748 (Mo. Ct. App. 2020); *Village at Deer Creek Homeowners Ass'n, Inc. v. Mid-Continent Cas. Co.*, 432 S.W.3d 231 (Mo. Ct. App. 2014); *D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899 (Mo. 2010); *Columbia Mut. Ins. v. Epstein*, 239 S.W.3d 667 (Mo. Ct. App. 2007).

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 Montana	Favorable	*21st Century N. Am. Ins. Co. v. Frost*, 516 P.3d 148 (Mont. 2022); *Farmers Ins. Exch. v. Wessel*, 477 P.3d 1101 (Mont. 2020); *Employers Mut. Cas. Co. v. Fisher Builders, Inc.*, 371 P.3d 375 (Mont. 2016).
 Nebraska	Favorable	*Drake-Williams Steel, Inc. v. Cont'l Cas. Co.*, 883 N.W.2d 60 (Neb. 2016); *Cizek Homes v. Columbia Nat'l Ins. Co.*, 853 N.W.2d 28 (Neb. App. 2014); *Auto-Owners Ins. v. Home Pride Companies*, 684 N.W.2d 571 (Neb. 2004).
 Nevada	Favorable	*Big-D Const. Corp. v. Take it for Granite Too*, 917 F. Supp. 2d 1096 (D. Nev. 2013); *Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.*, 459 F. Supp. 2d 1039 (D. Nev. 2006).
 New Hampshire	Favorable	*Concord Gen. Mut. Ins. Co. v. Green & Co. Building & Develop. Corp.*, 8 A.3d 24 (N.H. 2010); *High Country Assocs. v. New Hampshire Ins. Co.*, 648 A.2d 474 (N.H. 1994); *Webster v. Acadia Ins. Co.*, 934 A.2d 567 (N.H. 2007).
 New Jersey	Favorable	*Cypress Point Condo Ass'n, Inc. v. Adria Towers LLC*, 143 A.3d 273 (N.J. 2016).
 New Mexico	Favorable	*Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.*, 367 P.3d 869 (N.M. Ct. App. 2015).
 New York	Unfavorable	*Transp. Ins. Co. v. AARK Constr. Group*, 526 F. Supp. 2d 350 (E.D.N.Y. 2007); *George A. Fuller Co. v. U.S. Fid. & Guar. Co.*, 613 N.Y.S.2d 152 (N.Y. App. Div. 1994); *J.Z.G. Resources, Inc. v. King*, 987 F.2d 98 (2d Cir. 1993); but see *Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd.*, 882 F.3d 952, 954 (2018).
 North Carolina	Favorable	*Builders Mut. Ins. Co. v. Mitchell*, 709 S.E.2d 528 (N.C. Ct. App. 2011); *ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.*, 472 F.3d 99 (4th Cir. 2006); *Travelers Indem. Co. v. Miller Bldg. Corp.*, 97 Fed. Appx. 431 (4th Cir. 2004).

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North Dakota	Favorable	*K&L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 2013 ND 57, 829 N.W.2d 724 (2013); *ACUITY v. Burd & Smith Contr., Inc.*, 2006 ND 187, 721 N.W.2d 33 (2006).
Ohio	Unfavorable	*Ohio Northern University v. Charles Construction Services, Inc.*, 155 Ohio St.3d 197, 120 N.E.3d 762 (Ohio 2018); *Allied Roofing, Inc. v. W. Reserve Group*, 2013 Ohio 1637 (2013); *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 2012 Ohio 4712, 979 N.E.2d 269 (Ohio 2012).
Oklahoma	Favorable	*MTI, Inc. v. Emplrs. Ins. Co. of Wausau*, 913 F.3d 1245 (10th Cir. 2019); *Essex Ins. Co. v. Sheppard & Sons Constr.*, 2015 WL 4132919 (W.D. Okla. 2015); *Employers Mut. Cas. Co. v. Grayson*, 2008 WL 2278593 (W.D. Okla. 2008).
Oregon	Unfavorable	*Oak Crest Constr. Co. v. Austin Mut. Ins. Co.*, 998 P.2d 1254 (Or. 2000).
Pennsylvan...	Unfavorable	*MMG Ins. Co. v. Floor Assocs.*, 2017 WL 3394619 (E.D. Pa. Aug. 8, 2017); *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006).
Rhode Island	Favorable	*General Acc. Ins. Co. of America v. American Nat. Fireproofing, Inc.*, 716 A.2d 751 (RI 1998).
South Carolina	Favorable	S.C. Code Ann. § 38-61-70, *retroactive application held unconstitutional by Harleysville Mut. Ins. Co. v. State*, 736 S.E.2d 651 (Nov. 21, 2012); *Auto-Owners Ins. Co. v. Rhodes*, 748 S.E.2d 781 (S.C. 2013); *Crossman Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011).
South Dakota	Favorable	*Owners Ins. Co. v. Tibke Constr., Inc.*, 901 N.W.2d 80 (S.D. 2017); *Corner Constr. Co. v. U.S. Fid. & Guar. Co.*, 638 N.W.2d 887 (S.D. 2002).
Tennessee	Favorable	*Travelers Indem. Co. of Am. v. Moore & Assocs.*, 216 S.W.3d 302 (Tenn. 2007).
Texas	Favorable	*United States Metals, Inc. v. Liberty Mut. Grp., Inc.*, 490 S.W.3d 20 (Tex. 2015); *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007).

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Utah	Unclear	*Cincinnati Ins. Co. v. AMSCO Windows*, 921 F. Supp. 2d 1226 (D. Utah 2013); *Cincinnati Ins. Co. v. Linford Bros. Glass Co.*, 2010 WL 520490 (D. Utah Feb. 9, 2010); *H.E. Davis & Sons, Inc. v. N. Pac. Ins. Co.*, 248 F. Supp. 2d 1079 (D. Utah 2002); but see *Great Am. Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp. 2d 1275 (D. Utah 2006).
Vermont	Favorable	*Fine Paints of Europe, Inc. v. Acadia Ins. Co.*, No. 2:08-CV-81, 2009 WL 819466 (D. Vt. Mar. 24, 2009); *Transcont'l Ins. Co. v. Engelberth Constr., Inc.*, 2007 WL 3333465 (D. Vt. Nov. 8, 2007).
Virginia	Unfavorable	*Stanley Martin Cos. v. Ohio Cas. Group*, 313 Fed. Appx. 609 (4th Cir. 2009); *Hotel Roanoke Conference Ctr. Comm'n v. Cincinnati Ins. Co.*, 303 F. Supp. 2d 784 (W.D. Va. 2004), aff'd 119 Fed. Appx. 451 (4th Cir. 2005); *Travelers Indem. Co. of Am. v. Miller Bldg. Corp.*, 142 Fed. Appx. 147 (4th Cir. 2005).
Washington	Favorable	*Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 608 P.2d 254 (Wash. 1980).
West Virginia	Favorable	*Cherrington v. Erie Ins. Prop. & Cas. Co.*, 745 S.E.2d 508 (W. Va. 2013).
Wisconsin	Favorable	*Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004).
Wyoming	Unfavorable	*Great Divide Ins. Co. v. Bitterroot Timberframes of Wyoming, LLC*, 2006 WL 3933078 (D. Wyo. Oct. 20, 2006).

Disclaimer: *This survey is current as of 08/2024. This material is made available for general informational purposes only. The field of insurance law is ever-evolving, and courts may change their views at any time. Readers are advised to verify the information contained herein independently. This material is not intended to, and does not constitute, legal advice, nor is it intended to constitute a solicitation for the formation of an attorney-client relationship.*

For more information or questions on defective construction as an "occurrence", please contact us at coverage@sdvlaw.com. 14

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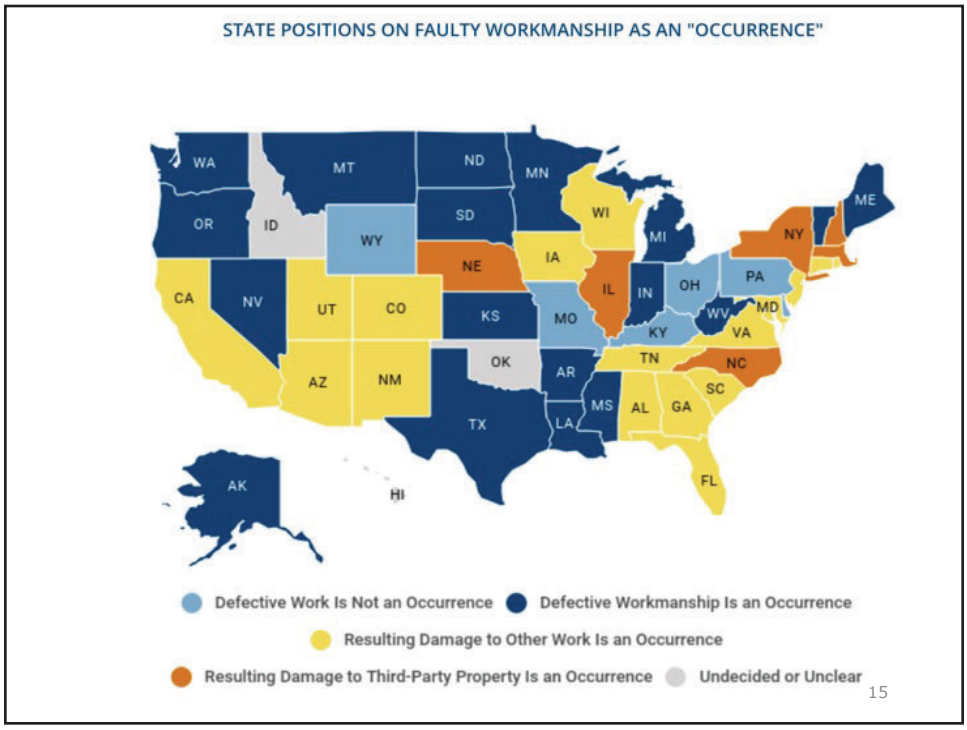

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CGL Exclusions

- Your Work
- Your Product

- However, we usually pay for any BI or PD that arises out of your bad work or your bad product

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CGL Exclusions

l. Damage To *Your Work*

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

Claim Example:

Contractor builds a deck off the second story of your home, which later collapses due to faulty workmanship, injuring three people and causing damage to your Mercedes parked under the deck.

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CGL Exclusions

l. Damage To Your Work

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

(GC, Inc hired by State to construct new highway ramp. Project involves site preparation, excavation, grading compaction and laying down gravel base and covering with asphalt. Three weeks after GC, Inc. completes the project and the ramp is open to the public, the ramp caves in and crumbles due to faulty soil compaction. The State sues for faulty workmanship. No question ramp was GC's work, and since it since it was put to intended use it falls under products and completed operations. No Coverage.

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

(GC, Inc. hired SUB, Inc to do site preparation work and GC was only responsible for asphalt. Therefore GC has coverage for damage to its work (asphalt) since damage arose out of work performed on its behalf by SUB, and also has coverage for improperly compacting soil. Exclusion does not reach GC, as the cause of damage was from SUB.

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Two Important Items

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I. The GC (upper tier) will have coverage ONLY if they are legally liable for the actions of the SUB. GC's are NOT usually responsible for a SUB's actions, unless they negligently hire them, fail to supervise them, or the work is inherently dangerous. This is NOT automatic coverage.

II. Prior to 1986, the standard CGL policy excluded coverage for an insured's work — the "your work" exclusion — and did not contain an exception for property damage caused by a subcontractor's work. Beginning in 1986, the CGL policy contained such an exception to the "your work" exclusion.

Question: If defective construction was not an occurrence, then there would be no need for the subcontractor exception to the "your work" exclusion.

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"Your Work"

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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Example

- GC builds a warehouse
- Subs out 50% of the work
- A year later warehouse burns due to faulty electrical work
- Warehouse owner brings suit against GC for damage
- Any coverage under GC's policy?

- If electrical work was performed by a sub, the exclusion does not apply and GC's policy pays the claim up to its limits
- If GC did electrical work, the policy will exclude coverage for damage to the GC's work (50% of loss), but will cover the damage to the work by the subs.

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Exception to Exclusions leaves coverage for…

(Paper GC-subs out all work)

- PD to the insureds work that results from the work of the the insured's subcontractor;
- PD to the work of the insured's subcontractor that results from that subcontractors work
- PD to the work of the insured's subcontractor that results from the insured's work
- PD to the work of the insured's subcontractor that results from the work of another contractors or subcontractor
- Not covered: PD to Insured's work caused by Insured

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LEXOLOGY

Florida Supreme Court holds that defective work is an occurrence under a CGL policy but costs for repairing defective work are not property damage

Hunton Andrews Kurth LLP

USA January 3 2008

The Florida Supreme Court has held that defective work performed by a subcontractor that damages a general contractor's completed work constitutes "property damage" caused by an "occurrence" under a commercial general liability (CGL) policy. U.S. Fire Ins. Co. v. J.S.U.B., Inc., No. SC05-1295 (Fla. Dec. 20, 2007). In a companion decision issued on the same day, the Florida Supreme Court held that the costs of repairing or removing the defective work itself do not constitute "property damage" under a CGL policy. Auto-Owners Ins. Co. v. Pozzi Window Co., No. SC06-779 (Fla. Dec. 20, 2007).

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CGL Insuring Agreement

- Occurrence
- BI or PD
- During the policy period
- Inside the coverage territory
- Not known to the insured, prior to the policy period

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Q & A – CLAIM #1

[Source: Claims Que by David Thamann]

Our insured installed a hardwood floor, but subcontracted out the sanding and finishing. After the job was done, the floor started to buckle. It was determined that the floor was not installed properly and moisture was getting under the floor, causing the buckling. We think that exclusion 2(l) would prevent coverage in this situation, but would the work of the subcontractor change the situation?

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CLAIM # 1 ANSWER

From your description of the insured's work as being done improperly, the damage to your work exclusion — 2(l) — would prevent coverage in this case. This was a completed operations claim since the damage occurred after the work of the insured was finished, and damage to the insured's work arose out of that work.

The exception to exclusion 2(l) does provide coverage for the damage if the work was performed by a subcontractor on behalf of the named insured, but the sanding and finishing work was not the cause of the damage; it was the improper installation work of the insured that caused it. So the exception does not apply, and the insured does not have coverage for this claim.

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Q & A – CLAIM #2

[Source: Claims Que by David Thamann]

The insured was hired by the claimant to do various home repairs, including work on the windows, gutters, and roof. The insured did the window and gutter work, but subcontracted out the work on the roof. The work on the roof was completed by the subcontractor and, as part of this work, a "torch down" was required.

Later that day, a fire started because of this torch down and it destroyed the roof and some of the work that had been finished by the insured. Would this property damage claim be excluded from coverage due to exclusion 2(l), or does the exception provide coverage? And, if there is coverage, does it apply to the roof damage only or to all the damage done by the fire?

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CLAIM # 2 ANSWER

This is a completed operations claim since the requirements of completed work under the terms of the CGL form have been met, and the property damage occurred after the work was finished. Exclusion 2(l) would not apply because the subcontractor's work caused the damage.

That exception allows coverage if the damaged work or the work out of which the damage arises was performed by a subcontractor. In this instance, the damage to the work of the insured and to the work of the subcontractor will be covered because the work out of which the damage arose was done by the subcontractor, thus empowering the exception to exclusion 2(l).

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Q & A – CLAIM #3

[Source: Claims Que by David Thamann]

The insured was hired as a general contractor to build a house for the claimant, with the entire job being subcontracted out to others. At issue is damage to the deck. The insured hired one subcontractor to frame and side the house. That subcontractor built the deck with plywood, but another subcontractor then came in to install a rubberized underlayer over the plywood; this subcontractor then installed slate on the deck. The allegation against the second subcontractor is that the underlayer was installed improperly and not up to manufacturing specifications. Eventually, water got underneath the tiles and underlayer, and rotted the plywood and framing. The water also entered the house and damaged the interior floors. So what part of the deck, if any, would be covered? And if the work of the second subcontractor damaged the plywood installed by the first subcontractor, is there coverage for that damage?

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CLAIM # 3 ANSWER

The exception to exclusion 2(l) applies to any property damage that arises out of the work of subcontractors. If the damaged work was done by a subcontractor, then it is not excluded. If the damage arises out of the work of a subcontractor, it also is not excluded.

The purpose behind this exception is to give the named insured coverage for property damage for which he may be held legally responsible due to his status as the general contractor, but for which he did not actually perform himself. In this case, since the property damage arose out of the work done by the second subcontractor, the damage he caused because of his work is covered by the CGL form. This includes the damaged plywood installed by the first subcontractor.

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BEWARE THE CG 2294

- Nasty Exclusion
- Your Work coverage
- Removes exception for PD coverage, if work done on your behalf by sub-contractors

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CGL Exclusions

k. Damage To *Your Product*

"Property damage" to "your product" arising out of it or any part of it. (no products guarantee)

Insured mfgrs gas furnaces. Furnace malfunctions and catches fire destroying the furnace—no coverage for the furnace. Insured sold a material used for the interior coating of piping. The interior coating failed, causing the pipes to have to be cleaned and replacement of defective coating. The pipe itself had no damage. No coverage. Had there been PD to another object other than the insured's product, there could be coverage.

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Exception to “Your Product” Exclusion

THERE IS NONE !

[See AERT v. AISLIC case]

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Damage to Property Exclusions

"Property damage" to: (faulty workmanship exclusions)

(j5) That particular part of ***real property*** on which you or any contractors or subcontractors working directly or indirectly on your behalf are ***performing*** operations, if the "property damage" arises out of those operations; or (plumber tightens pipe too tight and it burst causing water damage, steel erection contractor hired to place beams on project. 4 of 5 beams are in place. While installing 5th beam it drops and damages all of them, plus other property. No coverage for 5th beam, but coverage for others) (Electrical Contractor hospital- breaker #42, panel #8) **(demo operations performed on wrong property-performing ops = what you were hired to do vs. you were working) **(“performing”** means ongoing not completed operations—see L)

(j6) That particular part of ***any property*** that must be restored, repaired or replaced because "your work" was incorrectly performed on it. (Demo wrong house / tree, hire paver to remove existing asphalt and resurface. Scrapes too much asphalt and damages compacted gravel underneath it; so when new asphalt is laid it collapses and crumbles. No coverage for fixing compacted gravel.)

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J(6) Claim… you decide

- Employers Mut. Cas. V. Pires (RI 1999)
- Insured was a painting contractor hired to repaint replacement windows and doors in a home. After completing the job the GC noticed scratches on the windows. GC filed suit against painter alleging damage was caused when he sanded the window frames. Covered?
- Carrier denied coverage based upon J (6)—the window panes had to be restored, repaired, or replaced because of insured's incorrectly performed work
- Court remanded case back to trial level, to determine fact:
  - Did incorrect work damage the window panes ? or
  - Did contractor accidentally damage the panes when he performed work on the frames?
- If contractor performed work on the window panes in connection with painting the frames (e.g. by taping, cleaning, or scraping them) and he negligently damaged the panes—then claim is excluded.
- If contractor did not intentionally perform work on the panes in connection with his painting of the frames, but only damaged them accidentally when he was performing the work on the frames—then claim is covered.

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Exclusions j.(5) and j.(6): Appeals Court Provides a Simple Tutorial

Author: Randy Maniloff

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Decisions addressing the applicability of exclusions j.(5) and j.(6), given their often fact-intensive nature, are sometimes complex. But not MTI, Inc. v. Employers Insurance Company, No-17-6206 (10th Cir. 2019). It is simple and clearly explained. And that's why the decision could become a go-to one for courts confronting the double Js. [I just made that term up. Maybe it'll stick.]

At the outset, the facts at issue are straightforward. That helped to keep the decision simple. Western Farmers Electrical Cooperative, which owns cooling towers in Oklahoma, hired MTI to replaced corroded anchor bolts in a tower. MTI employees removed all 64 corroded anchor bolts. However, because the adhesive applicator had not yet arrived, "MTI did not immediately install new anchor bolts. Further, MTI did not provide any temporary support to ensure the stability of the tower. On the night of May 24, extremely high winds struck the tower, causing it to lean and several structural components to break. Due to the extent of the structural damage, removal and replacement of the tower was determined to be the only viable option. Although at least some internal operational equipment was not damaged, this equipment was deemed too dangerous to access and recover."

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Even the procedure is simple: "WFEC demanded MTI pay the cost of removing and replacing the entire tower, which totaled over $1.4 million. MTI filed a claim for coverage with its insurer, Wausau, under the [CGL] Policy. After Wausau declined to provide coverage, MTI directly negotiated a settlement of $350,000 with WFEC. The balance of the tower replacement cost was borne by WFEC's insurer." MTI filed a coverage action seeking recoupment of its settlement amount from Wausau.

At issue before the court was the potential applicability of exclusions J(5) and J(6):

j. Damage To Property

"Property damage" to:

. . . .

(5) ***That particular part*** *of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or*

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

As the court noted, the key to the scope of these exclusions is the meaning of the phrase "that particular part." The court observed that these exclusions have received inconsistent treatment from courts around the country. It provided several examples on both sides. But inconsistent treatment, the court pointed out, does not mean that the language is necessarily ambiguous.

The court identified two schools of thought nationally on the interpretation of "that particular part" - narrow and broad.

Courts in the narrow camp have "determined the scope of coverage by looking to the 'distinct component parts' on which an insured conducts operations. Courts in the broad camp have held that "that particular part" could "apply to those parts of the project directly impacted by the insured party's work."

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The court saw both ways as being reasonable -- but only one could apply: "Because both readings are permissible, the exclusions are facially ambiguous." At that point, the outcome is easy to predict: "Because the exclusions are ambiguous, they must be strictly and narrowly construed in a manner favorable to the insured party. . . . In this case, interpreting 'that particular part' to refer to the distinct components upon which work is performed best comports with these rules of interpretation." [Even so, the court acknowledged that it's a fact intensive and case-by case-issue: "In some instances, a larger unit will properly be considered "the particular part."]

Applying a narrow interpretation, the court held: "As applied to the facts of this case, we conclude the 'particular part' on which MTI was 'performing operations' and upon which work 'was incorrectly performed' should reasonably be understood as the anchor bolts. Those bolts constitute 'distinct component parts' of the tower[.] . . . MTI performed work incorrectly by removing them without promptly replacing them or bracing the structure. We further conclude it is objectively reasonable that MTI would expect coverage for the cost of replacing the entire tower, including all of its operational elements, given the ambiguous language of exclusions j(5) and j(6)."

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Advanced Environmental Recycling Tech v. American Int'l Specialty Lines Ins Co

- October 22, 2010 decision, 5th Circuit

- ("AERT"), a manufacturer of recycled wood composite building products, including decking and other exterior products. AERT was named as a defendant in suits by its customers seeking damages based on allegations that AERT's ChoiceDek products were vulnerable to mold, mildew, and fungal growth. The claims were based upon allegations that AERT's products were defectively designed and manufactured, not suitable for their intended use, and not suitable for use as they were warranted and represented. The court noted that, "[s]ignificantly, the only damage alleged in the Mold Lawsuits is to the AERT products themselves and not to any additional property or to people." 41

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- AERT sought coverage from AISLIC under Commercial General Liability and Umbrella Liability policies. AISLIC asserted that no coverage was owed because, among other reasons, the Mold Lawsuits did not allege an "occurrence."

- The *AERT* Court, addressing Arkansas law, turned for guidance to the Arkansas Supreme Court's decision in *Essex Ins. Co. v. Holder*, 261 S.W.3d 456, 458 (Ark. 2007). *Essex* involved a suit brought against a home builder for breach of contract, breach of an express warranty, breach of implied warranties and negligence. "The [*Essex*] court concluded unequivocally that '[f]aulty workmanship is not an accident.'" *Id.* at 6 (quoting *Essex* at 460].

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- AERT sought to distinguish *Essex* because it involved workmanship rather than product manufacturing. However, the *AERT* court was not convinced [at least not in the absence of addressing the issue on a blank slate, the court noted]:

- [AERT] does not explain why that distinction makes a difference. *Essex* stands for the proposition that shoddy work *(whether in manufacturing a product or working at a construction site)* which then fails without collateral damage to a person or other property is not an 'accident' from the standpoint of the insured. In this case, the only damages AERT's customers alleged were to AERT's products. We hold that the events alleged in the Mold Lawsuits were not 'accidents' under the Umbrella Policies. We conclude that the Mold Lawsuits do not allege an 'occurrence' and therefore hold that AISLIC did not have a duty to defend the Mold Lawsuits. *Id.*

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- Having determined that the Mold Lawsuits did not allege an "occurrence," the *AERT* Court deemed it unnecessary to address any applicable exclusions.

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Bringing it all Home

- Let's tie the faulty Workmanship / Occurrence issue and the Exception to the Exclusion for work performed on your behalf by Sub-Contractors together, according to the New Jersey courts:

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District of New Jersey Prevents General Contractor from Reaching the "Sub-Contractor Exception" to the "Your Work" Exclusion

Penn National Mutual Ins. Co. v. Parkshore Development Corp. (*Parkshore* II – June 2009)

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Penn National Mutual Ins. Co. v. Parkshore Development Corp.

Parkshore involved coverage for construction defects at a condominium. At issue was whether faulty workmanship is an "occurrence" -- arising in the context of a project in which the developer/general contractor uses all subcontractors.

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Penn National Mutual Ins. Co. v. Parkshore Development Corp.

Parkshore was the developer and general contractor for Catalina Cove Condominiums in Linwood, New Jersey. All of the work on the project was performed by subcontractors.

Construction was completed in 1998. In October 2006, Catalina Cove filed suit against Parkshore for breach of contract, negligence, breach of implied warranties, consumer fraud and failure of remediation. Catalina Cove's expert identified numerous construction problems in the condominiums that led to wet crawl spaces and water infiltration of the walls.

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Penn National Mutual Ins. Co. v. Parkshore Development Corp.

- Catalina Cove claimed that "Parkshore and the other defendants were negligent in failing to properly diagnose the cause of and failing to remedy water infiltration, failing to repair structural damage caused by water infiltration, and failing to prevent further water infiltration. According to Catalina Cove, this negligence caused common elements of the Catalina Cove condominiums to sustain substantial damage."

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Penn National Mutual Ins. Co. v. Parkshore Development Corp.

- The insurer disclaimed coverage to Parkshore on the basis that all of the claims sprung from Parkshore's faulty workmanship, which, the insurer concluded, was not an "occurrence." Coverage litigation ensured.
- In its September 10, 2008 Opinion, this Court found that there was no occurrence because the only damage was to the condominiums built by Parkshore.

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Penn National Mutual Ins. Co. v. Parkshore Development Corp.

- The Court noted that the New Jersey Supreme Court has not ruled on when, if ever, faulty workmanship could constitute an occurrence.
- This Court further noted, however, that the Appellate Division of the Superior Court of New Jersey has held that faulty workmanship that damages only the work product of the insured is not an occurrence.
- *See Firemen's Ins. Co. of Newark v. Nat'l Union Fire Ins. Co.,* 387 N.J. Super. 434, 904 A.2d 754, 762-63 (N.J. Super. Ct. App. Div. 2006) (finding no occurrence where only damage was to general contractor's work product).

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Penn National Mutual Ins. Co. v. Parkshore Development Corp.

- In its Motion for Reconsideration, Parkshore argued that the Court overlooked the significance of the New Jersey Supreme Court's decision in *Weedo v. Stone-E-Brick, Inc.,* 81 N.J. 233, 405 A.2d 788 (N.J. 1979) – the *Marbury v. Madison* of New Jersey construction defect coverage law. According to Parkshore, the *Weedo* court drew a distinction between the risk of having to repair a defect and the risk that the defect could cause consequential damages.

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Penn National Mutual Ins. Co. v. Parkshore Development Corp.

- The *Parkshore II* Court disagreed:
- First, this Court stands by its prior conclusion that the decision in *Weedo* was based on an interpretation of exclusions in the policy, not on the definition of occurrence. *See Weedo*, 405 A.2d at 792 (finding that two exclusions were applicable).
- Second, to the extent that *Weedo* could be interpreted to address the definition of occurrence, the distinction drawn by the *Weedo* court was between the risk that faulty goods will need to be repaired or replaced and "the risk . . . that the goods, products or work of the insured, once relinquished and completed, will cause bodily injury or damage to property **other than to the product or completed work itself,** and for which the insured may be found liable." *Id.* at 791 (emphasis added by Parkshore II) Thus, the Court finds that there was no "manifest error" in its interpretation of *Weedo*.

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Penn National Mutual Ins. Co. v. Parkshore Development Corp.

- *Parkshore II* is consistent with prior New Jersey construction defect coverage decisions. <u>But the decision is nonetheless significant for their clear pronouncement that, when a general contractor employs all subcontractors on a project, the G.C. is not entitled to coverage when the faulty workmanship of one subcontractor causes damage to the work of another subcontractor.</u>
- **In other words, because, <u>*as a threshold matter,*</u> faulty workmanship is not an "occurrence," an insured-general contractor's claim, for faulty workmanship of one subcontractor, that causes consequential damages to another subcontractor's work, never has an opportunity to be potentially covered via the "subcontractor exception" to the "your work" exclusion.**

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No Occurrence / No Claim

- No Occurrence means No Claims
- No need to look at policy language – no coverage !

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FLORIDA DISTRICT COURT DECISION ON "YOUR WORK" EXCLUSION IN CGL POLICY IS AT ODDS WITH LAW OF NUMEROUS JURISDICTIONS

Sep 23, 2016 By Merlin Law Group

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The lawsuit arose when DiMucci Development Corp. of Ponce Inlet Inc. ("DiMucci") was sued by the homeowners' association at the Towers Grande high-rise in Daytona Beach Shores, Florida, for various construction defect related issues. 57

The construction defect lawsuit alleged that DiMucci 's work was defective on a portion of the high rise condominium complex and that the defective work caused property damage to other portions of the building that DiMucci also had constructed. More specifically, the Towers Grande Condominium Association alleged that DiMucci 's defective work resulted in damage to the roof and HVAC systems, as well as multiple water intrusion issues purportedly tied to poor waterproofing.

DiMucci had held three consecutive CGL policies with Evanston predecessor Essex Insurance Company between 2003 and 2005. During that time, DiMucci constructed Towers Grande, a 132-unit condominium building, with subcontractor Wayne's Roofing and Sheet Metal handling the roofing work.

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After DiMucci tendered a claim for defense and indemnity to its general liability insurance company (Evanston), Evanston filed suit in Florida federal court in September 2014, seeking a ruling that its policy excluded coverage and therefore it had no obligation to defend or indemnify DiMucci. 58

After the parties filed cross motions for summary judgment, the trial court ruled that the so-called "your work" exclusion in DiMucci's CGL policy with Evanston precluded coverage because the underlying construction defect complaint only alleged damage to the builder's own work. The court found that the Your Work exclusion barred coverage, and that Evanston had no duty to defend or indemnify DiMucci.

This decision is notable because it takes the interesting position that because DiMucci constructed the entire high-rise—even though the defective construction caused damage to other parts of the high-rise—the exclusion applied not only to the portions of the high-rise where the defective work appeared, but even to the consequential damage to other parts of the high-rise caused by the defective construction work.

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This decision is at odds with the law of numerous jurisdictions including (1) California (*see* ***Blackfield v. Underwriters at Lloyd's, London*, 245 Cal. App. 2d 271, 273, 276 (1st Dist. 1966)** – where defective construction is at issue, the "your work" exclusion only applies to the defective work itself, not the consequential damage caused by the defective work. [insured builder of tract home constructed home with defective fill/foundation; this caused the remainder of the house to suffer cracking, slanting, windows and doors could not be opened. Coverage for damages to the "other parts" of the house covered, *i.e.*, not excluded]) (2) New Jersey (*see* ***Cypress Point Condominium Assoc. Inc. v. Adria Towers*, 226 N.J. 403 (N.J. August 4, 2016)**, and even (3) Florida (***United States Fire Insurance Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla.2007)**, and ***Auto-Owners Insurance Co. v. Pozzi Window Co.*, 984 So.2d 1241 (Fla.2008)** both hold that faulty workmanship or defective work that has damaged the otherwise non defective completed project has caused 'physical injury to tangible property' within the plain meaning of the definition in the policy)) to name a few.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

EVANSTON INSURANCE COMPANY,

Plaintiff,

v. Case No. 6:15-cv-486-Orl-37DAB

DIMUCCI DEVELOPMENT CORP.
OF PONCE INLET, INC.; and
TOWERS GRANDE CONDOMINIUM
ASSOCIATION,

Defendants.

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Upon review of the State Court Complaint, the Court concludes that Insured's defective work was an "occurrence" as defined by the CGL Policies. Based on the State Court Complaint, Insured did not expect nor intend the resulting structural damages caused by "water intrusion" and improper "ground floor decking." (Doc. 69, p. 26.)[16]

The Court, having found an "occurrence," must now determine whether such an occurrence caused "property damage," thereby triggering Insurer's duty to defend.

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policy exclusions[17] relieve Insurer of its duty to defend. (Doc. 42, ¶¶ 55–80.) While not explicit in the instant Complaint, Insurer also appears to argue that the Your Work Exclusion applies because the only alleged damage is to the "property that was the subject of the construction project itself." (*Id.* ¶¶ 52–54; *see also* Doc. 81, pp. 16–17.) Upon consideration, the Court concludes that the allegations in the State Court Complaint bring the alleged property damage within the Your Work Exclusion, thus extinguishing Insurer's duty to defend.

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Summary

Is Faulty Workmanship an Occurrence?

- Jurisdictional
  - Depends on the State
  - Accident- Unexpected and Unintended from the standpoint of the insured
- Construction Defect Issues
  - Is there Bodily Injury
    - Is the BI to others ?
  - Is there Property Damage
    - Is the damage contained just to your work, or has it damaged a third party's work
- Damage to your Work
  - Excluded
  - Exception to Exclusion for work performed on your behalf by subs
  - CG 2294 Exclusionary Endorsement
  - Many states have problems with the exception – if no occurrence
- Damage to your Product
  - Excluded
  - No Exception to Exclusion

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Auto-Owners Insurance v. Home Pride Companies (Neb 2004)

- Appletree Apartments hire JT Builders to install new shingles on a number of apartment buildings.
- JT subs work to Home Pride, who in turn subs it out to Ron Hanson
- Appletree sues Home Pride alleging that the shingles were breaking apart and falling off the roofs at the apartment complex, resulting in damage to the roof structures and buildings.

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- Auto owners defends under a ROR, but seeks Declaratory relief claiming there was no coverage because the faulty workmanship was not an "occurrence" under the policy. The lower court agreed and granted summary judgment in favor of Auto Owners.
- The appellate court considered the following:
  - Was there Property Damage ?
    - YES . [shingles, roof structures, buildings]
  - Is faulty workmanship an Occurrence?
    - NO. Normally not an accident. If however, faulty workmanship caused BI / PD to something other than the insureds work product, an unintended and unexpected event occurred, and coverage existed.

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- Here the allegations that substantial damage to the roof structures and buildings were a consequence of faulty work properly alleged an occurrence within the meaning of the policy.
- The court next turned to the exclusions, noting that the burden of proof rests on the insurer. Your work and impaired property exclusions were examined.
- "Your work" exclusions generally exclude coverage for an insured's own faulty workmanship, which is a business risk.

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- This exclusion [your work] did not exclude Appletree's damage claim however, because the claim extended to the roof structure and buildings which fell outside of the exclusion.
- Further because damage to the roof structures and buildings could not be repaired by simply reshingling the roofs, they were not "impaired property" under the exclusion.
- Accordingly the lower courts decision was reversed.

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Pennsylvania Case

In *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Co.*, 908 A.2d 888 (Pa. 2006), the Pennsylvania Supreme Court considered the meaning of the word "occurrence," which the policy defined as "an accident, including continuous or repeated exposure to substantially the same or general conditions." 908 A.2d at 897. Kvaerner entered into an agreement with the Bethlehem Steel Corporation to design and construct a coke oven battery. *Id.* at 891. A number of problems were discovered with the coke oven battery, and Bethlehem Steel sued Kvaerner for breach of contract and breach of warranty. *Id.* Kvaerner notified its insurance carrier, which disclaimed coverage because the policy only covered property damage caused by an occurrence. *Id.* at 897. The court concluded that a claim reliant on faulty workmanship was not an occurrence under the insurance policy because there was no accident. *Id.* at 899. An accident required a fortuitous event not covered by faulty workmanship. *Id.* at 898. Therefore, there was no duty to defend against a lawsuit that alleged only property damage from poor workmanship to the work product itself. *Id.* at 900.

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The Pennsylvania Superior Court also considered the meaning of "occurrence" under an insurance policy in *Millers Capital Insurance Co. v. Gambone Brothers Development Co.*, 941 A.2d 706 (Pa. Super. Ct. 2007). Gambone, a real estate firm, purchased insurance from Millers for two housing development projects. *Id.* at 708. The insurance covered "bodily injury" and "property" *8 damage" caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 711. Homeowners at the housing developments sued Gambone alleging that faulty workmanship on the part of Gambone and/or its subcontractors damaged their homes. *Id.* at 708. The issue in *Gambone* was whether Millers had a duty to defend Gambone in those lawsuits. *Id.*

The Pennsylvania Superior Court concluded that *Kvaerner* dictated the outcome in *Gambone*. The court rejected Gambone's argument that water damage flowing from faulty workmanship could constitute an "occurrence." *Id.* at 713-14. Such foreseeable damage was not an occurrence because the water leakage merely exacerbated the damage caused by the faulty workmanship and was therefore not "sufficiently fortuitous" be deemed an accident. *Id.*

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Bomgardner Concrete v. State Farm. - PA

(Very stingy with Occurrence/Const Defect Coverage)

- Bomgardner Concrete was an insured-concrete installer that installed a concrete floor at a residence. A claim was made against the company for spalling and delamination of the concrete.
- The court discussed *Kvaerner*, *Gambone* and *CPB International* and concluded that no coverage was owed because the claim "[did] not arise out of an 'occurrence.'" *Id.* at 11.

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Common Types of Deterioration

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Bomgardner Concrete v. State Farm. - PA

- So far it sounds like a run of the mill Pennsylvania construction defect decision of late. And, besides, even if any "property damage" had been caused by an "occurrence," surely coverage would have nonetheless been precluded by the "your work" exclusion. Even the staunchest policyholder counsel, arguing in favor of faulty workmanship constituting an "occurrence," would be hard pressed to deny the applicability of the "your work" exclusion to those facts.

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Bomgardner Concrete v. State Farm. - PA

- But *Bomgardner Concrete* has a twist. The defective concrete was caused by the concrete itself -- excess water and inadequate curing. The defect was not caused by the concrete installation. And, most significantly, Bomgardner Concrete, the insured-concrete installer, obtained the concrete from another party [Pennsy]. Thus, the insured argued that the claim was not for "faulty workmanship."

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Bomgardner Concrete v. State Farm. - PA

- The court rejected this argument. Although Bomgardner asserts that his claim is not one for faulty workmanship because the blame lay with Pennsy, this argument is unavailing. Assuming, as we must, that the fault was entirely Pennsy's, the underlying claim is nonetheless one based on improper workmanship. That Pennsy was responsible for the defective concrete does not convert the claim into one based on an "accident." Indeed, the court in *Kvaerner* rejected the insured's argument that its faulty workmanship claim was covered under the insurance policy, even though the insured alleged that its subcontractor was actually to blame for the defective work product. *Kvaerner*, 908 A.2d at 893.

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Bomgardner Concrete v. State Farm. - PA

- Likewise, in *Millers Capital Insurance Co. v. Gambone Brothers Development Co.*, 941 A.2d 706, 715 (Pa. Super. Ct. 2007), in which the Superior Court applied *Kvaerner*, the court stated that claims based on faulty workmanship, whether the fault of the insured or a subcontractor, "cannot be considered 'occurrences'... as a matter of plain language and judicial construction."

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Bomgardner Concrete v. State Farm. - PA

- The significance of *Bomgardner Concrete* is this. The Pennsylvania Supreme Court held in *Kvaerner* that, even if the insured did not intend for the damage to occur (which the *Kvaerner* court noted is almost always the case), faulty workmanship does not constitute an occurrence.
- In *Bomgardner Concrete,* the insured, having bought the at-fault product from another party, no doubt felt that it had a stronger argument that it did not intend for the damage to occur. But despite this, the court still concluded that the property damage was not caused by an "occurrence."

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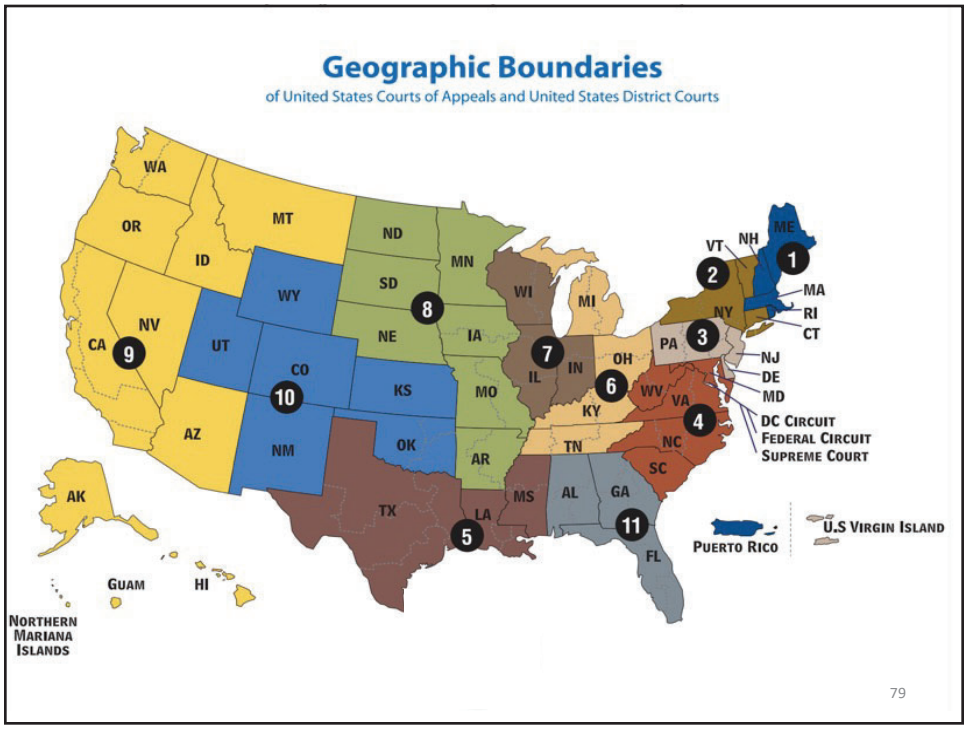

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LEXOLOGY

Paying The Ultimate Premium: Does Your Insurance Cover Property Damage Or Will You Be Left Holding the Bag?

Bradley Arant Boult Cummings LLP

USA | March 30 2022

Construction and Procurement Law News, Q1 2022

A recent decision by the Eleventh Circuit (the federal appeals court supervising trial courts in Florida, Georgia, and Alabama) sheds light on at least one way that insurers with complicated policies (and a host of exclusions) may avoid providing coverage and defense resources to insured material suppliers whose products are the focus of defect claims. In *Morgan Concrete Company v. Westfield Insurance Company,* Morgan Concrete ("Morgan") agreed to supply ready-mix concrete to Georgia Concrete for Georgia Concrete's work on a multilevel building at Clemson University. The specifications for the job required that concrete for Georgia Concrete's scope have a specific strength (measured in PSI). During pours for the second level of the structure, Georgia Concrete encountered strength deficiencies which it attempted to remedy by ordering a higher strength ready-mix to achieve the specified PSI.

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However, the strength deficiencies continued, and Georgia Concrete blamed its supplier Morgan – ultimately withholding payment and prompting Morgan to cease further deliveries and file a lien on the property. In response, Morgan asserted that the strength issues with its concrete were the result of Georgia Concrete mishandling the concrete, exposing it to high ambient temperatures, and not sampling and maintaining it in accordance with industry standards.

During this period of time, Morgan held an insurance policy through Westfield Insurance Company which included coverage for sums Morgan became legally obligated to pay as damages because of "property damage . . . caused by an occurrence." A common phrase in CGL policies, Westfield defined "property damage" as "physical

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injury to tangible property, including all resulting loss of use of that property[.]" The policy excluded property damage to the concrete itself, "property damage" to Morgan's work, and "damages claimed for any loss, cost or expense incurred by Morgan or others for the loss of . . ., inspection, repair, replacement, [or] adjustment of Morgan's product,. . . [or] its work." The policy included a defense and indemnity provision, and Morgan tendered its defense of this dispute to Westfield.

Though Westfield initially provided defense for Morgan under a reservation of rights, it later withdrew because it determined there was no alleged "property damage" under the policy. Morgan sued Westfield in federal court seeking, among other things, a determination that Westfield had a duty to defend Morgan in its state court suit with Georgia Concrete. The federal court, applying Georgia law, agreed with Westfield, explaining that the alleged "property damage was [only] to [Morgan's] concrete and not to any other component parts of the Level 2 slab or to the structure as a whole." On appeal, the Eleventh Circuit agreed finding that Georgia law defined property damage "as damage to property that was previously undamaged" and "damage beyond mere faulty workmanship." As a result, the Eleventh Circuit determined that there was no trigger under the policy for Westfield to provide a defense.

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CL CG 01 45 04 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF OCCURRENCE DEFINITION FOR SUBCONTRACTED WORK

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Under **SECTION V DEFINITIONS**, the definition for "Occurrence" is deleted and replaced by the following:

13.. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions and includes "property damage" to "your work" if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor and the "property damage" to "your work" is included in the "products-completed operations hazard"

All other terms, conditions, provisions and exclusions of the policy to which this endorsement is attached remain unchanged.

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COMMERCIAL GENERAL LIABILITY
CG 79 45 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The Definition of Occurrence is deleted in its entirety and replaced by the following:

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions and includes "property damage" to "your work" if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor and the "property damage" to "your work" is included in the "products-completed operations hazard."

All other terms, conditions, provisions, and exclusions of the policy not changed by this endorsement shall continue to apply as written.

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STATES THAT DEFINE "OCCURRENCE"

- Arkansas
- Colorado
- Hawaii
- South Carolina

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Construction Defect Coverage

Colorado Style

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- **The "Occurrence" Issue**: IN INTERPRETING A LIABILITY INSURANCE POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL, A COURT SHALL PRESUME THAT THE WORK OF A CONSTRUCTION PROFESSIONAL THAT RESULTS IN PROPERTY DAMAGE, INCLUDING DAMAGE TO THE WORK ITSELF OR OTHER WORK, IS AN ACCIDENT UNLESS THE PROPERTY DAMAGE IS INTENDED AND EXPECTED BY THE INSURED.

- **First Manifestation Endorsements**: (1) A PROVISION IN A LIABILITY INSURANCE POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL EXCLUDING OR LIMITING COVERAGE FOR ONE OR MORE CLAIMS ARISING FROM BODILY INJURY, PROPERTY DAMAGE, ADVERTISING INJURY, OR PERSONAL INJURY THAT OCCURS BEFORE THE POLICY'S INCEPTION DATE AND THAT CONTINUES, WORSENS, OR PROGRESSES WHEN THE POLICY IS IN EFFECT IS VOID AND UNENFORCEABLE IF THE EXCLUSION OR LIMITATION APPLIES TO AN INJURY OR DAMAGE THAT WAS UNKNOWN TO THE INSURED AT THE POLICY'S INCEPTION DATE.

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- The Act applies to all insurance policies currently in existence or issued on or after the effective date.

- The bigger issue is whether this is the start of things to come for construction defect coverage. Will other state legislatures follow?

- Randy Maniloff – Binding Authority 5/27/10
- White and Williams, LLP Philadelphia, PA

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- It is not news that courts are all over the place when it comes to coverage for construction defects. Hundreds of decisions nationally have produced a multitude of rules for deciding what's covered and what's not.

- There are five schools of thought:
  - (1) Damage to an insured's own defective workmanship is not covered because it is not an "occurrence;"
  - (2) Damage to an insured's own defective workmanship is an "occurrence," but coverage is precluded by the "your work" exclusion;
  - (3) Damage to an insured's own defective workmanship is not covered because of the "your work" exclusion, but coverage is restored by the "subcontractor exception;"
  - (4) Even if damage to an insured's own defective workmanship is not covered because it is not an "occurrence," damage to other property, caused by the defective workmanship, is an "occurrence" and is covered; and
  - (5) Damage to an insured's own defective workmanship is not covered because it is not an "occurrence," and nor is damage to other property caused by the defective workmanship an "occurrence," and, therefore, it is also not covered.

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Is Defective Work an Occurrence ?

Defective Work Is Not an Occurrence	Defective Workmanship Is an Occurrence	Resulting Damage to Other Work Is an Occurrence	Resulting Damage to Third-Party Property Is an Occurrence	Undecided or Unclear
Delaware, District of Columbia, Kentucky, Missouri, Ohio, Pennsylvania, Wyoming	Alaska, Arkansas,* Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Oregon, South Dakota, Texas, Vermont, Washington, West Virginia	Alabama, Arizona, California, Colorado,* Connecticut, Florida, Georgia, Iowa, Maryland, New Jersey, New Mexico, Rhode Island, South Carolina,* Tennessee, Utah, Virginia, Wisconsin	Illinois, Massachusetts, Nebraska, New Hampshire, New York, North Carolina	Hawaii,* Idaho, Oklahoma

*By statute. See "Statutory Requirements Regarding CGL Coverage for Faulty Workmanship."

Source: Patrick J. Wielinski. *Insurance for Defective Construction,* 5th ed., International Risk Management Institute, Inc.

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State Positions on Faulty Workmanship As an "Occurrence"

Defective Work Is Not an Occurrence	Defective Workmanship Is an Occurrence	Resulting Damage to Other Work Is an Occurrence	Resulting Damage to Third-Party Property Is an Occurrence	Undecided or Unclear
District of Columbia, Pennsylvania, and Wyoming	Alaska, Arkansas, [A] Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, South Dakota, Texas, Vermont, Washington, and West Virginia	Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Iowa, Maryland, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Wisconsin	Illinois, Kentucky Massachusetts, Missouri, Nebraska, New Hampshire, New York, and North Carolina	Delaware, Hawaii, [B] Idaho, Ohio, and Oklahoma

Source: Patrick J. Wielinski. Insurance for Defective Construction, 6th ed., International Risk Management Institute, Inc none

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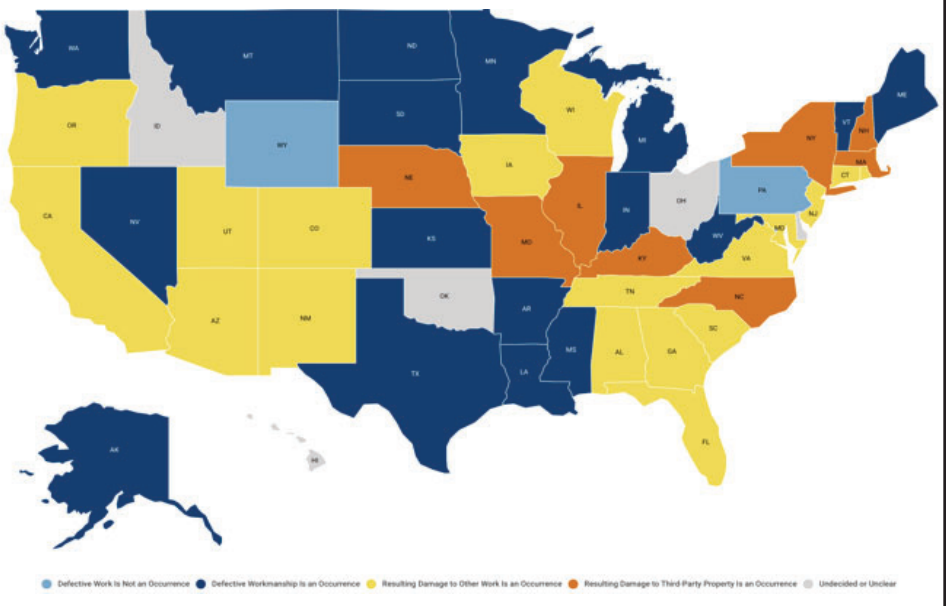

92

CYPRESS POINT CONDOMINIUM
ASSOCIATION, INC.,
Plaintiff-Appellant/
Cross-Respondent,
v.
ADRIA TOWERS, L.L.C.; D. LOUREIRO
MASONRY CONTRACTOR; DEAN MARCHETTO
ASSOCIATES, P.C.; PEREIRA CONSTRUCTION,
L.L.C.; AMERICAN ARCHITECTURAL
RESTORATION; METRO HOMES, L.L.C.;
COMMERCE CONSTRUCTION MANAGEMENT, L.L.C.;
WATERFRONT MANAGEMENT SYSTEMS, L.L.C.;
NCF GLAZING & ERECTING, INC.; and
MDNA FRAMING, INC.,
Defendants

Approved for Publication 7/9/15
Superior Court of NJ - Appellate Division

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- Plaintiff, a condominium association, brought claims against the association's developer, Adria Towers, L.L.C. (the "developer"), the developer's insurers, Evanston Insurance Company ("Evanston") and Crum & Forster Specialty Insurance Company ("Crum & Forster") (collectively the "insurers"), and various subcontractors (the "subcontractors").

- The developer served as the general contractor on the condominium project and hired the subcontractors who performed all the construction work. Plaintiff sought coverage from the insurers under the developer's commercial general liability ("CGL") insurance policies for consequential damages caused by the subcontractors' defective work.

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- The judge determined that there was no "property damage" or "occurrence" as required by the policy to trigger coverage, granted summary judgment to Evanston, and dismissed the complaint against Crum & Forster as moot.
- Plaintiff appeals.
- The sole question in this appeal is whether consequential damages to the common areas of the condominium complex and to the unit owners' property, caused by the subcontractors' defective work, constitute "property damage" and an "occurrence" under the policy. We consider this issue by interpreting the plain language of the policy, which follows the

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- Insurance Services Office, Inc.'s ("ISO") 1986 standard CGL form (the "1986 ISO form"). Applying the relevant standards, we reverse the order denying reconsideration, set aside the orders dismissing plaintiff's complaint, and remand with instructions to consider the insurers' alternate contentions that plaintiff's claims are otherwise excluded under the policy.
- We hold that the unintended and unexpected consequential damages caused by the subcontractors' defective work constitute "property damage" and an "occurrence" under the policy. We base this holding in part on the developer's reasonable expectation that, for insurance risk purposes, the subcontractors' faulty workmanship is to be treated differently than the work of a general contractor.

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- The subcontractors failed to properly install the roof, flashing, gutters and leaders, brick and EIFS facade, windows, doors, and sealants (the "faulty workmanship"). The faulty workmanship amounted to what has typically been considered in the construction industry as defective work. In the insurance industry, such replacement costs are usually regarded as a cost of doing business and are considered a "business risk."

- In relation to sharing the cost of risks as a matter of insurance underwriting, consequential damages flowing from defective work are vastly different than the costs associated with replacing the defective work. See Hartford Ins. Grp. v. Marson Constr. Corp., 186 N.J. Super. 253, 258-59 (App. Div. 1982) (holding that defective work causing damage to other property is not a business risk), certif. denied, 93 N.J. 247 (1983); Newark Ins. Co. v. Acupac Packaging, Inc., 328 N.J. Super. 385, 392-93 (App. Div. 2000) (noting that damage to third-party property is a tort liability and not a business risk or work performance issue).

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- *If a determination is made that "property damage" and an "occurrence" exist, plaintiff concedes that the insurers would be free to argue, on remand, that plaintiff's claims are otherwise excluded under the terms of the policy.*

- We emphasize that the consequential damages here are not the cost of replacing the defective work — that is the improperly installed roof, flashing, gutters and leaders, brick and EIFS facade, windows, doors, and sealants. Those costs are considered a business risk associated with faulty workmanship. Rather, the consequential damages are those additional damages to the common areas of the condominium building and the unit owners' property. The consequential damages are therefore not the cost of correcting the defective work, such as the cost of replacing the stucco in the Weedo case or replacing the firewalls as in Firemen's, but rather the cost of curing the "property damage" arising from the subcontractors' faulty workmanship.

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- Second and most importantly, the 1986 ISO form includes a significant exception to an exclusion not contained in the 1973 ISO form. Due to this exception, we conclude that for insurance risk purposes, consequential damages caused by a subcontractor's faulty workmanship are considered differently than property damage caused by a general contractor's work.
- Although we need not resolve whether plaintiff's property damage claims are excluded under the policy, the addition of the subcontractor's exception is of critical importance when determining whether the subcontractors' faulty workmanship causing consequential damages amounts to "property damage" and an "occurrence" under the policy. The subcontractor's exception did not appear in ISO forms before 1986.

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- As a practical matter, it is very difficult for a general contractor to control the quality of a subcontractor's work. If the parties to the insurance contract did not intend a subcontractor's faulty workmanship causing consequential damages to constitute "property damage" and an "occurrence," as those terms are defined in the policy, then it begs the question as to why there is a subcontractor's exception.
- *The absence of such an exception in the 1973 ISO form is important because in defining "property damage" to effectuate insurance coverage, we previously rejected any attempt to separate a subcontractor's faulty workmanship from that of a general contractor.*
- Thus, as a matter of an insurance underwriting risk, the exception treats consequential damages caused from faulty workmanship by subcontractors differently than damage caused by the work of general contractors.

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Horizontal vs. Vertical Exhaustion of Limits

Saxe Doernberger & Vita
Willis
2010/2018

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What is the Purpose of the "Other Insurance" Clause

4. Other Insurance

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

a. Primary Insurance

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

b. Excess Insurance

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

c. Method Of Sharing

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

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

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Other Insurance Clause

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

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Other Insurance Clause

- 1998 Countrywide GL Revision changed the Other Insurance Clause as follows:

4. OTHER INSURANCE

b. Excess Insurance:

This insurance is excess over:

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

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W9/PHC Real Estate LP v. Farm Family

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W9/PHC Real Estate LP v. Farm Family

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

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Case Facts

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

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Case Facts

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

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Conclusion

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

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Primary and Noncontributory

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

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NEW CG 20 01

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

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

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

Background

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

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

Explanation of Changes

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

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

AND

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

Impact

There is no impact on coverage.

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New Forms

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

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Issues

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

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Horizontal vs. Vertical Exhaustion of Limits

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

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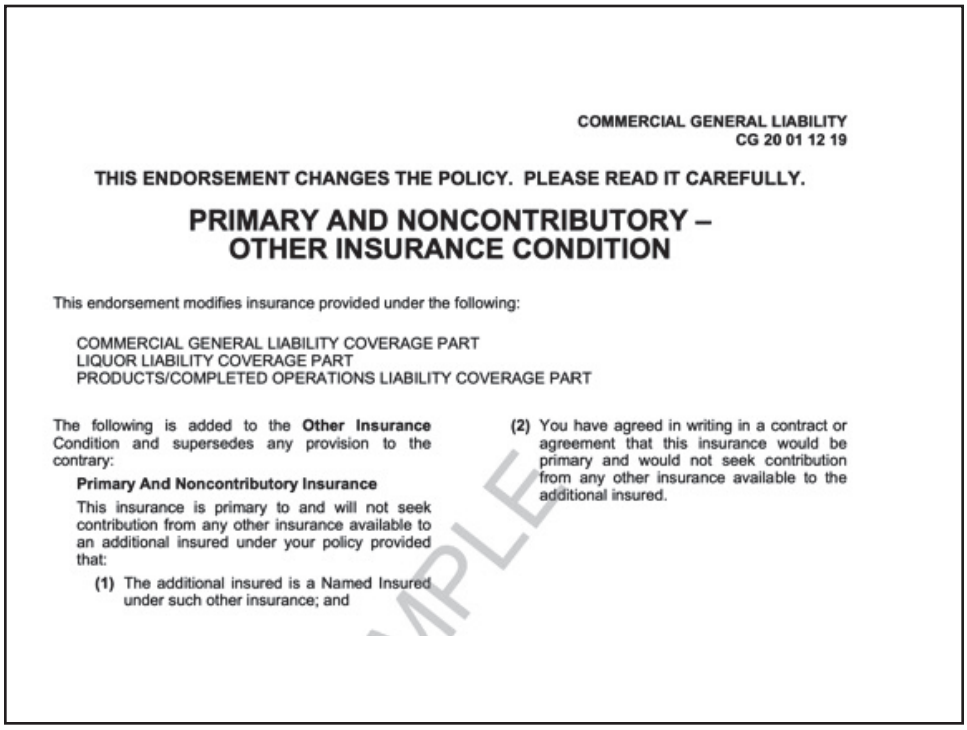


COMMERCIAL GENERAL LIABILITY
CG 20 01 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION

This endorsement modifies insurance provided under the following:

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

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

Primary And Noncontributory Insurance

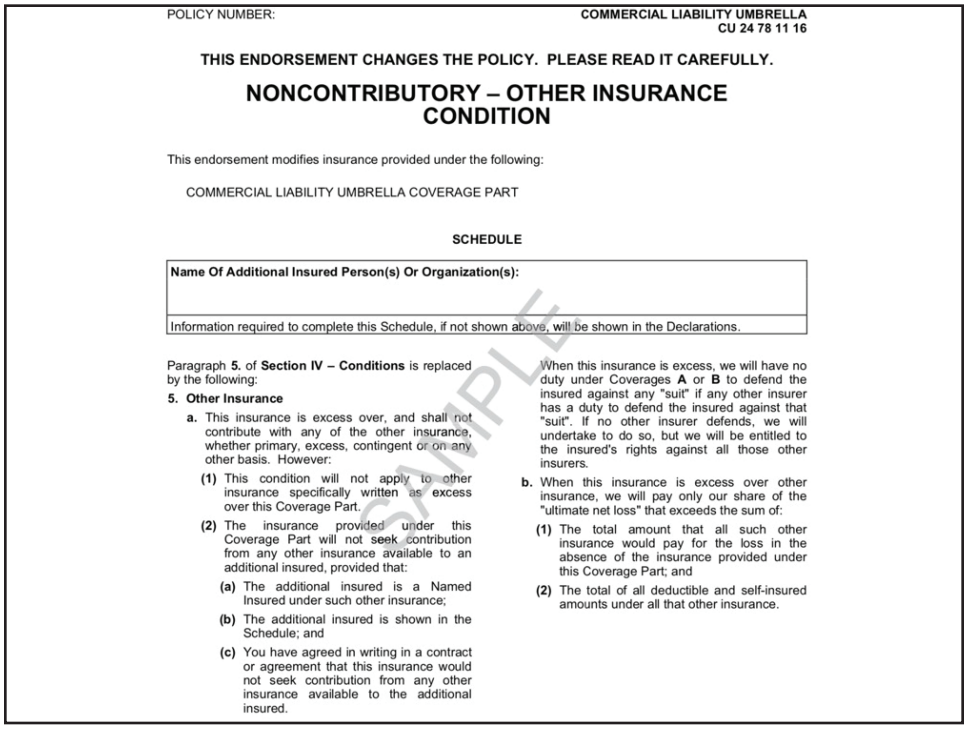
This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

(1) The additional insured is a Named Insured under such other insurance; and

(2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

SAMPLE

115



POLICY NUMBER:

COMMERCIAL LIABILITY UMBRELLA
CU 24 78 11 16

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NONCONTRIBUTORY – OTHER INSURANCE CONDITION

This endorsement modifies insurance provided under the following:

COMMERCIAL LIABILITY UMBRELLA COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

Paragraph **5.** of **Section IV – Conditions** is replaced by the following:

5. Other Insurance

a. This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis. However:

(1) This condition will not apply to other insurance specifically written as excess over this Coverage Part.

(2) The insurance provided under this Coverage Part will not seek contribution from any other insurance available to an additional insured, provided that:

(a) The additional insured is a Named Insured under such other insurance;

(b) The additional insured is shown in the Schedule; and

(c) You have agreed in writing in a contract or agreement that this insurance would not seek contribution from any other insurance available to the additional insured.

When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

b. When this insurance is excess over other insurance, we will pay only our share of the "ultimate net loss" that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of the insurance provided under this Coverage Part; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

SAMPLE

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Umbrella's DO NOT Follow Form

- The too often held but mistaken belief that all umbrella policies are "follow form" and thus follow the "primary and noncontributory" wording of an underlying CGL policy fails to recognize the fundamental nature of the "primary and noncontributory" issue. Even umbrella policies that are actually "follow form" do not follow the other insurance condition of the underlying policies—to do so would reduce the "follow form" umbrella to primary (first dollar) insurance.
- For example, the most recent Insurance Services Office, Inc. (ISO), "Commercial Excess Liability Coverage Form" CX 00 01, April 2013 edition, insuring agreement clearly limits the "follow form":
  - The insurance provided under this Coverage Part will follow the same provisions, exclusions and limitations that are contained in the applicable "controlling underlying insurance", *unless otherwise directed by this insurance. To the extent such provisions differ or conflict, the provisions of this Coverage Part will apply.* [Emphasis added.] 117

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ISO Non-Contributory Endorsements

CU 24 78 (1116) or CX 24 33 (1116)

- As the title suggests, these endorsement address only contribution—*and not the order of coverage*. Despite replacing the umbrella and excess liability other insurance condition, both endorsements reiterate that the umbrella/excess insurance will be excess of all other liability insurance—unless that liability insurance is specifically written as excess.
- The noncontributory endorsements state that if the named insured has so agreed in writing in a contract or agreement, the insurer will not seek contribution from a liability policy purchased by an additional insured as a named insured. As these are scheduled endorsements, the additional insured also must be scheduled.
- The workings of these endorsements are yet to be determined, but the endorsements appear to apply only when the liability policy of the named insured (listing the additional insured) and the liability policy of the additional insured (as the named insured) are both excess to any other insurance. In other words, both policies are on the same level—the umbrella or excess policy listing the additional insured will not seek contribution from the umbrella or excess policy in which the additional insured is a named insured. 118

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Proprietary Endorsements

- There are several major national insurers that offer umbrella policies that address both primary (who goes first) and noncontributory (no sharing), either within the policy form itself or by endorsement, if requested.
- By way of example, here is wording from an insurer's umbrella other insurance condition:
  - However, if you specifically agree in a written contract or agreement that the insurance provided to any person or organization that qualifies as an insured under this insurance must apply on a primary basis, or a primary and noncontributory basis, then insurance provided under Coverage A is subject to the following provisions:
  - This insurance will apply before [primary or order of coverage] any "other insurance" that is available to such additional insured which covers that person or organization as a named insured, and we will not share [noncontributory] with that "other insurance," provided that the injury or damage for which coverage is sought is caused by an "event" that takes place or is committed subsequent to the signing of that contract or agreement by you.[3] [Brackets added.]
- The above addresses both issues when promising to be "primary and noncontributory"—the order of coverage as well as giving up rights of contribution.

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OTHER INSURANCE CONDITION FOR ADDITIONAL INSUREDS — NON-CONTRIBUTORY - BLANKET BASIS

COMMERCIAL UMBRELLA LIABILITY
CXL 449 06 17

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL UMBRELLA LIABILITY COVERAGE PART

The following is added to **SECTION IV — CONDITIONS,** Paragraph **H. Other Insurance:**

With respect to each additional insured under **SECTION II, WHO IS AN INSURED**, Paragraph **A.5.,** this insurance is (i) excess over any "underlying policy", and (ii) primary to, and we will not seek contribution from, any other insurance providing coverage to any such additional insured whether primary or excess. However, we will not waive our right to seek contribution from other insurance unless:

a. The additional insured is a Named Insured under such other insurance;

b. The additional insured is included as an additional insured on an "underlying policy";

c. You have agreed in a written contract, written agreement or written permit that this insurance would be primary to and/or would not seek contribution from any other insurance provided to the additional insured; and

d. The written contract or written agreement has been executed (executed means signed by the Named Insured) or written permit issued prior to the "bodily injury" or "property damage" or "personal and advertising injury".

The most we will pay on behalf of the additional insured is the amount of insurance required by the written contract, written agreement or written permit, less any amounts payable by any "underlying insurance", subject to **SECTION III — LIMITS OF INSURANCE.**

This provision is included within and does not act to increase the Limits of Insurance stated in the Declarations.

00000FS 2001460 363

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COMMERCIAL GENERAL LIABILITY
CG 24 56 12 23

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCESS INSURANCE PROVISION – ORDER OF RESPONSE – WHEN YOU ARE AN ADDITIONAL INSURED ON OTHER INSURANCE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph **b.(1)(b)** of Paragraph **4. Other Insurance** of **Section IV – Commercial General Liability Conditions** is replaced by the following:

4. Other Insurance

b. Excess Insurance

(1) This insurance is excess over:

(b) Any other insurance available to you, whether primary, excess, contingent or on any other basis, 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.

Added to Upper Tier's Policy – ie, G.C.

121

POLICY NUMBER:

COMMERCIAL LIABILITY UMBRELLA
CU 24 77 12 23

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NONCONTRIBUTORY AND ORDER OF RESPONSE – OTHER INSURANCE CONDITION

This endorsement modifies insurance provided under the following:

COMMERCIAL LIABILITY UMBRELLA COVERAGE PART

Added to Lower Tier's Policy – ie, Sub

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

Paragraph **5.** of **Section IV – Conditions** is replaced by the following:

5. Other Insurance

a. This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis. However:

(1) This condition will not apply to other insurance specifically written as excess over this Coverage Part.

(2) The insurance provided under this Coverage Part will apply before any other insurance available to the additional insured shown in the Schedule, whether such other insurance is primary, excess, contingent or on any other basis, and will not seek contribution from such other insurance available to that additional insured, provided that:

(a) The additional insured is a Named Insured under such other insurance; and

(b) You have agreed in writing in a contract or agreement that this insurance would:

(i) Apply before any other insurance available to the additional insured; and

(ii) Not seek contribution from any other

When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

b. When this insurance is excess over other insurance, we will pay only our share of the "ultimate net loss" that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of the insurance provided under this Coverage Part; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

c. If the provisions of Paragraph **5.a.(2)** of this endorsement conflict with the provisions of other insurance available to the additional insured who is a Named Insured under such other insurance, 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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POLICY NUMBER:

COMMERCIAL EXCESS LIABILITY
CX 24 32 12 23

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NONCONTRIBUTORY AND ORDER OF RESPONSE – OTHER INSURANCE CONDITION

This endorsement modifies insurance provided under the following:

COMMERCIAL EXCESS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

Paragraph **8.** of **Section III – Conditions** is replaced by the following:

8. Other Insurance

a. This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis. However:

(1) This condition will not apply to other insurance specifically written as excess over this Coverage Part.

(2) The insurance provided under this Coverage Part will apply before any other insurance available to the additional insured shown in the Schedule, whether such other insurance is primary, excess, contingent or on any other basis, and will not seek contribution from such other insurance available to that additional insured, provided that:

(a) The additional insured is a Named Insured under such other insurance; and

(b) You have agreed in writing in a contract or agreement that this insurance would:

(i) Apply before any other insurance available to the additional insured; and

(ii) Not seek contribution from any other insurance available to the additional insured,

When this insurance is excess, 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.

b. When this insurance is excess over other insurance, we will pay only our share of the "ultimate net loss" that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of the insurance provided under this Coverage Part; and

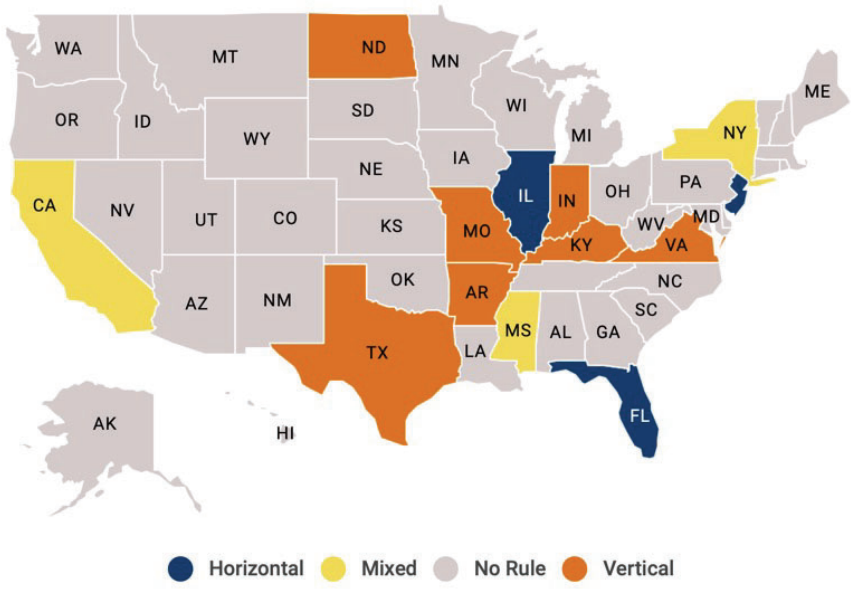
(2) The total of all deductible and self-insured amounts under all that other insurance.

c. If the provisions of Paragraph **8.a.(2)** of this endorsement conflict with the provisions of other insurance available to the additional insured who is a Named Insured under such other insurance, 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.

123

Vertical and Horizontal Exhaustion of Limits | IRMI.com

IRMI- 2022



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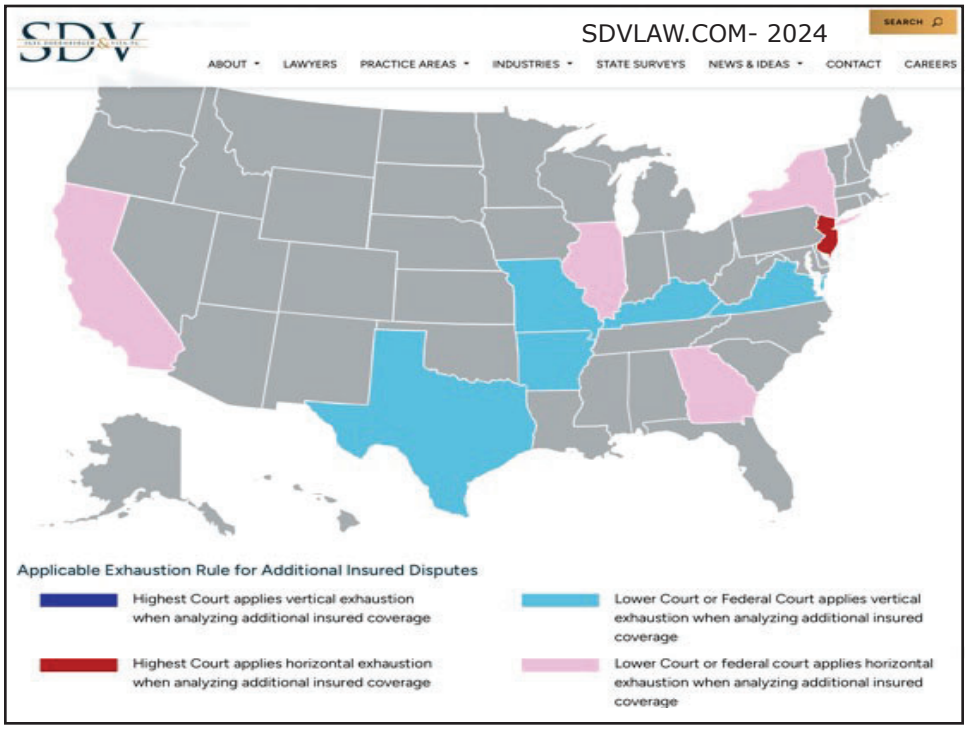

126

Major Construction Company New Revised Insurance Requirements

May 9, 2013

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NEW INSURANCE REQUIREMENTS

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

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

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

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

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Excess/Umbrella vs. Business Auto

- Horizontal Exhaustion - $10 mil claim
  - Owner of vehicle = $1mil Primary BAP
  - General Contractor = $1mil Primary BAP
  - Owner and GC Split = $4mil each Excess
- Vertical Exhaustion = $10 mil claim
  - Owner of vehicles = $1mil Primary BAP
  - Owner of vehicle = $9 mil Excess

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Quality Sewer Inc. v. Oxbow City

- Quality Sewer was required to name Oxbow City as AI on their CGL and UMB.
  - Quality's CGL limits were: $1mil / $1mil
  - Quality's UMB Limits were: $5mil / $5mil
- A lawsuit for damages was filed against both Quality and Oxbow, and the court awarded a judgement of $10mil; with each party being 50% responsible
- How do we settle the claim ?

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Dilution of Limits

- First million
  - Quality's CGL paid $500,000 for Quality
  - Quality's CGL paid $500,000 for Oxbow
- Next $5mil
  - Quality's UMB paid- $2.5 Mil for Quality
  - Quality's UMB paid - $2.5 mil for Oxbow
- Next 4mil
  - Quality's owes $2mil - but its limits are exhausted
  - Oxbow's CGL/UMB paid its $2mil share

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Circuity of Litigation

Other Insurance Clause .vs. Indemnity Agreement

Which Controls ?

134

Walmart Stores, Inc. v RLI Ins. Co.

- Walmart has $10mil of coverage with National Union
- Walmart agrees to sell lamps made by Cheyenne
- Cheyenne agrees to add Walmart as AI per Vendor Agreement, and have $1mil CGL and $10mil Umbrella
- Cheyenne agrees to sign Indemnity Agreement to save, defend, indemnify and Hold Harmless Walmart from the sale of its products
- A lamp causes a fire and injures a young girl. Everyone is sued. Jury comes back with an $11mil award.
- Cheyenne's CGL carrier pays $1mil. All agree.
- However, Cheyenne's UMB carrier wants contribution from Walmart's UMB
- Cheyenne argues that the "Other Insurance Clause" in its policy says it is excess over all other insurance
- Walmart / NU argue that was not the intent of the parties and that the Indemnity Agreement should control

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Walmart Stores, Inc. v RLI Ins. Co.

- The District Court agrees with Cheyenne/RLI and orders Walmart/NU to pay $10mil
- Walmart/NU appeals
- The US Court of Appeals overturns the District Courts decision, and says that the Indemnity Agreement CONTROLS --- not the Other Insurance Clauses in the policy
- Walmart/ NU owe nothing !
- The court opines that to do otherwise would: 1). Go against the intent of the parties, 2). Violate the Anti-Subrogation Rule, and 3). Create a "circuity of litigation"
- Example:
  - If Walmart paid the judgement, it would sue Cheyenne for indemnity.
  - Cheyenne would look to RLI to pay the claim under its Contractual Liability coverage
  - The end result would be the RLI would have to pay $10mil
  - If NU paid the claim, it would step into Walmart's shoes and file a subrogation action against Cheyenne/RLI
  - Same Result

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ISO AI Endorsements Changes Alignment of Coverage

- **All of the ISO additional insured endorsements are being revised to better align coverage in the endorsement to the coverage required in the underlying written contract and the coverage legally enforceable in that jurisdiction.**
- **First,** language is added to only afford coverage to an additional insured within the constraints of law. In other words, if anti-indemnity statutes, for example, restrict the extent of coverage permissible, the additional insured will be limited to that coverage.
- **Second**, language is added to restrict the coverage afforded an additional insured to the coverage requested in the underlying written contract. For example, if the written contract does not require personal and advertising injury liability coverage, then this coverage will not be applicable to the additional insured.
- **Third,** language is added to restrict policy limits to the lesser of the amount required by the underlying written contract or the maximum amount available under the policy.

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Written Contract Required ?

- NOT included in Contractual Liability section

- NOT included on CG 20 10
- NOT included on CG 20 37
- NOT included on CG 20 11

- IS included on CG 20 33
- IS included on CG 20 38
- IS included on CG 20 01

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CU 00 01 0413

3. Any additional insured under any policy of "underlying insurance" will automatically be an insured under this insurance.

Subject to Section **III** – Limits Of Insurance, *if coverage provided to the additional insured is required by a contract or agreement*, the most we will pay on behalf of the additional insured is the amount of insurance:

a. Required by the contract or agreement, less any amounts payable by any "underlying insurance"; or

b. Available under the applicable Limits of Insurance shown in the Declarations;

whichever is less.

Additional insured coverage provided by this insurance will not be broader than coverage provided by the "underlying insurance".

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

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Additional Insured Coverage Limits Reduced From $25M to $9M

- A Delaware state court ruled in favor of an umbrella insurer represented by Bates & Carey LLP in holding that additional insured coverage for a refinery owner: 1) did not apply to punitive damages, and 2) was limited to the minimum limits required by the refinery owner's contract with the insured. *Premcor Refining Group v. Matrix Service Indus. Contractors*, 2008 WL 2232641, C.A. No. 07C-01-095-JOH (Del. Super. May 7, 2008). Based on the court's order, the umbrella insurer's maximum indemnity exposure for two underlying wrongful death lawsuits was reduced from $25 million to $9 million.
- In November 2005, two employees of the insured contractor died while performing maintenance work at the refinery pursuant to a contract with the refinery owner. Among other things, the contract required the insured to procure insurance that would provide coverage to the owner "for liabilities arising out of or relating to the concurrent, contributory or sole negligence" of the contractor. In addition to $1 million in primary coverage, the contract obligated the contractor to procure "excess liability insurance over coverages afforded by the primary…with a minimum limit of $9 million."

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- The decedent employees' estates brought suit against the owner in Pennsylvania federal court, seeking, in part, punitive damages. The owner then sought coverage as "additional insureds" under the umbrella policy issued to the contractor.
- On behalf of the umbrella carrier, Bates & Carey LLP attorneys argued that "additional insured" coverage for the owner was limited to the $9 million "minimum limits" specified by the contract, based on several provisions of the umbrella policy specifying that the maximum coverage available to an entity whose status as an "additional insured" is based on a written contract is the lesser of the limits stated in the declarations, or the minimum limits the named insured agreed in the written contract to procure.
- The refinery owner contended that its status as an additional insured under the umbrella policy was not based on a written contract, such that those provisions should not apply. The owner also contended that the contract obligated the contractor to procure the same amount of coverage for the owner as it procured on its own behalf, such that the $25 million limit stated in the declarations of the umbrella policy should be available.

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- Bates & Carey counsel also argued that the "additional insured" coverage potentially available under the umbrella policy did not extend to punitive damages because the policy stated that coverage for "additional insureds" does not apply to liability which arises and/or results "solely from the acts or omissions" of the additional insured. Under the applicable law, any punitive damages would only be awarded on the basis of the refinery owner's own conduct, and could not be awarded on a joint and several basis.

- The court found in the umbrella insurer's favor on both issues. As to the first issue, the policy unambiguously limited the amount of coverage available to entity whose status as an "additional insured" is based on a written contract to the minimum limits specified in that contract. Finding that the contract at issue "explicitly required the contractor to have no less than $9 million excess coverage," the court held that the additional insured coverage available to the refinery owner was limited to that amount, rather than the $25 million limits set forth in the declarations. On the second issue, the court also agreed with Bates & Carey's argument that, under the applicable law, any assessment of punitive damages against the refinery owner could only be considered a liability which arises solely from its own acts or omissions. As a result, the court agreed that the additional insured coverage of the umbrella policy did not extend to the owner's potential liability for punitive damages.

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Problematic Insurance Requirements

- All policies shall exhaust vertically, and not share horizontally with any of the additional insured's insurance notwithstanding any case law to the contrary.

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Non-Standard Wording to Defeat "Lesser of" Wording…

Notwithstanding any contrary provisions contained in this Exhibit, Contractor and Subcontractor agree that the limits of coverage provided in this Exhibit are minimum coverages and shall not be construed to limit the coverage available to any additional insured to an amount less than the full limits of the policies required pursuant to this Exhibit.

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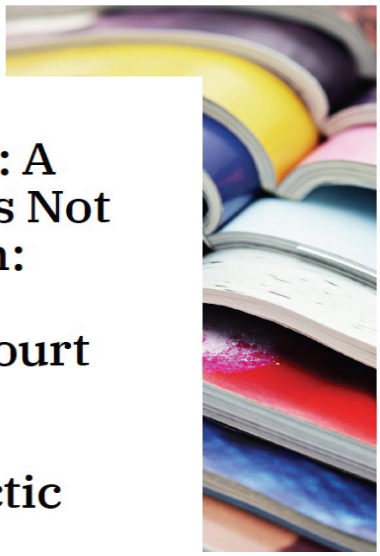
JENNER&BLOCK

:NT ALERT: A MINIMUM IS NOT A MAXIMUM: THE TEXAS SUPREME COURT REJECTS A COMMON INSURER TACTIC TO REDUCE ADDITIONAL INSURED COVERAGE



Client Alert: A Minimum is Not a Maximum: The Texas Supreme Court Rejects a Common Insurer Tactic to Reduce

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More About Excess D&O Insurance and the Exhaustion Trigger

By Kevin LaCroix on June 29, 2010

Posted in D & O Insurance

One of the recurring D&O insurance coverage issues is the question of excess D&O insurers' obligations when the underlying insurers have paid less than their full policy limits as a result of a compromise between the underlying insurers and the policyholder.

In the latest of a growing line of recent cases examining these issues, Judge Wayne Anderson of the Northern District of Illinois, in a June 22, 2010 opinion applying Illinois law, held that the "plain language" of the excess D&O insurance policies at issue required the actual payments of full policy limits in covered claims before the insureds could access the excess insurance.

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Background

During the relevant period, Bally Total Fitness Holding Corporation carried a total of $50 million in D&O insurance arranged in five layers of $10 million each, between a primary insurer and four excess insurers. Bally and certain of its directors and officers were named as defendants in a securities class action lawsuit (about which refer here) in connection with which Bally incurred $33 million in defense expenses, for which Bally sought coverage under from its D&O insurers.

The primary insurer initiated an action in the Northern District of Illinois seeking a judicial declaration of noncoverage. Bally joined the excess insurers to the action as third-party defendants. Ultimately the primary insurer and the first and second level excess insurers reached a compromise by which they agreed to contribute a total of $19.5 million toward Bally's defense expenses. The first level excess insurer settled for $8 million, $2 million less than its full policy limit. The second level excess insurer settled for $1.5 million.

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The third and fourth level excess insurers refused to settle or otherwise contribute toward Bally's defense expense. These two excess insures argued that the conditions precedent to coverage in their excess insurance policies had not been triggered. In making this argument, the third level excess insurer relied on its policy's language that its payment obligations are triggered "only after the insurers of the Underlying Policies shall have paid, in the applicable legal currency, the full amount of the Underlying Limit." The fourth level excess insurer relied on language in its policy specifying that its payment obligations apply "only after all Underlying Insurance has been exhausted by payment of the total underlying limit of insurance."

The Court's June 22 Opinion

In his June 22 opinion, Judge Anderson granted the third and fourth level excess insurers' motions for summary judgment, finding that the plain language of their policies requires that the underlying insurers each "make actual payments of $10 million each in covered claims before Insureds can access coverage provided by the Third and Fourth Layer Excess Policies."

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Golasiewski v. Waste Management of Pennsylvania Inc., 2011 WL 2133788 (E.D.N.Y 2011),

Listing an entity as AI on a Certificate does NOT mean they are an AI

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- In *Golasiewski v. Waste Management of Pennsylvania Inc.*, 2011 WL 2133788 (E.D.N.Y 2011), the District Court for the Eastern District of New York recently held that a third-party plaintiff could not claim to be an additional insured under a certificate of insurance where the third-party was not endorsed as an additional insured under the relevant policy and the certificate of insurance specifically stated that it did not modify the terms of the policy.
- The certificates of insurance stated that they were "issued as a matter of information only" and conferred "no rights upon the certificate holder."

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- The certificates further stated that they did "not amend, extend or alter the coverage afforded" by the underlying policies. Furthermore, the reverse side of the certificates stated that the underlying policies had to be endorsed to reflect any additional insureds and that the "certificate does not confer rights to the certificate holder in lieu of such endorsement(s)."

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- National Union moved to dismiss Waste Management's claims on the basis that Waste Management was not endorsed as an additional insured under the relevant policy. The court concluded that the clear and unambiguous language provided that Waste Management was not covered under either of the policies issued by National Union.
- *The court determined that the inclusion of Waste Management as an additional insured on the certificates of insurance did not alter the result because the policies clearly stated that they could be amended only through an endorsement issued by National Union. Simply because a party is listed in a certificate of insurance as an additional insured does not make that party an additional insured.*

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T-Mobile USA, Inc. v. Selective Ins. Co. of Am.,

2019 WL 5076647, 2019 Wash. LEXIS 659
(Oct. 10, 2019)

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Message from the Editor- IRMI

- Analyzing the intersection between insurers, insurance brokers, and additional insureds, the Washington Supreme Court issued a significant ruling on certificates of insurance. At issue in the case was the standard Acord certificate of insurance issued by an insurance broker authorized by the terms of its agency agreement with the insurer to issue such certificates. The certificate of insurance issued by the insurer's broker listed T-Mobile as an additional insured but contained the typical preprinted disclaimers that the certificate cannot "amend, extend or alter the coverage afforded by" the policy. In contradictory fashion, T-Mobile did not qualify as an additional insured under the express terms of the commercial general liability (CGL) policy.

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- T-Mobile argued to Washington's high court that the certificate's general disclaimers should not be enforced and that the insurer should be bound by the certificate of insurance's statement that it was an additional insured. The insurer, along with industry groups, argued that the preprinted disclaimers made the specific, written-in, additional statements about coverage completely ineffective. However, the court harshly criticized the insurer's position of enforcing the disclaimers and compared it to setting a "trap" for a certificate holder. Instead, Washington's Supreme Court sided with T-Mobile and ruled that the certificate of insurance's statements created additional insured coverage under the policy.

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- This ruling does not fit with many decisions from across the country. For example, the Texas Supreme Court enforced the disclaimers and ruled that the insurance policy terms cannot be changed by the certificate of insurance. The Texas Supreme Court noted that, given "the numerous limitations and exclusions that often encumber such policies, those who take such certificates at face value do so at their own risk." *Via Net v. TIG Ins. Co.,* 211 S.W.3d 310, 314 (Tex. 2006). Thus, it will be interesting to see if Washington's approach is the start of a new trend.

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COVERAGE OPINIONS

Judicial Opinions Today - Impact On Counsel's Opinions Tomorrow

Coverage Opinions Baseball Issue leads to Op-ed in WSJ

Coverage Opinions In The News!

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Vol. 14 - Issue 1

January 6, 2025

***TCF Enterprises, Inc. v. Rames, Inc.* (Supreme Court Of Montana)**

Broker (Uselessly) Listed A General Contractor As An "Additional Insured" On A Certificate Of Insurance: $1 Million Mistake

It is the error that won't go away. A party, often a general contractor, is entitled to coverage as an additional insured under a subcontractor's liability policy. The subcontractor's broker, advised of this obligation, issues a Certificate of Insurance to the general contractor – the certificate holder -- identifying the subcontractor's policy. Then, in the COI's comments section, it identifies the general contractor and states that it is an additional insured. And it might even go a step further and add that additional insured coverage is provided on a primary and non-contributory basis.

And then the broker's work ends there. It does not, in fact, have the general contractor added as an additional insured to the subcontractor's policy. That's one scenario.

But perhaps that's no harm, no foul as the general contractor may also believe that it is an additional insured, under the subcontractor's policy, by way of a blanket additional insured endorsement. But, for various reasons, sometimes that road to AI coverage does not go as planned. And when that happens, the general contractor will likely point to the COI, and its statement of additional rights, as its basis for additional insured coverage.

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New ACORD 855

Optional Certificate of Liability Insurance for New York

Introduced April 2014
Law becomes effective July 2015

158

Optional Certificate of Liability Insurance Addendum Available in New York

- The Association for Cooperative Operations Research and Development (ACORD) has developed an optional certificate of liability addendum that will be available in June for use in connection with New York construction projects. The addendum is the result of a collaboration between construction and insurance organizations to supplement the information on the standard ACORD 25 certificate of liability insurance.

  The demand for more information on New York contractors' insurance arises out of the strict liability standard imposed in sections 240-241 of the New York State Labor Laws, which has resulted in a constriction of the insurance market for New York contractors. Those insurers who are still active in this market frequently include a host of additional exclusions collectively referred to as "240 exclusions." Many contractors have had to turn to the surplus lines market for coverage, where policy language is not regulated and varies widely across forms.

- The ACORD 855 New York Construction Certificate of Liability Insurance Addendum requires the issuing agent or broker to clarify 13 specific aspects of a contractor's coverage, including the scope of additional insured coverage and contractual liability coverage. The agent or broker must stipulate whether the policy contains the specified provision and, where the answer indicates an unfavorable coverage position, whether this is the only option available from the insurer in question. While most agents and brokers resist attempts to require them to "interpret" coverage, the addendum includes a disclaimer similar to that in other ACORD certificates regarding reliance on the information provided in the certificate. And from the agent's standpoint it is a vast improvement over the growing number of nonstandard certificate forms that many agents in New York were being asked to complete "attesting to" a contractor's coverage.

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AGENCY CUSTOMER ID: _____

ACORD

NEW YORK CONSTRUCTION CERTIFICATE OF LIABILITY INSURANCE ADDENDUM

DATE (MM/DD/YYYY)

THIS ADDENDUM SUMMARIZES SOME OF THE POLICY PROVISIONS IN THE REFERENCED INSURANCE POLICIES AND IS ISSUED AS A MATTER OF INFORMATION ONLY; IT CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. ALL TERMS, EXCLUSIONS AND CONDITIONS IN THE ACTUAL POLICY SHOULD BE CONSULTED FOR A MORE DETAILED ANALYSIS OF COVERAGE, AS THIS ADDENDUM DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES.

AGENCY		NAMED INSURED(S)	
POLICY NUMBER	EFFECTIVE DATE	CARRIER	NAIC CODE

ADDENDUM INFORMATION CERTIFICATE NUMBER: REVISION NUMBER:

A. Insurer
- ☐ Admitted / authorized
- ☐ Excess line or free trade zone

B. General Liability (GL) policy form
- ☐ ISO / ISO modified
- ☐ Other

C. Specific operations excluded or restricted (GL policy)
- ☐ Location: _____
- ☐ Type of construction: _____
- ☐ Building height: _____
- ☐ Classifications [see attached declarations / endorsement]
- ☐ Designated work [see attached endorsement]

D. Additional insured endorsement (GL policy)
- ☐ CG 20 10 ☐ CG 20 26 ☐ CG 20 32 ☐ CG 20 33 ☐ CG 20 37 ☐ CG 20 38
- ☐ Other: #: _____ Title: _____

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D. Additional insured endorsement (GL policy)
- ☐ CG 20 10 ☐ CG 20 26 ☐ CG 20 32 ☐ CG 20 33 ☐ CG 20 37 ☐ CG 20 38
- ☐ Other: #: _____ Title: _____

E. According to the terms of this GL policy, the additional insured has primary and noncontributory coverage
- ☐ Yes ☐ No and ☐ no other option is available with this insurer

F. Additional insured will receive advance notice if insurer cancels (GL policy)
- ☐ Yes ☐ No and ☐ no other option is available with this insurer

G. Blanket contractual liability located in the "insured contract" definition (Section V, Number 9, item f. in the ISO CGL policy) is removed or restricted
- ☐ Yes and ☐ no other option is available with this insurer ☐ No changes made

H. "Insured contract" exception to the employers liability exclusion is removed or modified (GL policy)
- ☐ Yes and ☐ no other option is available with this insurer ☐ No changes made

I. GL policy (including endorsements) does not cover the additional insured for claims involving injury to employees of the named insured or subcontractors (not workers' compensation)
- ☐ Yes and ☐ no other option is available with this insurer ☐ No changes made

ACORD 866 NY (2014/06) Attach to ACORD 25

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ADDENDUM INFORMATION (continued) AGENCY CUSTOMER ID: _____

J. Earth movement, excavation or explosion / collapse / underground property damage is excluded or restricted (GL policy)

☐ Yes and ☐ no other option is available with this insurer ☐ No changes made

K. Insured vs. insured suits (cross liability in the ISO CGL policy) are excluded or restricted (other than named insured vs. named insured)

☐ Yes and ☐ no other option is available with this insurer ☐ No changes made

L. Property damage to work performed by subcontractors (exception to the "damage to your work" exclusion in the ISO CGL policy) is excluded or restricted

☐ Yes and ☐ no other option is available with this insurer ☐ No changes made

M. Excess / umbrella policy is primary and non-contributory for additional insureds

☐ Yes, by specific policy provision ☐ Yes, by endorsement ☐ No and ☐ no other option is available with this insurer

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ACORD 855

AGENCY CUSTOMER ID: _____

ACORD

NEW YORK CONSTRUCTION CERTIFICATE OF LIABILITY INSURANCE ADDENDUM

DATE (MM/DD/YYYY)

THIS ADDENDUM SUMMARIZES SOME OF THE POLICY PROVISIONS IN THE REFERENCED INSURANCE POLICIES AND IS ISSUED AS A MATTER OF INFORMATION ONLY. IT CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. ALL TERMS, EXCLUSIONS AND CONDITIONS IN THE ACTUAL POLICY SHOULD BE CONSULTED FOR A MORE DETAILED ANALYSIS OF COVERAGE, AS THIS ADDENDUM DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES.

AGENCY		NAMED INSURED(S)	
POLICY NUMBER	EFFECTIVE DATE	CARRIER	NAIC CODE

ADDENDUM INFORMATION CERTIFICATE NUMBER: REVISION NUMBER:

A. Insurer
☐ Admitted / authorized
☐ Excess line or free trade zone

B. General Liability (GL) policy form
☐ ISO / ISO modified
☐ Other

C. Specific operations excluded or restricted (GL policy)
☐ Location: _____
☐ Type of construction: _____
☐ Building height: _____
☐ Classifications [see attached declarations / endorsement]
☐ Designated work [see attached endorsement]

D. Additional insured endorsement (GL policy)
☐ CG 20 10 ☐ CG 20 26 ☐ CG 20 32 ☐ CG 20 33 ☐ CG 20 37 ☐ CG 20 38
☐ Other: If: _____ Title: _____

E. According to the terms of this GL policy, the additional insured has primary and noncontributory coverage
☐ Yes ☐ No and ☐ no other option is available with this insurer

F. Additional insured will receive advance notice if insurer cancels (GL policy)
☐ Yes ☐ No and ☐ no other option is available with this insurer

G. Blanket contractual liability located in the "insured contract" definition (Section V, Number 9, Item f. in the ISO CGL policy) is removed or restricted
☐ Yes and ☐ no other option is available with this insurer ☐ No changes made

H. "Insured contract" exception to the employers liability exclusion is removed or modified (GL policy)
☐ Yes and ☐ no other option is available with this insurer ☐ No changes made

I. GL policy (including endorsements) does not cover the additional insured for claims involving injury to employees of the named insured or subcontractors (not workers' compensation)
☐ Yes and ☐ no other option is available with this insurer ☐ No changes made

ACORD 855 NY (2014/05) Attach to ACORD 25

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Alienated Premises- Exclusion

- Your Insured is a “Spec” Builder of homes
- She has built 4 new high value houses, but cannot sell them
- In an effort not to have to secure and pay for a “Vacant Home” policy, she rents them very cheaply
- Two years later, there is a completed operations claim PD Claim, presented to the builder for one of the above homes
- Coverage ?

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Alienated Premises Exclusion

j. Damage To Property

"Property damage" to:

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

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

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Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III**

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

sion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

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

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166

Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III**

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Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

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

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Residential Work Exclusion

- What does “residential” mean ??

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- Any structure where 30% or more of the square foot area is used or is intended to be used for human residency, including but not limited to:

- Single or multi-family housing
- Apartments
- Condominiums
- Townhouses
- Cooperatives
- Planned unit developments
- Military housing
- College university housing or dormitories
- Long term care facilities
- Hotels
- Motels
- Hospitals
- Prisons

- Including their common areas and/or appurtenant structures (including pools, hot tubs, detached garages, guest houses or other similar structures).

169

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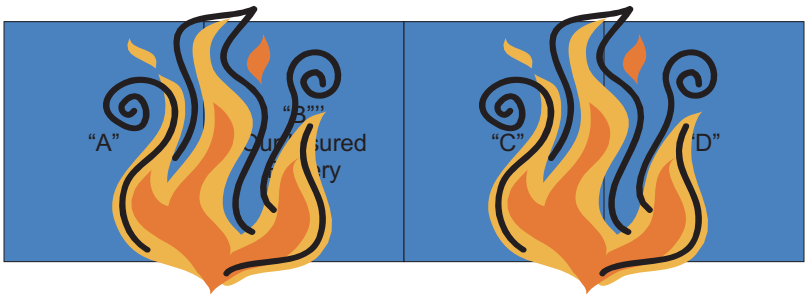
Damage to Premises Rented
a/k/a Fire Legal Liability

Landlord: $1,000,000 PROPERTY ---$250,000 each store



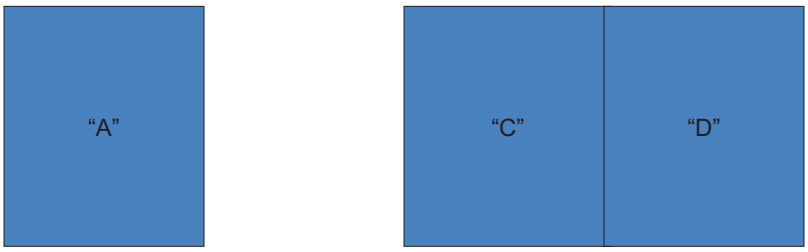
Tenant "B": BOP/CPP $50,000 BPP and $1,000,000 CGL and $50,000 DPR

170

170

Damage to Premises Rented
a/k/a Fire Legal Liability

Landlord: $1,000,000 PROPERTY ---$250,000 each store



Tenant "B": BOP/CPP $50,000 BPP and $1,000,000 CGL and $50,000 DPR

171

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j. Damage To Property EXCLUSIONS:

"Property damage" to:

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

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

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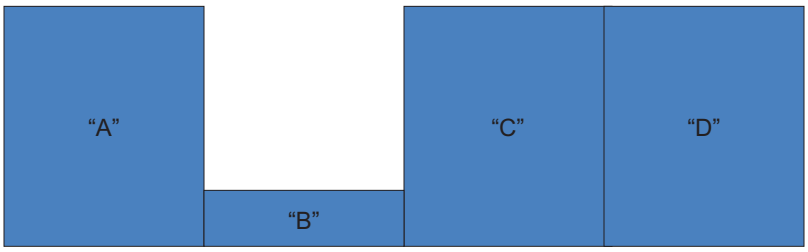
172

Damage to Premises Rented
a/k/a Fire Legal Liability

Landlord: $1,000,000 PROPERTY ---$250,000 each store



Tenant "B": BOP/CPP $50,000 BPP and $1,000,000 CGL and $50,000 DPR

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Damage to Premises Rented
a/k/a Fire Legal Liability

PROBLEMS and SOLUTIONS:

- Limited Coverage under CGL
- One Peril Only – FIRE !
- Need Legal Liability Coverage- CP 00 40
- Can my Commercial Umbrella help ?
- Waiver of Subrogation

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COMMERCIAL PROPERTY
CP 00 40 10 12

LEGAL LIABILITY COVERAGE FORM

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. The words "we", "us" and "our" refer to the company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **F.** Definitions.

A. Coverage

We will pay those sums that you become legally obligated to pay as damages because of direct physical loss or damage, including loss of use, to Covered Property caused by accident and arising out of any Covered Cause of Loss. We will have the right and duty to defend any "suit" seeking those damages. However, we have no duty to defend you against a "suit" seeking damages for direct physical loss or damage to which this insurance does not apply. We may investigate and settle any claim or "suit" at our discretion. But:

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

(2) Our right and duty to defend end when we have used up the Limit of Insurance in the payment of judgments or settlements.

1. Covered Property And Limitations

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

Covered Property does not include electronic data. Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), on hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other repositories of computer software which are used with electronically controlled equipment. The term computer programs, referred to in the foregoing description of electronic data, means a set of related electronic instructions which direct the operations and functions of a computer or device connected to it, which enable the computer or device to receive, process, store, retrieve or send data. This paragraph does not apply to electronic data which is integrated in and operates or controls the building's elevator, lighting, heating, ventilation, air conditioning or security system.

2. Covered Causes Of Loss

See applicable Causes of Loss form as shown in the Declarations.

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Tenant Signs Lease with Landlord that Includes a Mutual WOS

- Tenant turns down heat in building too low
- Pipes freeze and burst
- $100,000 damage to landlords building
- Landlord files a claim with her own carrier
- Carrier pays $50,000
- $100,000 loss less the landlords $50,000 deductible
- Carrier cannot subrogate against the Tenant for the $50,000 payment
- Landlord sues Tenant for the $50,000 deductible !

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OFTEN MISUNDERSTOOD

- Existing……
- Per Project Aggregate Endorsement (incorrect)
- Designation Construction Project(s) – General Aggregate Limit CG 25 03 (correct)
- Per Location Aggregate Endorsement (incorrect)
- Designated Locations – General Aggregate Limit – CG 25 04 (correct)
- Introducing…..
- Designated Project(s) – Completed Operations Aggregate Endt.- CG 25 45
- Designated Location(s) – Completed Operations Aggregate Endt.- CG 25 46

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 25 03 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED CONSTRUCTION PROJECT(S) GENERAL AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designated Construction Project(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

SAMPLE

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 25 04 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED LOCATION(S) GENERAL AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designated Location(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

SAMPLE

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 25 45 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED PROJECT(S) PRODUCTS-COMPLETED OPERATIONS AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designated Project(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

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POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 25 46 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED LOCATION(S) PRODUCTS-COMPLETED OPERATIONS AGGREGATE LIMIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Designated Location(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

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LEXOLOGY

The Ups and Downs of Elevator Maintenance Contractor's Policy Limits

Saxe Doernberger & Vita, P.C.

USA | August 31 2022

The December 2021 First Department decision in Nouveau Elevator Indus. v. New York Marine & General Ins. Co. is pushing some buttons in the elevator industry, given the significant implications it may have on the adequacy of policy limits for elevator service companies operating in New York state.

The Court held in Nouveau that monthly elevator maintenance work performed under an ongoing service agreement is considered "completed operations" for purposes of applying policy limits. Specifically, the Court found that the per location policy limits are not implicated here, and instead held that the products-completed operations aggregate limit applies to completed work, which expressly includes "that part of the work done at a job site [that] has been put to its intended use."

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Excess Coverage for Wrap-Up Operations

IRMI

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POLICY NUMBER: COMMERCIAL GENERAL LIABILITY
CG 21 54 01 96

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description and Location of Operation(s):

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

The following exclusion is added to paragraph 2., Exclusions of COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I – Coverages):

This insurance does not apply to "bodily injury" or "property damage" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" at the location described in the Schedule of this endorsement, as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved.

This exclusion applies whether or not the consolidated (wrap-up) insurance program:

(1) Provides coverage identical to that provided by this Coverage Part;

(2) Has limits adequate to cover all claims; or

(3) Remains in effect.

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Structure Tone, Inc. v. National Cas. 2015 NY Appellate Div.

- Kleinknecht Electric Co. (KEC) entered into a sub agreement with Structure Tone, Inc. (STI) for electrical work at the "project"
- KEC should name STI as AI
- Although a wrap up policy existed for the project, KEC was not an enrolled party.
- STI argued that the wrap exclusion in the KEC Policy did not apply
- The court disagreed, holding that notwithstanding the fact that KEC was not insured under the wrap up; the language of the exclusion does not require that KEC be enrolled in the wrap up, but that the wrap up insurance program exist and covers BI that arose from KEC's operations !!

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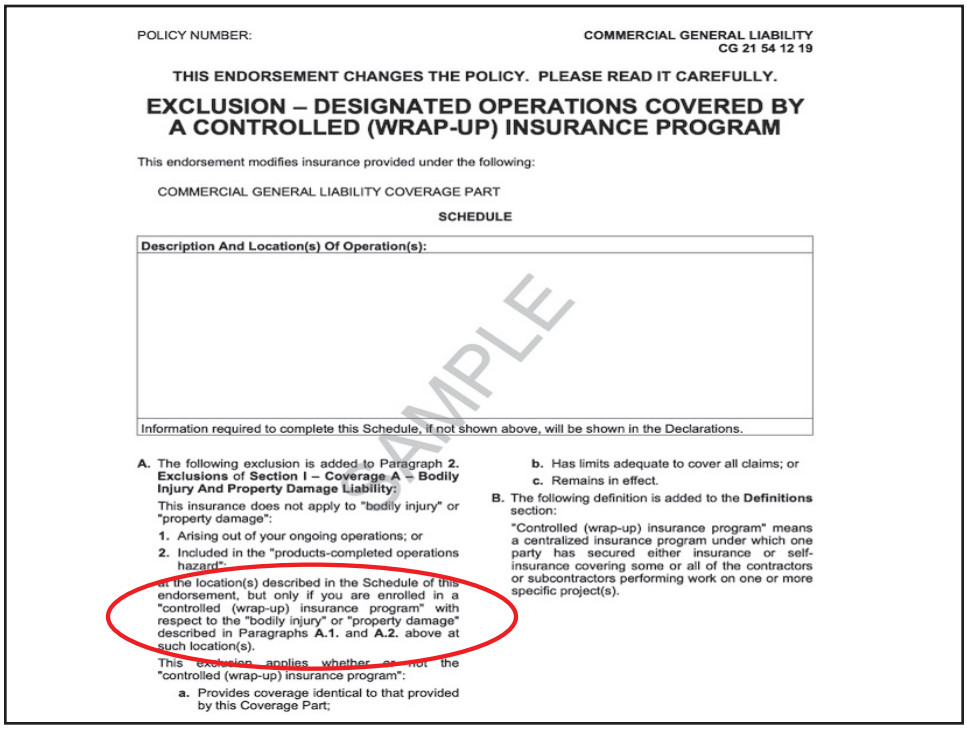

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 21 54 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONTROLLED (WRAP-UP) INSURANCE PROGRAM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description And Location(s) Of Operation(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

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

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

1. Arising out of your ongoing operations; or

2. Included in the "products-completed operations hazard"

at the location(s) described in the Schedule of this endorsement, but only if you are enrolled in a "controlled (wrap-up) insurance program" with respect to the "bodily injury" or "property damage" described in Paragraphs **A.1.** and **A.2.** above at such location(s).

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

a. Provides coverage identical to that provided by this Coverage Part;

b. Has limits adequate to cover all claims; or

c. Remains in effect.

B. The following definition is added to the **Definitions** section:

"Controlled (wrap-up) insurance program" means a centralized insurance program under which one party has secured either insurance or self-insurance covering some or all of the contractors or subcontractors performing work on one or more specific project(s).

SAMPLE

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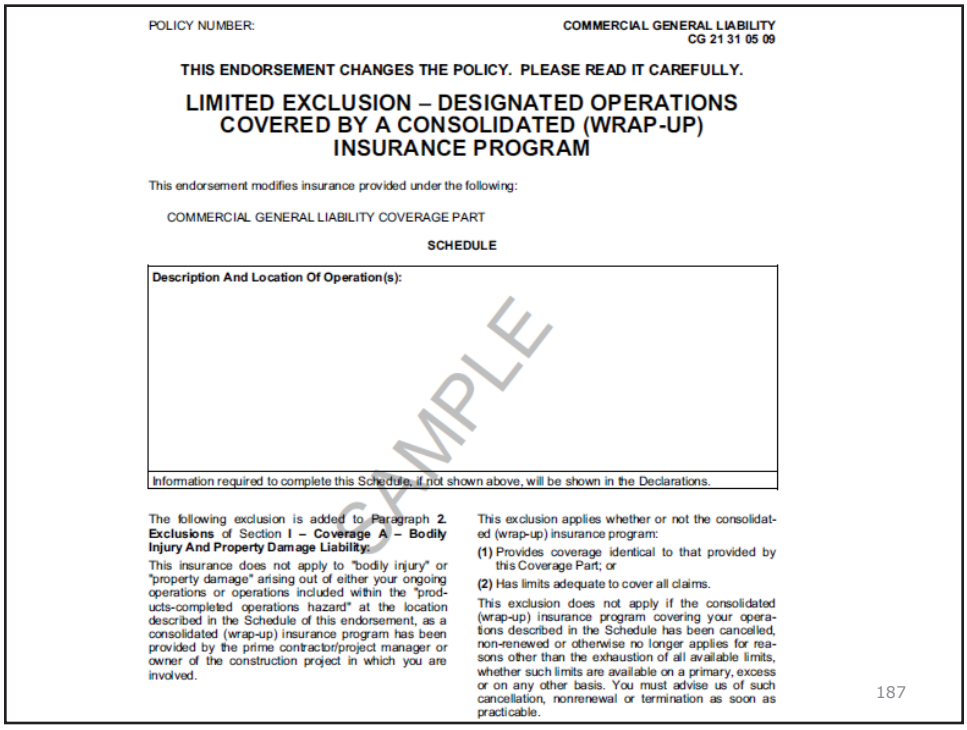

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 21 31 05 09

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITED EXCLUSION – DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description And Location Of Operation(s):
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

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

This insurance does not apply to "bodily injury" or "property damage" arising out of either your ongoing operations or operations included within the "products-completed operations hazard" at the location described in the Schedule of this endorsement, as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved.

This exclusion applies whether or not the consolidated (wrap-up) insurance program:

(1) Provides coverage identical to that provided by this Coverage Part; or

(2) Has limits adequate to cover all claims.

This exclusion does not apply if the consolidated (wrap-up) insurance program covering your operations described in the Schedule has been cancelled, non-renewed or otherwise no longer applies for reasons other than the exhaustion of all available limits, whether such limits are available on a primary, excess or on any other basis. You must advise us of such cancellation, nonrenewal or termination as soon as practicable.

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SAMPLE

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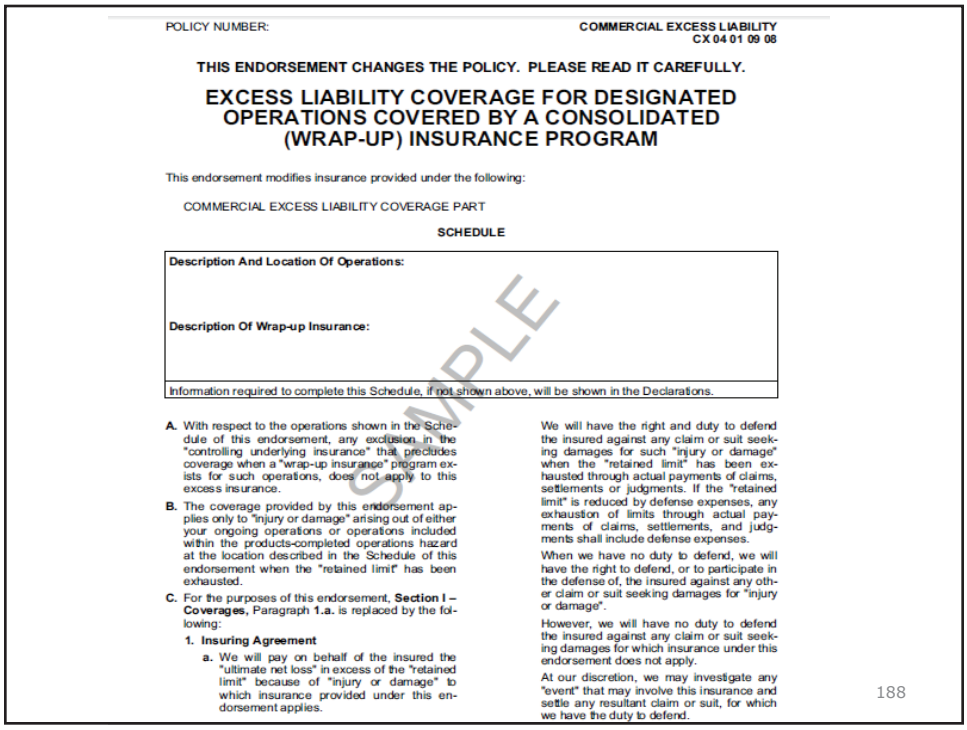

POLICY NUMBER:

COMMERCIAL EXCESS LIABILITY
CX 04 01 09 08

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCESS LIABILITY COVERAGE FOR DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM

This endorsement modifies insurance provided under the following:

COMMERCIAL EXCESS LIABILITY COVERAGE PART

SCHEDULE

Description And Location Of Operations:
Description Of Wrap-up Insurance:
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

SAMPLE

A. With respect to the operations shown in the Schedule of this endorsement, any exclusion in the "controlling underlying insurance" that precludes coverage when a "wrap-up insurance" program exists for such operations, does not apply to this excess insurance.

B. The coverage provided by this endorsement applies only to "injury or damage" arising out of either your ongoing operations or operations included within the products-completed operations hazard at the location described in the Schedule of this endorsement when the "retained limit" has been exhausted.

C. For the purposes of this endorsement, **Section I – Coverages,** Paragraph **1.a.** is replaced by the following:

1. Insuring Agreement

a. We will pay on behalf of the insured the "ultimate net loss" in excess of the "retained limit" because of "injury or damage" to which insurance provided under this endorsement applies.

We will have the right and duty to defend the insured against any claim or suit seeking damages for such "injury or damage" when the "retained limit" has been exhausted through actual payments of claims, settlements or judgments. If the "retained limit" is reduced by defense expenses, any exhaustion of limits through actual payments of claims, settlements, and judgments shall include defense expenses.

When we have no duty to defend, we will have the right to defend, or to participate in the defense of, the insured against any other claim or suit seeking damages for "injury or damage".

However, we will have no duty to defend the insured against any claim or suit seeking damages for which insurance under this endorsement does not apply.

At our discretion, we may investigate any "event" that may involve this insurance and settle any resultant claim or suit, for which we have the duty to defend.

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Claims Journal

Essentials: Wrap-Ups and Agent E&O Exposures

By Steven Plitt

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Enrollment

- Although a client subcontractor may try to not enroll in an OCCIP and instead rely on its own liability insurance for the project, most OCCIPs have mandatory enrollment requirements. That means that the agent is likely to be faced with a coordination of benefits question.
- The agent's goal to analyze the wrap-up plan to determine if the coverage afforded is sufficient to replace the client subcontractors' existing coverage for that project is key. In reviewing the wrap-up the agent must determine the scope of subcontractor participation. In some wrap-up programs coverage may only include subcontractors with contract values over a specified amount. The client subcontractor may not be aware of this. Subcontractors that furnish both materials and installation through their own subcontractors may not qualify for coverage under the wrap-up because these subcontractors may be designated as material suppliers, which typically are not covered.

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Who's enrolled / Who's not

- Commonly excluded:
  - Materialmen, suppliers, vendors, delivery services, concrete asphalt haulers, off-site fabrication, off-site mfgrs.,abatement, blasting, demo, EIFS, hazardous waste removal, Architects / Engineers, Third party crane contractors, scaffolding, guards, janitorial and food services.

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Off-Site Work

- OCCIPs do not provide coverage for claims for off-site work. Therefore, it is important to understand your client's business. Does your client have a fabrication shop or infrastructure work on an adjacent site? Wrap-up coverage typically does not attach to the subcontractor's offsite operations, including offsite work and transportation. Wrap-up coverage does not provide coverage for post-completion onsite work as well, which may include warranty work. The offsite work that is incidental to the project is typically covered by the subcontractor's existing policies but will not be covered by most OCCIP programs. Therefore, the client subcontractor's existing general liability coverage must remain to some extent for that project.

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Contractual Indemnity

- The agent needs to know that the client subcontractor's participation in a typical OCCIP arrangement will not eliminate contractual indemnity owed by the client to the property owner/developer and general contractor. This indemnity obligation is a covered "insured contract" under a CGL policy. If an OCCIP exclusion is used, this indemnity obligation becomes an uncovered exposure. In many instances the construction contracts on smaller projects still contain requirements for individualized liability coverage and the subcontractor is required to name the owner/developer and general contractors. In this situation, the agent must make sure there is no OCCIP exclusion on the subcontractors policy.

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Limits

- **An OCCIP policy provides a "composite" aggregate that combines both operations losses and completed operations losses under one aggregate limit. Under this type of approach an OCCIP's policy limit may be exhausted by a single bodily injury claim during the construction operations phase. If this were to occur there would be no policy limits left available for other claims.** Typically, what occurs is that an employee, who could not bring suit against his own employer due to worker's compensation exclusivity, will bring a suit against the project owner or general contractor for injuries sustained while working on the project. These type of claims become transferred back to the subcontractor due to the indemnity requirements of the construction contract and the "insured contract" coverage in the commercial general liability policy. This will not have the same effect in an OCCIP because there is only one policy for all of the contractors and it is the only policy that is available for accident settlements.

- Brain injuries, wrongful deaths, paralysis, all common general types of serious accidents on work sites jeopardize coverage availability. Thus, the question must be asked as to whether a residential OCCIP has "adequate limits." The characteristics of each project may call for different OCCIP limits based upon type of construction, size of project, length of construction phases, the extent of construction (from demolition, conversion, seismic retrofitting, only exterior work), the number of projects that may be folded into the OCCIP, and the number of contractors named under the policy. The the greater the number of named insureds, the greater the potential for claims to erode the aggregate.

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Tropicana Parking Garage Collapse
Atlantic City, NJ 10/30/03

[$101M settlement largest PI Construction Claim in the Nation –$27M OCIP)

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Completed Operations

- Although OCCIPs typically include completed operations coverage for losses, there is typically a specified time period limitation, i.e., two- to five-year tail after project completion. Therefore the contractor's exposure is likely to continue for a longer period of time. Thus, whenever possible, a contractor should endorse its own general liability policy to include any exposures beyond the OCCIP period.

- At a minimum, the agent should remove from the client subcontractor policy any wrap-up exclusion endorsement from their client's CGL policy. It is best to get confirmation from the insurance company's underwriting department that the client subcontractor's individual coverage will be excess whenever the client is involved with an OCCIP project. This is required so that the CGL policy will apply as excess insurance coverage over the OCCIP provided policy.

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CG 21 31—LIMITED EXCLUSION—DESIGNATED OPERATIONS COVERED BY A CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM

- Contractors bidding on work to be performed under a consolidated insurance program—a so-called wrap-up, in which the owner and all participating contractors are covered under a single liability policy—ordinarily do not maintain coverage for the wrap-up operations under their own CGL policy. (In any event, contractors bidding on wrap-up work are usually required to deduct their insurance costs from the bid.) The standard tool for excluding work performed under a wrap-up from a contractor's CGL policy is endorsement CG 21 54, discussed later in this section.

- *Endorsement CG 21 31 is similar to endorsement CG 21 54, except that it preserves coverage in connection with the insured's work performed under a wrap-up when the wrap-up policy itself has been canceled, has expired, or is otherwise no longer available to the insured contractor for reasons other than the exhaustion of the wrap-up policy's limits*. Wrap-up policies, for example, usually apply to completed operations claims for some period of time after the project concludes. Once this completed operations "tail" expires, individual participating contractors would still need coverage in connection with their completed work. The insured is required to notify the insurer when any of these excepted circumstances takes place.

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POTENTIAL ISSUES WITH WRAPS

1). Full separation of insureds – no cross suits endt or insured vs insured

2). Indemnity provisions go beyond coverage applicable/available and coverage for any liability assumed in an insured contract is excluded with the wrap exclusion- normally covered

3). Basket Aggregate - usually not separate aggs like CGL underlying or BAP with no agg. Blow out agg. on operations claim, nothing left for COOPS !

4). No per project agg. –does not follow form

5). Defense costs should be outside limit

6). "Off premises" "outside the gate" –supporting work areas: laydown areas, staging areas, utility areas, office trailers, other offices, fabrication sites, batch plants, warehouses, signage, adjacent areas, etc.

7). Watch wording on wrap exclusion

8). Completed operations – statute of repose

9) COI for off premises exposures

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POTENTIAL ISSUES WITH WRAPS

10). Warranty work / repair work – should be included in def of coops—but arguments arise

11). Who's enrolled / who's not ? Commonly excluded—includes materialmen, suppliers, vendors, delivery services, concrete / asphalt haulers, Off-site fabricators, off-site manufacturers, abatement, blasting, demo, EIFS, Hazardous waste removal, Architects/Engineers, Third party crane contractors, Scaffolding, Guards, janitorial and food services.

12). Get copy of policies and read them !

13). Wrap should be primary and non-contrib—will not seek contribution for CUMB -- often overlooked!

14). Conflict of Other Insurance Clauses

15). Your program should be EXCESS to the wrap

16). Deductibles and SIR responsibility ?

17). Cancellation- what happens if the wrap is cancelled ? how much time to replace coverage? Do you receive Notice ?

18). May need a WRAP DIC policy- if wrap is broader than your primary coverage

19). Wrap up exclusions block AI claim in New York- sdv law. Excluded contractors (local 3 electricians-because of self-insured wc program) add wrap CM as AI, and no coverage because of the wrap exclusion on their policy.

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STATES THAT REQUIRE 3A COVERAGE…

…and DO NOT recognize your 3C Coverage !

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STATES THAT REQUIRE 3A COVERAGE

- MA, NV, NH, NM, NY, MT, WA, MD and WI
- FL, NV, MO, TN (contractors only)

- New York is not alone in this requirement. Massachusetts, Nevada, New Hampshire, New Mexico, Montana, Wisconsin, Ohio, and Washington all require state specific workers' compensation coverage — always or in certain circumstances.
- On a related note, both New York and New Jersey require that contractors purchase disability insurance in addition to their workers' compensation coverage.

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Indemnity Agreements

- Indemnity agreements are NOT insurance
- Therefore indemnitees are NOT insureds

- Although Insurance may pay for obligations assumed in an indemnity agreement, insurance is completely independent of the obligation to indemnify.

- The Contractual obligation to add a person or organization as AI is NOT accomplished if that insurance obligation happens to be part of an “insured contract”.

- We spend a lot of time drafting H/H agreements. How can you be sure Indemnitors have complied with your contractual Indemnification requirements?

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Indemnity vs. Additional Insured

- While an indemnitee may benefit from the indemnitors CGL policy, the indemnitee is not a party to the indemnitors insurance policy.

- Insureds, including additional insureds, are parties to the insurance contract and have rights afforded to that type of insured.
  - Right to tender a claim directly to the carrier
  - Right to demand defense
  - Right to sue insurer for breach of contract

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Defense of Indemnittee

b. Contractual Liability

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

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

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. **Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or *for a party other than an insured* are deemed to be damages because of "bodily injury" or "property damage", provided:**

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

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Insurer's Obligation to Defend Indemnitee

- ***ISO's original Intent*** (no defense to ind-1992, filed CG0043 to provide cover)
- Supplementary Payments section of CGL obligates carrier to provide a defense for indemnitee [in addition to policy limits], but only under limited circumstances.

- Depends in part on the wording of the Indemnity Agreement
  - Tenant agrees to hold harmless and *indemnify* landlord for any loss, costs or expenses, including attorney fees and costs attributable to bodily injury or property damage, arising out of the tenant's use of the demised premises and common areas, even if the indemnified party is partly at fault for such bodily injury or property damage……..
  - AGREES TO INDEMNIFY LANDLORD a/k/a **REIMBURSE ONLY**
  - Does not obligate the indemnitor to defend the indemnitee.

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Insurer's Obligation to Defend Indemnitee

- Supplementary Payments section of CGL obligates carrier to provide a defense for indemnitee, [in addition to policy limits] but only under limited circumstances.
- Depends in part on the wording of the Indemnity Agreement in an Insured Contract

  [COMPARE THIS EXAMPLE TO PREVIOUS]

  – Tenant agrees to hold harmless, ***defend*** and indemnify landlord for any loss, costs or expenses, including attorney fees and costs attributable to bodily injury or property damage, arising out of the tenant's use of the demised premises and common areas, even if the indemnified party is partly at fault for such bodily injury or property damage……..

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Supplementary Payments

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

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

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Other Requirements for Direct Defense under Supplemental Payments

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

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Defense of Indemnitee

<u>So long as the above conditions are met</u>, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments.

Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability, **<u>such payments</u>** will ***<u>not</u>*** be deemed to be damages for "bodily injury" and "property damage" and **<u>will not reduce the limits of insurance</u>**.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when:

a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or

b. The conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

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DRIVE OTHER CAR

CA 9910

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Problems - Gaps

- All vehicles insured under XYZ Inc.'s Corporate policy – No PAP
- Furnished Company Car by XYZ Inc – No PAP
- Dad, Mom and Son all live in same household – no one has a PAP
- Employer has BAP with symbol 1 for liability, and symbol 2 for UM, Med Pay, and symbols 2 and 8 for Physical Damage
- CA 2054 added- Employee hired autos

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Problems - Gaps

- Coverage WOULD be provided for XYZ, Inc and Dad, mom and son in the following circumstances:
  - Dad is driving company car on business and causes injury/damage to third party and company car
  - Mom and/or son are driving company auto with permission and cause injury/damage to third party and company car
  - Dad while away on a business trip rents a car in his personal name and damages the rental car and does third party damage/injury
  - All covered because they involve a “covered auto”

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Problems -Gaps

- Coverage would NOT be provided under the BAP in the following circumstances:
  - Dad rents a car while on vacation and damages/injures a third party
  - Mom travels out of town and rents a car for business for her employer (not xyz, inc.)
  - Son borrows a friends car and injures/damages a third party and is sued naming son, mom and dad
  - Dad, Mom or son are struck as a pedestrian by an uninsured motor vehicle
  - Not covered because none of the above are a “covered auto”

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Recommended Endorsement

- Drive Other Car – CA 9910
  - Can provide Liability, Med Pay, UM, Phys Damage
  - If Dad is named on DOC endorsement then his entire family is covered for Med Pay and UM
  - If Dad is named on DOC endorsement then just he and his spouse are an insured for Liability and Physical Damage
  - Each family member other than the spouse must named on the DOC end't. for Liability and Phys Damage coverage

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POLICY NUMBER:

COMMERCIAL AUTO
CA 99 10 10 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DRIVE OTHER CAR COVERAGE – BROADENED COVERAGE FOR NAMED INDIVIDUALS

This endorsement modifies insurance provided under the following:

AUTO DEALERS COVERAGE FORM
BUSINESS AUTO COVERAGE FORM
MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Named Insured:	
Endorsement Effective Date:	

SCHEDULE

Name Of Individual:				
Covered Autos Liability Coverage	**Limit:**	**$**	**Premium:**	**$**
Auto Medical Payments	**Limit:**	**$**	**Premium:**	**$**
Comprehensive	**Deductible:**	**$**	**Premium:**	**$**
Collision	**Deductible:**	**$**	**Premium:**	**$**
Uninsured Motorists	**Limit:**	**$**	**Premium:**	**$**
Underinsured Motorists	**Limit:**	**$**	**Premium:**	**$**

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

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Drive Other Car Coverage

- If Mom rents a vehicle while on vacation for personal use, and only Dad is named on the DOC end't--- mom is covered for Liability, Med Pay, UM and Phys Damage
- However if son rented the same vehicle, he would only get Med Pay and UM

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Named Non-Ownership Policy

- If carrier will not add DOC or employer does not want exposure (for other family members); then write a Named Non-Owned Policy
- NNOP is a policy for people who don't own any autos but have an auto exposure
- NNOP provides Liability, Med Pay and UM only to specified person named in endorsement (no PIP or physical damage)
- Each family members must be named [or all family members triggered]
- No way to pick up Physical Damage (or PIP)

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CGL Exclusions

Aircraft, **Auto** Or Watercraft

- **"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft <u>owned</u> or <u>operated by</u> or <u>rented</u> or <u>loaned</u> to any insured.** Use includes operation and "loading or unloading".
- This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

- What's left ?
- *Coverage for Independent Contractors use of an auto--- since we do not own, operate, rent, or loan it.*

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ABSOLUTE
AUTO, AIRCRAFT AND WATERCRAFT EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

g. Aircraft, Auto Or Watercraft

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

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

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

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

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

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COMMERCIAL GENERAL LIABILITY
CG 22 92 12 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SNOW PLOW OPERATIONS COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

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

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First Named Insured

Who has all the rights under the policy?

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

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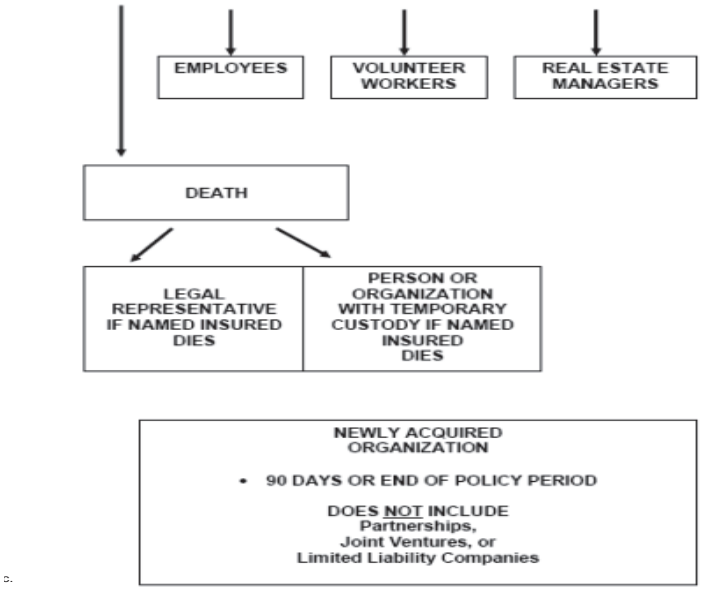
Who is an Insured - Others



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C. Others Included as Automatic Insureds:

No person or organization is an insured with respect to the conduct of any *current or past* partnership, joint venture, or limited liability company

that is not SHOWN as a Named Insured in the Declarations

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COMMERCIAL GENERAL LIABILITY
CG 24 54 12 19

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AUTOMATIC INSURED STATUS FOR NEWLY ACQUIRED OR FORMED LIMITED LIABILITY COMPANIES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Paragraph **3.** under **Section II – Who Is An Insured** is replaced by the following:

3. Any organization you newly acquire or form, other than a partnership or joint venture, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization.

However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

B. The last paragraph of **Section II – Who Is An Insured** is replaced by the following:

No person or organization is an insured with respect to the conduct of any current or past:

1. Partnership or joint venture; or

2. Limited liability company, unless Paragraph **A.** above applies;

that is not shown as a Named Insured in the Declarations.

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Who's an Insured ?

- Jennifer owns 100% of ABC, Inc.
- Jennifer forms and owns 100% of XYZ, Inc.
- Is XYZ, Inc. an insured ?

- NO !
- Why not ?
- New Entity not formed by "YOU"
- Employees are not "you's"
- Common Interest, but not formed by ABC, Inc
- ABC, Inc. would have had to form XYZ in order to trigger coverage [Watch carrier broadening endorsements]

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ISO CG 00 01 (0413)

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

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

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WHAT'S IN A NAME ?

- What is a D/B/A ? What is a T/A
  - Fictitious entities filed with the Secretary of State
  - Not legal entities, cannot be sued or become liable
  - 24 Andrews Place, LLC T/A Steve's Ice Cream Shoppe is a good example.
  - The legal name of the entity is 24 Andrews Place, LLC
  - Steve's Ice Cream Shoppe is a trade name

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Should you list T/A or D/B/A on the CGL Policy

- Steven D Lyon, a sole proprietor
- Steven D. Lyon D/B/A Lyon Landscaping
- A recent Massachusetts SJC ruling states that showing the d/b/a or t/a AFTER a legal entity, limits coverage to those operations ONLY
- That means the automatic coverage provided by the CGL policy is defeated !

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CGL Exclusion

Aircraft, Auto Or Watercraft

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

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CGL Definition
"Loading or Unloading"

as used in CGL Auto Exclusion

11. "Loading or unloading" means the ***handling of property:***

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto;"

b. While it is in or on an aircraft, watercraft or "auto;" or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto."

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BAP Exclusions

7. Handling Of Property

"Bodily injury" or "property damage" resulting from the handling of property:

a. **Before** it is moved from the place where it is accepted by the "insured" for movement into or onto the covered "auto"; or

b. **After** it is moved from the covered "auto" to the place where it is finally delivered by the "insured".

8. Movement Of Property By Mechanical Device

"Bodily injury" or "property damage" resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered "auto".

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In General……

- The CGL ***exclusion*** for aircraft, auto, or watercraft exclusion, precludes coverage for injury or damage arising out of the ownership, maintenance, ***use,*** or entrustment to others of certain aircraft, auto, or watercraft.
- The term "use" includes loading and unloading. Therefore, this definition is important in determining what is meant by excluded "use" of an aircraft, watercraft, or auto.
- If injury or damage occurs in the course of loading or unloading, the liability policy that covers the operation of the vehicle or craft, e.g., automobile liability, would respond to the loss.

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"Loading and Unloading" Legal Theories

- Coming to Rest Theory
  - Minority View
- Complete Operation Theory
  - Majority View

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"Coming to Rest" Theory

- Some courts adopted a "coming-to-rest" reading of the phrase, under which the loading/unloading process began when property was lifted up to be put on the vehicle and ended when the property was first set down after being removed from the vehicle. The classic statement of this "coming-to-rest" definition was made by the Wisconsin Supreme Court in the 1937 case of Stammer v. Kitzmiller, 276 N.W. 629:

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"Coming to Rest" Theory

"When the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile then may be said to be no longer in use. The precise time at which the unloading of the automobile ends and a further phase of commerce such as the completion of the delivery begins after unloading may in some cases be difficult of ascertainment, but where, as here, the merchandise had been removed from the truck and considerable time had elapsed after anything was done which could reasonably be said to be connected with the actual unloading, there is no difficulty in limiting the responsibility of the insurer who covers loading and unloading operations, and fixing the liability of an insurer who protects against loss arising from the acts caused by employees of the assured engaged in the discharge of their duties to carry on its work off the assured's premises."

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"Complete Operation" Theory

- A broader understanding of when loading begins and unloading ends was enunciated in the decision of a New York appellate court—Wagman v. American Fid. and Cas. Co., 109 N.E.2d 592 (1952). The court in Wagman acknowledged the existence of the "coming-to-rest" definition, but also pointed out that a broader definition was logically possible.
- The broader construction, adopted in a majority of the jurisdictions which have passed upon the question, is that "loading and unloading" embrace, not only the immediate transference of the goods to or from the vehicle, but the "complete operation" of transporting the goods between the vehicle and the place from or to which they are being delivered.

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- **The broadness or narrowness of any particular definition of "loading or unloading," as an excluded exposure under general liability insurance is not as important as a proper coordination of that definition with the corresponding usage of the term in the same insured's automobile liability coverage. The exclusion under one policy should fit exactly with the coverage provision under the other, so that liability coverage is uninterrupted from the movement of property onto a vehicle until its final delivery at its destination. Problems arise only when a broad loading or unloading exclusion (e.g., the Wagman "complete operation" concept) under the CGL policy meets a narrow definition of loading or unloading (e.g., a "coming-to-rest" definition) under the auto policy. As the "complete operation" definition gained wider acceptance around the country, its provisions came to be incorporated into both CGL and commercial automobile policies**.
- In current standard coverage forms, the CGL definition of "loading or unloading," which reflects the broad understanding of the term dictated by the Wagman decision, coordinates precisely with the coverage provisions of standard automobile insurance as respects the delivery of cargo.

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- The business auto policy, for instance, contains a "handling of property" exclusion that eliminates coverage with respect to:
  - "bodily injury" or "property damage" resulting from the handling of property:
    - a. Before it is moved from the place where it is accepted by the "insured" for movement into or onto the covered "auto"; or
    - b. After it is moved from the covered "auto" to the place where it is finally delivered by the "insured".
- In other words, what is excluded in the business auto policy is covered by definition under the CGL, and what falls outside the CGL definition of "loading or unloading" becomes the subject of coverage under the business auto policy.
- The same is true with respect to the movement of property by a mechanical device; if the device is attached to the vehicle, it is a covered auto exposure. If not, it is a subject for CGL coverage.

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Assicurazioni Generali, S.P.A. v. Public Serv. Mut. Ins. Co., 77 F.3d 731 (3d Cir. 1996)

- The federal circuit court was asked to interpret the CGL phrase "loading or unloading" as it applied to the delivery of a piece of furniture to a condominium. Employees of a delivery service delivering a bed accidentally dropped the bed on the foot of an elevator operator in the residential building to which the delivery was being made. The injury occurred in the hallway of the nineteenth floor of the building, as the bed was being carried to the condominium unit of the purchaser. The delivery service's CGL insurer denied coverage of the elevator operator's bodily injury claim on the basis that the injury occurred in the process of "unloading" the delivery truck. At issue was the point at which the bed arrived at "the place where it is finally delivered." How far beyond the delivery vehicle—or how far into (up) a building—does the process of "unloading" the vehicle extend? The circuit court invoked the Wagman decision in determining that the unloading of the insured's delivery vehicle included "movement of the bedframe from the delivery truck to the place of final delivery, the purchaser's 19th floor apartment. Thus the ... claim falls squarely within the scope of [the CGL] exclusion clause, and [the CGL insurer] is not obligated to defend [the insured] in the tort action."

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- Note that the CGL definition of "loading or unloading" pertains only to the handling of "property." In Croom's Transp., Inc. v. Monticello Ins. Co., 692 So. 2d 255 (Fla. 1997), the issue was coverage under an ambulance company's general liability policy for injuries suffered by a hospital nurse. The nurse was injured as she helped the insured's employees transfer a hospital patient from the hospital bed to a stretcher for transport in the insured's vehicle. The liability policy in question apparently excluded "loading or unloading" as part of the use of the vehicle, but did not define the term. The court ultimately adopted a narrow interpretation of "loading" to find coverage, reasoning that undefined policy terms should be construed narrowly when they are exclusionary.
- Under a standard CGL policy, the "loading or unloading" exclusion could not be applied to a claim like the one in Croom's Transportation because the injury did not arise out of the "handling of property".

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Mobile Equipment

- CGL always covers Mobile Equipment
  - Except ?
- Auto always cover Autos
  - Except ?

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CGL Definition
"Loading or Unloading"

11. "Loading or unloading" means the ***handling of property:***

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto;"

b. While it is in or on an aircraft, watercraft or "auto;" or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, *other than a hand truck*, that is not attached to the aircraft, watercraft or "auto."

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CGL Definition
"Loading or Unloading"

11. "Loading or unloading" means the ***handling of property:***

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto;"

b. While it is in or on an aircraft, watercraft or "auto;" or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, that is *not* attached to the aircraft, watercraft or "auto."

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CGL Definition
"Loading or Unloading"

11. "Loading or unloading" means the ***handling of property:***

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto;"
b. While it is in or on an aircraft, watercraft or "auto;" or
c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, *other than a hand truck*, that is not attached to the aircraft, watercraft or "auto."

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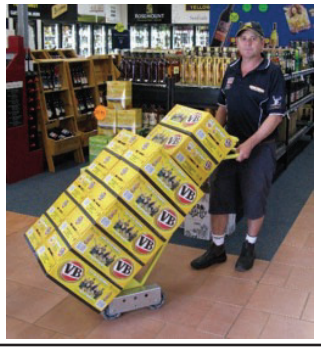
What is a Hand Truck ?





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hand truck *n.* A two-wheeled cart for moving heavy objects by hand, consisting of a vertical framework with handles at the top and a metal blade at the bottom that is inserted beneath a load, the entire assembly being tilted backward until balanced for easy pushing or pulling.

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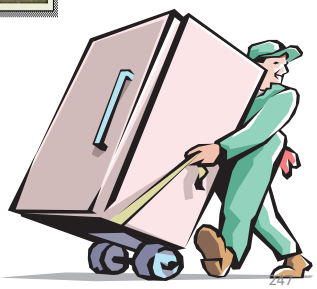
HANDTRUCK OR MECHANICAL DEVICE ATTACHED TO THE AUTO



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Exposure	Business Auto Coverage Form	Commercial General Liability Coverage Form
Losses during Loading and Unloading	**Covers.** Insuring agreement of the BAP generally covers claims arising out of the "use" of a covered auto, which under the common law "completed operations" doctrine, includes all loading and unloading operations, from the moment of pickup to the moment of final delivery.	**Excludes.** CGL policy's auto exclusion applies to claims "arising out of the ... handling of property: "a. *After* it is moved from the place where it is accepted for movement into or onto an ... 'auto' [i.e., during loading]; or ... "c. *While* it is being moved from an ... 'auto' to the place where it is finally delivered [i.e., during unloading]."
Losses before Loading or after Unloading	**Excludes.** The BAP's "handling of property" exclusion applies to claims "resulting from the handling of property: "a. *Before* it is moved from the place where it is accepted by the 'insured' for movement into or onto the covered 'auto' [i.e., before loading]; or "b. *After* it is moved from the covered 'auto' to the place where it is finally delivered by the 'insured' [i.e., after unloading]."	**Covers.** Claims resulting from the handling of property *before* it is moved from the point of acceptance and *after* being moved to the point of final delivery would not fall within the CGL policy's auto exclusion, and thus would be covered by the general terms of the CGL policy's insuring agreement.
Losses during Transit	**Covers.** The BAP's "handling of property" exclusion only applies before loading and after unloading. It does not apply in between, and therefore the BAP covers losses during transit.	**Excludes.** CGL policy's auto exclusion specifically applies to claims "arising out of the ... handling of property ... "b. While it is in or on an ... 'auto' [i.e., during transit]."

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Exposure	Business Auto Coverage Form	Commercial General Liability Coverage Form
Losses during Transit	**Covers.** The BAP's "handling of property" exclusion only applies before loading and after unloading. It does not apply in between, and therefore the BAP covers losses during transit.	**Excludes.** CGL policy's auto exclusion specifically applies to claims "arising out of the ... handling of property ... "b. While it is in or on an ... 'auto' [i.e., during transit]."
Detached Mechanical Device	**Excludes.** The BAP has a separate "mechanical device" exclusion for claims "resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered 'auto.'" If the device is not attached, the exception does not apply, and the BAP would not cover the loss.	**Covers.** CGL policy's auto exclusion excepts "the movement of property by means of a mechanical device, other than a hand truck, that is *not* attached to the ... 'auto.'" If the device is not attached, the exception applies, and the CGL policy would cover the loss.
Attached Mechanical Device	**Covers.** BAP's "mechanical device" exclusion has an exception for devices that are attached to the covered auto, meaning the BAP covers them.	**Excludes.** Any mechanical device that *is* attached to the auto would not fall within the exception and thus would be excluded under the CGL policy.
Hand Truck	**Covers.** BAP's "mechanical device" exclusion has a separate exception for hand trucks, meaning the BAP covers them.	**Excludes.** Auto exclusion has an exception to the exception for "hand trucks," meaning the CGL policy does not cover them.

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Options
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Loading/unloading is "use" in NYS

Q. **We insure a moving company with an ISO Truckers Coverage Form. The movers damaged a building while carrying furniture off a truck and getting it inside. The insurer is denying this claim. Are they correct?**

A. By implication, the "Handling of Property" exclusion (number 7) leaves in place coverage for the process of moving property from the auto to its final delivery place. Unfortunately, in New York, it is not so simple, because the entire "Handling of Property" exclusion (along with its exception) is not a permitted exclusion (see the CA 01 12 endorsement).

This brings us back to the insuring agreement, which promises to pay damages caused by the auto's "use." "Use" of the auto, for coverage purposes, is subject to interpretation through case law. We believe your trucker is covered, since the New York courts have consistently interpreted "use" to include loading and unloading activities (see *B. & D. Motor Lines v. Citizens Casualty Co. of New York,* 1943, 181 Misc. 985, 43 N.Y.S. 2d 486).

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Misdelivery

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MISDELIVERY OF LIQUID PRODUCTS COVERAGE – CG 22 66

- A form of damage that represents a significant loss exposure for certain businesses is the misdelivery of liquid products. Such damage can take a variety of forms. The unloading of the wrong liquid (a caustic acid, for example) into a storage tank can cause damage to the tank itself. The use of the wrong liquid from a container in which the correct liquid is supposed to be stored (certain types of engine fuel, for example) can cause property damage to the machinery in which the misdelivered liquid is used.
- Because the CGL auto exclusion (exclusion g.) applies to the "loading or unloading" of any auto, coverage could be denied for either of the kinds of claims mentioned in the preceding paragraph. (Coverage would not be available under the business auto policy because "loading and unloading" coverage in that form ceases once the delivered goods have been moved to their final place of delivery.) For certain classes of risk with a significant exposure, a coverage endorsement for misdelivery of liquid products is mandated by CLM rules.

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MISDELIVERY OF LIQUID PRODUCTS COVERAGE – CG 22 66

- The endorsement makes the CGL auto exclusion inapplicable to bodily injury or property damage arising out of the misdelivery of a any liquid product (either into the wrong container or to the wrong address), or the erroneous substitution of one liquid product for another.
- The injury or damage must occur after the delivery operation has been completed or abandoned (that is, when the injury or damage falls within the products-completed operations hazard of the CGL and does not unambiguously come within the loading or unloading coverage of the business auto policy).

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Wrong Delivery of Liquid Products – CA 23 05

- This endorsement **precludes** coverage for liability arising out of the delivery of any liquid product into the wrong receptacle or to the wrong address if the bodily injury or property damage occurs after delivery has been completed.
- Like the previous endorsement, this endorsement precludes coverage that is more logically provided under a CGL policy. There is an endorsement available for attachment to the CGL policy, the misdelivery of liquid products coverage (CG 22 66) endorsement, that clarifies that coverage for bodily injury or property damage that occurs after delivery is completed applies under the CGL.
- Bodily injury or property damage that occurs during the unloading of a liquid product from an auto, on the other hand, would be subject to the auto policy.

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Email

Coverage While Loading and Unloading Non-Owned Autos

259

Author: Mike Edwards

Q.

"An unusual claim came up last week, and the initial indication from the adjuster is that it is going to be denied. I would like your thoughts on whether or not you think there is coverage.

"The situation is this. Our insured owns a popular, upscale art and frame shop in town. One of her customers purchased a large, original painting by a local artist. An employee was attempting to load it into the customer's car, when he lost his balance, and the heavy frame struck the customer in the head. He had some injury to his eye, and a mild concussion. In addition, the frame put a big dent in the trunk lid of his new Lincoln, and also cracked the rear window. The frame and canvas of the painting were damaged as well.

"The insurer's initial response to us has been that loading and unloading of autos is excluded by the BOP/CGL, and the claim should be submitted to the insured's BAP.' As it turns out, our insured's business owns no autos, thus they have no BAP. Should we have written hired/non-owned auto coverage for the claim to be covered?

"We have not received the insurer's written denial yet, but I wanted to do my homework on the coverage issues beforehand, so I can decide how to proceed."

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Section II – Liability

B. Exclusions

1. Applicable To Business Liability Coverage

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".

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Comments:

(1) The auto exclusion has two parts, both of which must be met in order for the exclusion to apply. The first part excludes the *"ownership, maintenance, use* [which includes loading or unloading], *or entrustment to others"* of certain autos. Since Jack is loading the painting into John's Lincoln, this is a form of "use" of an auto, and thus meets the first condition of the exclusion.

(2) The second part of the auto exclusion applies to autos which are "*owned or operated by or rented or loaned to any insured*." Employees are "insureds" in the BOP (and CGL), so when Jack is loading the painting into John's Lincoln, Jack is an "insured." However, John's Lincoln is not "*owned or operated by or rented or loaned"* to Jack. Therefore, the auto exclusion does not apply in this case.

(3) This is just one example that illustrates the inaccuracy of the overly-broad statement that "loading or unloading of an auto is excluded in the CGL/BOP." More accurately, loading or unloading of an auto is excluded *under certain circumstances*.

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Review of Insured's Contracts

- E& O Question of the Day:

Should we review Contracts for our Clients?

- "Our Agency has, upon your request, reviewed the contract indicated above. Specifically, we reviewed only the insurance requirements in Section __."

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Review of Insured's Contracts

- "The scope of our review was to determine if the current insurance program which you have placed through our Agency addresses the types and amounts of insurance coverage referenced by the contract. We have identified the significant insurance obligations, and have attached a summary of the changes required in your current insurance program to meet the requirements of the contract. Upon your authorization, we will make the necessary changes in your insurance program. We will also be available to discuss any insurance requirements of the contract with your attorney, if desired."

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Review of Insured's Contracts

- "In performing this review, our Agency is not providing legal advice or a legal opinion concerning any portion of the contract. In addition, our Agency is not undertaking to identify all potential liabilities that may arise under this contract. This review is provided for your information, and should not be relied upon by third parties. Any descriptions of the insurance coverages are subject to the terms, conditions, exclusions, and other provisions of the policies and any applicable regulations, rating rules or plans."

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Contractors Equipment Dilemma

July 2012

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RE: Insurance Certificate Request

Please provide a certificate of insurance including General Liability & Contractor's Equipment for the following piece(s) of equipment currently rented from Hoffman Equipment Co.

Customer/Policyholder: ATLANTIC MANAGEMENT AND CONSTRUCTION

MAKE	MODEL	SERIAL #	UNIT #	YEAR	INSURED AMT
JCB	722	0833080	H01378	2005	$110,000
JCB	718	0832213	H01854	2008	$145,000

Please provide insurance certificates as follows:

Personal Injury:	$1,000,000.00
Property Damage:	$1,000,000.00
All Risk Damage:	$255,000.00

Hoffman Equipment Co. MUST be named as additional insured AND loss payee for each machine. Please fax and mail each certificate to my attention upon completion.

* It is imperative that each certificate of insurance contain all the requested information.
* Please specify which policy cover's general liability & contractor's equipment.

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CONTRACTOR'S EQUIPMENT COVERAGE EXTENSION - GOLD EDITION

This endorsement modifies insurance provided under the following:

CONTRACTOR'S EQUIPMENT COVERAGE FORM
CONTRACTOR'S EQUIPMENT ANNUAL ADJUSTMENT COVERAGE FORM

The following Coverage Extensions are added:

A. Leased, Rented or Borrowed Equipment

Covered Property is extended to include Contractor's Equipment you lease, rent or borrow from others during the policy period. The most we will pay for all "loss" in any one occurrence to leased, rented or borrowed property is the lesser of:

1. The amount for which you are legally liable;
2. The Actual Cash Value; or
3. The cost of repairing or replacing the property with property of a similar kind and quality.

The most we will pay is $250,000 in any one occurrence. This Coverage Extension does not apply if there is any other endorsement, Declarations or Schedule entry providing similar coverage attached to this policy.

B. Leased or Rented to Others

2. You are legally obligated to pay until the repaired or replaced leased or rented Covered Property is returned to the Lesso or otherwise made available for use.

The most we will pay under this Coverage Extension is $75,000 in any one occurrence.

D. Hauling Property of Others

The following Coverage Extension is added:

This insurance is extended to cover your lega liability for "loss" by a Covered Cause of Loss t contractor's equipment belonging to others while in your care, custody and control for the purpose of transportation to a designated site.

The most we will pay for "loss" to any one item is the lesser of the following:

1. The amount for which you become legally liable;
2. The actual cash value of the property; or

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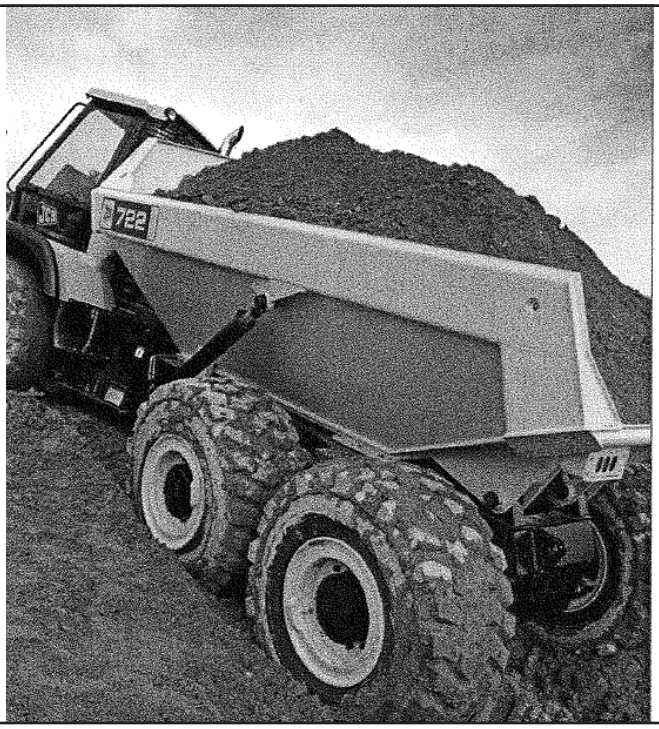

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Claim Circumstances

- Insured stock piling dirt at a job site.
- Builds a mound of compacted dirt about 10 feet high
- Has equipment on top of mound dumping another load and the dump body hits a power line
- The six huge tires on the vehicle explode and catch fire, engulfing the equipment in flames
- The driver jumps out and survives
- Damage to the equipment is $45,000
- Covered ?

- Adjuster denies claim ! "MOTOR TRUCKS" ! 270

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CONTRACTOR'S EQUIPMENT COVERAGE FORM

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. The words "we," "us" and "our" refer to the Company providing this insurance.
Other words and phrases that appear in quotation marks have special meaning. Refer to Section F - DEFINITIONS.

A. COVERAGE

We will pay for direct physical "loss" to Covered Property caused by any of the Covered Causes of Loss.

1. **Covered Property,** as used in this Coverage Form, means the Contractor's Equipment listed and described in the Declarations or Schedule.
2. **Property Not Covered**
   Covered Property does not include:
   a. (1) Automobiles, motor trucks, tractors, trailers, motorcycles;
      (2) Aircraft; or
      (3) Watercraft
      unless described and listed with a Limit of Insurance in the Declarations or Schedule;

following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss".

a. Seizure or destruction of property by order of governmental authority.
   But we will pay for acts of destruction to Covered Property ordered by governmental authority and taken at the time of a fire to prevent its spread.
b. (1) Any weapon employing atomic fission or fusion; or
   (2) Nuclear reaction or radiation, or radioactive contamination from any other cause. But we will pay for direct physical "loss" to Covered Property caused by resulting fire.
c. (1) War, including undeclared or civil war;
   (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
   (3) Insurrection, rebellion, revolution, usurped power or action taken by

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Business Income for Specialty Vehicles

ISO 2012 Property Endorsements

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Specialty Vehicles

- **The types of businesses that derive a substantial portion of their income from specialty vehicles are pretty diverse.**
- **They include, but are not limited to vehicles such as: mobile veterinarian lab, mobile shredders, mobile cranes, cement trucks, septic tank pumpers, water well drillers, mobile MRI labs, bloodmobiles, insulation blowers, carpet cleaners, food delivery vehicles, and so forth are critically important to the income stream of these businesses.**

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ISO CP 00 30 and 00 32
Business Income Forms

- **We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.**

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Requirements

- **<u>Must have:</u>**
  - Damage to property (not covered property)
  - **At the described location** (potential gap problem)
  - By a Covered Cause of Loss
  - Causes a slowdown or shutdown of your business
  - The insured suffers financially

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POLICY NUMBER: COMMERCIAL AUTO
CA 99 05 02 14

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BUSINESS INTERRUPTION COVERAGE

This endorsement modifies insurance provided under the following:

AUTO DEALERS COVERAGE FORM
BUSINESS AUTO COVERAGE FORM
MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form to which this endorsement is attached apply, unless modified by the endorsement.

SCHEDULE

Description Of Business Activities Dependent On Scheduled Property:	
Applicable Coverage(s) (select one): ☐ **Business Income (Without Extra Expense)** ☐ **Business Income And Extra Expense**	
Option A	
Description Of Scheduled Property	**Limit Of Insurance**
1.	$
2.	$

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POLICY NUMBER: COMMERCIAL PROPERTY
CP 15 06 02 14

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

OFF-PREMISES INTERRUPTION OF BUSINESS – VEHICLES AND MOBILE EQUIPMENT

This endorsement modifies insurance provided under the following:

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

SCHEDULE

Described Premises:	
Description Of Business Activities Dependent On Scheduled Property:	
Option A	
Description Of Scheduled Property	**Off-premises Limit Of Insurance**
1.	$
2.	$
3.	$

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POLICY NUMBER: COMMERCIAL PROPERTY
CP 04 09 10 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

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

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM

SCHEDULE

Premises Number	Building Number	Additional Expense Coverage Percentage
		%
		%
		%

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

A. This endorsement applies with respect to a covered loss to a building identified in the Schedule.

Coverage for the loss is determined in accordance with all applicable policy provisions except as otherwise provided in this endorsement.

B. The Covered Causes of Loss (including related endorsements, if any) otherwise applicable to a building listed in the Schedule will apply to the

2. Expenses for labor and/or building materials for repair or replacement of the damaged property increase as a result of the disaster and the total cost of repair or replacement exceeds the applicable Limit of Insurance due to such increase in expenses;
3. You elect to repair or replace the damaged building; and
4. You notified us, within 30 days of completion,

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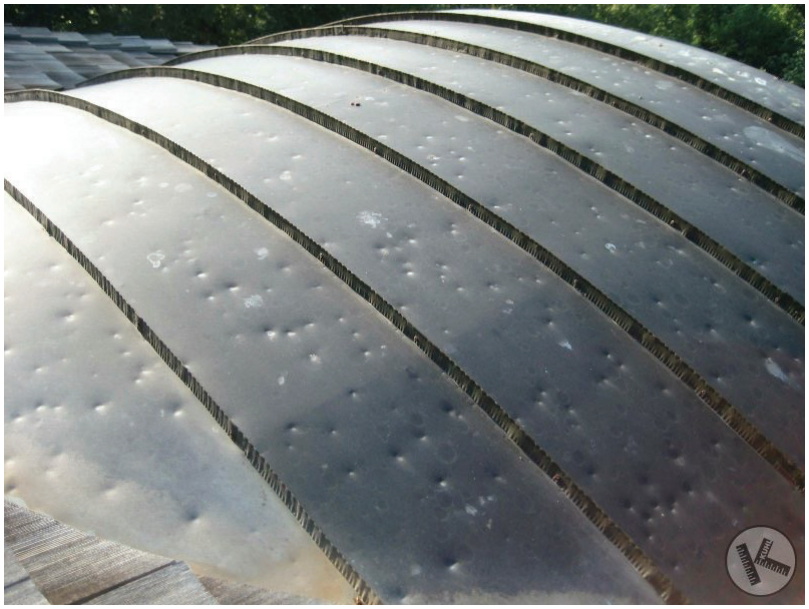

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POLICY NUMBER: Click to increase the magnification of the entire page

COMMERCIAL PROPERTY
CP 10 36 10 12

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITATIONS ON COVERAGE FOR ROOF SURFACING

This endorsement modifies insurance provided under the following:

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

SCHEDULE

Premises Number	Building Number	Indicate Applicability (Paragraph A. and/or Paragraph B.)

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

A. The following applies with respect to loss or damage by a **Covered Cause of Loss (including wind and hail if covered)** to a building or

C. For the purpose of this endorsement, roof surfacing refers to the shingles, tiles, cladding, metal or synthetic sheeting or similar materials

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ACTUAL CASH VALUE LOSS SETTLEMENT WINDSTORM OR HAIL LOSSES TO ROOF SURFACING

HO 04 93 (05 11)

281

ACTUAL CASH VALUE LOSS SETTLEMENT WINDSTORM OR HAIL LOSSES TO ROOF SURFACING

HO 04 93

- Under the homeowners 3 form, if a hailstorm severely damages an older roof, the loss settlement is on a replacement cost basis. This can result in an over-indemnification of the named insured. Many insurers, particularly in hail-prone areas, are reluctant to insure to full replacement cost on an older roof. This endorsement provides a mechanism to insure the home at replacement cost, but cover the shingles and related roof surfacing, for the peril of windstorm or hail only, on an actual cash value (replacement cost less depreciation) basis. Thus, the named insured assumes a higher participation in a loss, in return for a premium credit.
- Suppose that John Smith owns an older home in Oklahoma, a state prone to violent hailstorms. The roof on the home is more than 20 years old and thus, many insurers are reluctant to insure full replacement cost on it. This endorsement decreases the insurer's exposure in return for a premium credit to John; this makes John's home more attractive to insure from the insurer's perspective.
- This endorsement is available to all homeowners forms except the HO 4. The endorsement stipulates three sets of loss settlement provisions: one applies to the HO 2, HO 3, and HO 5. The second applies to the HO 6, and the third applies to the HO 8.

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Claims Reporting Occurrence

Bob Smith, a long time client is very cost conscious. You have moved his account from company to company over the past 22 years. On January 2, 2005 Bob came into your office with a lawsuit alleging negligence on a project he completed in 1994 caused an injury to the claimant in 2000. Which Insurance Company should you report the claim to?

• 1994	Podunck Mutual	$300,000
• 95-97	Lloyds of Lubbock	$500,000
• 98-01	Browntree Ins Co	$500,000
• 02-06	Everly Ins Group	$1,000,000

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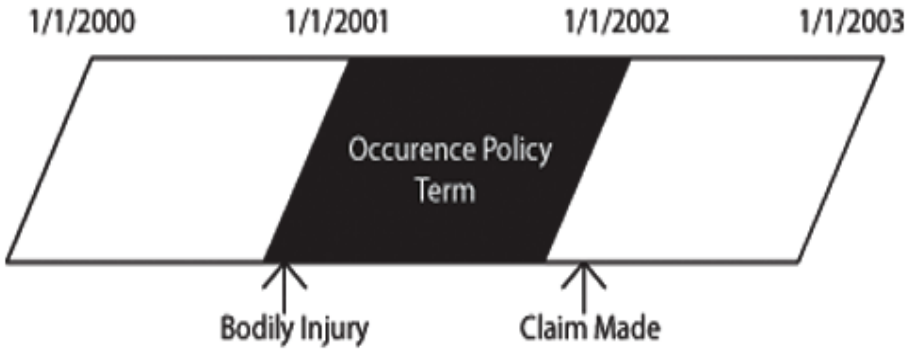
Occurrence Coverage Trigger Application

In the example noted below, the occurrence insurance policy is written with a January, 1 2001, to January 2, 2002, policy term.



Coverage applies because the bodily injury occurred during the January 2001 policy term. The date on which the claim was made has no bearing on the tigger of coverage. The claim could have been made during the January 2001 policy period or any time after the policy had expired, and the claim would still be covered.

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Claims Reporting Occurrence

Bob Smith, a long time client has decided to retire after 25 years in the Construction business. During the past 12 years, Bob has had coverage with the following carriers, shown below. On January 10, 2007 there is a fire in a home which was built by Bob in 1995, where a young girl is badly injured. On June 1, 2007 a lawsuit if filed against Bob for negligence and faulty construction. Which carrier will respond to this claim ?

- 1994 Podunck Mutual $300,000
- 95-97 Lloyds of Lubbock $500,000
- 98-01 Browntree Ins Co $500,000
- 02-06 Everly Ins Group $1,000,000

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Occurrence Policies……

- **DO NOT HAVE "TAILS"**
- **DO NOT HAVE "EXTENDED REPORTING PERIODS"**

- THESE ARE "CLAIMS MADE" TERMS

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Discontinued Products and Completed Operations Coverage

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

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Statute of Repose

AL=7	AK=10	AZ=8	AR=4	CA=10	CO=6	CT=7	DE=6
DC=10	FL= 7	GA=8	HI=10	ID=6	IL=10	IN=10*	IA=10*
KA=10	KY=7	LA=5	ME=6	MD=10	MA=6	MI=6	MN=10
MS=6	MO=10	NE=10	NV=10	NH=8	NJ=10	NM=10	NY=na
NC=6	ND=10	OH=10	OK=10	OR=10	PA=12	RI=10	SC=8
SD=10	TN=4	TX=10	UT=9	VT=na	VA=5	WA=6	WV=10
WI=7	WY=10						

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Misunderstanding…

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

28917

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Can I Set Up An LLC To Avoid Personal Liability In A Lawsuit?

- Posted on May 26, 2009 by Max Kennerly, Esq.
- Among the many creative "legal" ideas floating around on the internet is:
- If you set up an LLC for yourself and conduct all your business through it, the LLC will be liable in a lawsuit but you won't.
- Last week, I was asked if this "asset protection strategy" worked. No, it doesn't. Conducting your personal business through an LLC provides no protection against a tort verdict, the type of liability that most people are worried about. The use of corporate forms — like LLCs,S-Corporations, or Incorporation — has many important purposes, but avoiding personal tort liability for your own conduct is not one of them.

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- If Warren Buffet defrauded Mom and Pop's Ice Cream Stand wholly for the benefit of Berkshire Hathaway, he would *personally* be on the hook for the damage just the same as Berkshire.
- Let's go back to your personal LLC. Assume you hit a pedestrian with a car, defame someone in a blog post, or cause a building fire. It doesn't matter if you were "employed" by your LLC when you did it — you will still be *personally* liable, as will the LLC that "employed" you.
- Thus, in order to "protect your assets," you need to put enough money into the LLC that it can completely pay any tort judgment against you, or else the injured person can go for your assets long after it has bankrupted the LLC.
- That just defeats the nominal purpose of the LLC (to avoid liability),since you'll have to pay the same amount anyway, just through the LLC. Again, there are plenty of reasons for setting up an LLC, such as protecting investors, limiting *contractual* liability, limiting liability arising from *employee's* conduct, and a host of business and tax uses, but avoiding personal liability for your own conduct isn't one of them.
- There's an easier and more effective way. Buy good personal liability insurance and buy a Liability and Umbrella Insurance policy with good limits !

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ALPHABET?
What's Missing?

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

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The Lowest Bidder

It is unwise to pay too much, but it is worse to pay too little. When you pay too much, you lose a little money—that is all. When you pay too little, you sometimes lose everything, because the thing you bought is incapable of doing what it was bought to do. The common law of business balance prohibits paying a little and getting a lot—it can't be done. If you deal with the lowest bidder, it is well to add something extra for the risk you run. And if you do that, you will have enough to pay for something better"

John Ruskin (1819-1900)

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James K. Ruble Seminar

a proud member of Risk & Insurance Education Alliance

Section 2

Contractual Liability Confusion

CONTRACTUAL LIABILITY CONFUSION

1

1

LYON CONSULTING
SERVICES, LLC

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

2

2

DISCLAIMER

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

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

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

3

3

Words of Contractual Wisdom

- *"I created a good deal of our state of affairs myself by not providing clear boundaries and by creating an emotional structure where an exchange for the band's undying loyalty and exclusivity I gave an unspoken and uncontracted promise to cover everyone's back in whatever befell them. Everyone, without concrete, written clarification will define the terms of your relationship in accordance with their own financial, emotional, and psychological needs and desires, some realistic, some not. That meant contracts. Previously anathema to me.*

- *The Tunnel of Love tour was the first time I insisted on written contracts with the band. After all this time to some, I suppose, suggested mistrust. But those contracts and their future counterparts protected our future together. They clarified beyond debate our past and present relationships with one another. And in clarity lies stability, longevity, respect, understanding, and confidence. Everyone knew where everyone else stood. What was given and what was asked. Once signed, those contracts left us free to just play."*

- Bruce Springsteen

4

4

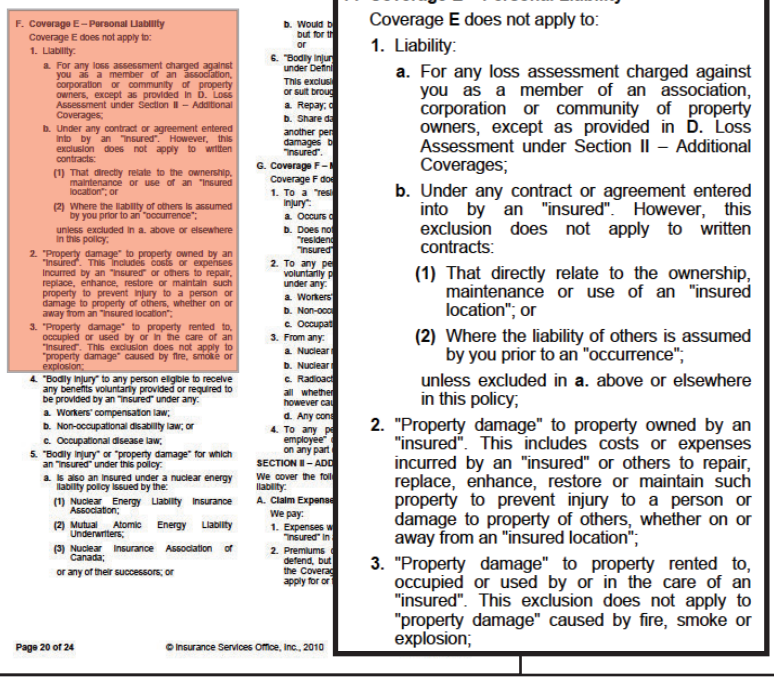
QUESTION ?

Brendan rents a house from Joshua. The lease includes a hold harmless agreement in favor of Joshua. Does the HO-4 Tenants Policy (or any other Homeowner policy) provide Contractual Liability coverage for the following situations:

A meter reader is injured on the premise when he trips over the meter which is not visible because of high grass. The meter reader sues Brendan and Joshua. Brendan calls your office because Josh is looking for defense and indemnity under Brendan's HO-4. Will Brendan's policy respond?

5

5



F. Coverage E – Personal Liability

Coverage **E** does not apply to:

1. Liability:

a. For any loss assessment charged against you as a member of an association, corporation or community of property owners, except as provided in **D.** Loss Assessment under Section **II** – Additional Coverages;

b. Under any contract or agreement entered into by an "insured". However, this exclusion does not apply to written contracts:

(1) That directly relate to the ownership, maintenance or use of an "insured location"; or

(2) Where the liability of others is assumed by you prior to an "occurrence";

unless excluded in **a.** above or elsewhere in this policy;

2. "Property damage" to property owned by an "insured". This includes costs or expenses incurred by an "insured" or others to repair, replace, enhance, restore or maintain such property to prevent injury to a person or damage to property of others, whether on or away from an "insured location";

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

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6

6

ANSWER

- COVERED! Section II Liability Coverage of the Homeowners policy provides coverage for liability assumed by the insured under a written contract as an exception to the exclusion. Therefore, there is coverage with respects Brendan's agreement to hold Josh harmless for liability arising out of the use of the premises.

7

7

QUESTION

Brendan is having an outdoor BBQ. When he goes into the house for a minute to get a drink, the grill blows over and catches the house on fire doing $20,000 damage. Joshua again looks to Brendan's policy for coverage (even though he has his own). Will Brendan's policy respond?

8

8

ANSWER

- COVERED! Since the Homeowners policy covers contractual liability, it first appears that Brendan has coverage for this damage.
- However Exclusion 1 (b) 2 stipulates that contractual coverage is afforded unless the damage is excluded elsewhere in the policy.
- Exclusion #3 excludes coverage for damage to property rented to or occupied by the insured.
- However, because of the exception to the exclusion for fire, Brendan's homeowner's policy would pay for this damage up to his limit of liability.
- Coverage is first excluded, then there is an exception to the exclusion, and finally an exception to the exception which provides the coverage!

9

9

QUESTION

Brendan starts the water running in the bathtub and falls asleep. The water overflows causing $30,000 of damage to the landlords dwelling. Joshua again looks to Brendan's policy for coverage.

Will Brendan's policy respond?

10

10

ANSWER

- NOT COVERED! Since the Homeowners policy covers contractual liability, it first appears that Brendan has coverage for this damage.
- However Exclusion 1 (b) 2 stipulates that contractual coverage is afforded unless the damage is excluded elsewhere in the policy.
- Exclusion #3 excludes coverage for damage to property rented to or occupied by the insured.
- However, because the damage is caused by water; the fire, smoke and explosion exceptions to the exclusion do not apply, and Brendan's homeowner's policy would NOT pay for this damage.

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Liability to Others

- Liability can be imposed by:
  - LAW
    - Responsible for our own actions
      - Direct Liability
    - Responsible for actions of others
      - Vicarious Liability
        - » Employees, Subcontractors, etc..
  - CONTRACT
    - Only "insured contracts"
    - Only part of these contracts
      - Hold Harmless / Indemnity

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Overview of Contractual Risk Transfer

- Contract Review and Negotiation
  - Three key elements in contractual relations

1. **Contract review**
   - By legal counsel ***and*** risk manager
   - Downstream contracts should be analyzed also
   - When ? (before signed!)
   - Negotiate more reasonable terms if warranted. Sometimes it's a matter of educating them
   - Unwillingness to Compromise- walk away / accept risk / hard to deal with
   - Only ask for what you are willing to give *** DOUBLE STANDARD
2. **Risk identification**
3. **Coordination with policy provisions**
   - Settle claims by terms and condition of policy– unless policy refers us outside

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Contract Issues

- When do we find out about many contracts?
- Contractor have a large appetite for risk…. until it happens
- Office procedure for contract review
  - Letter of Engagement
  - Disclaimer Letter

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Review of Insured's Contracts

- E& O Question of the Day:

Should we review Contracts for our Clients?

- "Our Agency has, upon your request, reviewed the contract indicated above. Specifically, we reviewed only the insurance requirements in Section __."

Review of Insured's Contracts

- "In performing this review, our Agency is not providing legal advice or a legal opinion concerning any portion of the contract.
- In addition, our Agency is not undertaking to identify all potential liabilities that may arise under this contract.
- This review is provided for your information, and should not be relied upon by third parties. Any descriptions of the insurance coverages are subject to the terms, conditions, exclusions, and other provisions of the policies and any applicable regulations, rating rules or plans."

Review of Insured's Contracts

- "The scope of our review was to determine if the current insurance program which you have placed through our Agency addresses the types and amounts of insurance coverage referenced by the contract.
- We have identified the significant insurance obligations, and have attached a summary of the changes required in your current insurance program to meet the requirements of the contract.
- Upon your authorization, we will make the necessary changes in your insurance program. We will also be available to discuss any insurance requirements of the contract with your attorney, if desired."

1) What is contractual indemnity?

"One party agrees to assume another's liability loss exposures."

a) Purpose: allocate the risk of loss to the party most capable of controlling the loss.

2) What does contractual indemnity and hold harmless clauses do?
   a) Does not transfer torts
   b) Transfer financial responsibility for torts
   c) Risk Management Tool – Non Insurance Transfer
   d) Indemnity is a contract to save one party from the financial consequences of the conduct of the parties or some other parties.

Is there is difference between a Hold Harmless Agreement and an Indemnity Agreement ?

Houston……We have a Problem !

- Insured is a Tenant in Commercial Building
- Per lease, Tenant adds LL/PM as AI, PNC
- Customer pushes shopping cart off side of upper level parking garage and severely injures a pedestrian
- Everyone is sued. LL/PM tender to Tenant
- Tenant's carrier pays its limits -$11M
- LL and PM insurer has to pay the rest of the claim - $20M
- LL/PM exercises the Indemnity agreement signed by the Tenant
- Tenant has no limits left
- Bankruptcy

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Hold Harmless vs. Indemnify Differences ?

- Hold Harmless means an agreement to **assume** the financial consequences of another's liability. May no harm come to me.
- Indemnify means to **reimburse** damages and defense costs; *it does not include a duty to defend,* unless the indemnitee says in its contract.

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- In particular, two recent decisions have indicated that a duty to *indemnify* obligates the indemnitor to reimburse the indemnitee, while a duty to *hold harmless* limits the indemnitee's liability and effectively bars the indemnitor from bringing suit against the indemnitee.

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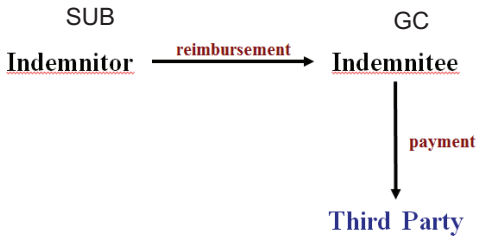
- Thus, in other words, indemnification deals with third party claims against the indemnitee:



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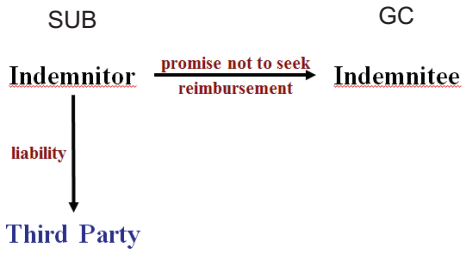
- In contrast, hold harmless deals with the indemnitor's claims against the indemnitee:



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Five Steps of Risk Management

- **Risk Identification** – Most Important Step
- Risk Analysis
- Risk Control
- Risk Finance *
- Risk Administration

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Risk Management

d. Risk Finance – Step #4
- Retention
  - Active
  - Passive
- Transfer
  - Insurance
  - Non-Insurance

e. Risk Administration – Step #5
- Monitor
- Adjust

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b. Contractual Liability Exclusion

1) What is contractual indemnity?

"One party agrees to assume another's liability loss exposures."

a) Purpose: allocate the risk of loss to the party most capable of controlling the loss.

2) What does contractual indemnity and hold harmless clauses do?

a) Does not transfer torts
b) Transfer financial responsibility for torts
c) Risk Management Tool – **Non Insurance Transfer**
d) Indemnity is a contract to save one party from the **financial consequences** of the conduct of the parties or some other parties.

Is there is difference between a Hold Harmless Agreement and an Indemnity Agreement ?

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Key Indemnity Definitions

a) Indemnify Definition

To be made whole again

To be put back in the position you were prior to the damage/injury

b) Indemnitor Definition

The person or entity accepting financial responsibility

The party making the promise to indemnify

I have to sign this contract "OR" I don't get the job (underdog-sub)

c) Indemnitee Definition

The party benefiting from the promise

Party in a position of power (GC)

The person or entity attempting to transfer financial responsibility

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- Indemnity Agreements are powerful
- Can transcend Common Law
- Whatever the competent parties agree to

- General Contractor hires a Sub Paving Contractor to pave the parking lot. Sub agrees to contractually indemnify and hold harmless GC for any injury or damage that results, regardless of cause.
- As traffic begins to jam up near paving site, an employee of GC begins to direct traffic.
- GC's employee directs two cars into each other, causing damage and injury. GC is sued, and tenders claim to Sub.
- Sub would not be liable in absence of a contract for this damage/injury.
- Any coverage for liability Sub incurs, would come as an "insured contract" via an exception to exclusion.

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- Important Observations
  1. **Indemnitee is *not* free of the obligation to the injured party.**
     - Whether or not the indemnitor is able to respond to its agreement, the indemnitee is still responsible.
     - Most indemnitees require insurance to respond to the indemnitor's assumption of the cost of liability.
  2. **Transfer of risk usually independent of insurance**
     - Indemnity agreements stand alone, not usually governed by insurance
     - Obligation of the indemnitor is not diminished by the lack of proper insurance coverage.
     - Damages are still owed even if not covered by insurance.

  – **Indemnity agreements are NOT insurance**
  – **Indemnitees are NOT insureds**

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Three Types of Indemnity Agreements Simplified

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1. **Limited**
   - I did it, I pay.
   - You did it, you pay unless you acted on my orders
2. **Intermediate**
   - I did it, I pay
   - You did it; I pay if you acted on my orders
   - We did it; I pay
3. **Broad**
   - You did it, I pay!

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Different Types of Indemnity Clauses

a) Comparative Indemnification or **Limited** Indemnity Clause

b) General Indemnification or **Intermediate** Indemnity Clause [partial or complete]

c) Specific Indemnification or **Broad** Form Indemnity Clause

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Indemnity Agreements

International Risk Management Institute

Exhibit 3.1
Indemnity Agreements

Type	Liability Assumed by Indemnitor		
	Indemnitor's Negligence	Indemnitee's Contributory Negligence	Indemnitee's Sole Negligence
Broad Form[1]	✓	✓	✓
Intermediate-Form[2]	✓	✓	
Comparative (Limited) Form[3]	✓		

[1] Most states prohibit or severely limit the transfer of liability for one's own negligence in a construction contract, which in turn limits the use of broad form indemnity provisions.
[2] The obligation to indemnify is not limited by the degree of the indemnitee's contribution, as long as the indemnitor's negligence was a contributory cause of the loss.
[3] This type of agreement mirrors the obligations imposed by tort law.

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Types of Agreements

- **Limited Form-** Court determines Steve is 70% at fault and Liz is 30% at fault. Steve will HH Liz and pay his fault –70%.
- **Intermediate Form-** Court determines Steve is 10% at fault and Liz is 90% at fault. Steve will HH Liz and pay 100%.
- **Broad Form-** Court determines Steve is 0% at fault and Liz is 100% at fault. Steve will HH Liz and pay 100%, if permitted.

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Two Types of Intermediate Indemnity Agreements

Intermediate: Subcontractor assumes responsibility for its own sole negligence or partial negligence. If the owner/general contractor is solely at fault, there is no indemnity. There are two types of intermediate indemnity:

- *(a)* ***Full Indemnity***: If the subcontractor is partially at fault, he pays all the damages. This allows an owner/general contractor who was 99 percent at fault to receive indemnity from the subcontractor who was only 1 percent at fault.
- *(b)* ***Partial Indemnity***: Indemnity is on a sliding scale based on the extent of the subcontractor's negligence. This sets a cap on the amount of indemnity that can be had. If the owner/general contractor is 51 percent at fault it is indemnified only for 49% of the total damages.

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Broad Form Indemnity

- Broad Form Indemnity requires one party to assume the obligation to pay for another party's liability even though that other party is solely at fault. One of the key indicators an indemnity agreement is Broad Form is the inclusion of the phrase "**caused in whole or in part**."

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Types of Clauses: Broad Form

BakerHostetler

- **Broad form:** Indemnitor promises to indemnify the indemnitee regardless of fault

  Including for the indemnitee's sole negligence

  I.e. Subcontractor agrees to indemnify the General Contractor for the General Contractor's sole fault and negligence

- Example:

  The Subcontractor shall indemnify and hold harmless the Owner and Contractor and all their agents and employees from and against all claims, damages, losses and expenses, including attorney's fees, arising out of or resulting from the performance of the Subcontractor's work regardless of fault, whether it is ***caused in whole or in part*** by the negligence of Owner or Contractor. It is specifically understood that this indemnity shall be interpreted as indemnifying Owner, Contractor and their agents and representatives from their own sole and/or partial negligence.

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Intermediate Form Indemnity

- Intermediate Form indemnifies a party for its own negligence, except if that party is solely at fault. A key indicator an indemnity agreement is Intermediate Form is the inclusion of the phrase **"caused in part**."
- *The omission of the word "whole" is what keeps this from being Broad Form*, and what is left being covered is the partial negligence of the party seeking indemnity. Granted, partial negligence can be as much as 99%.

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Types of Clauses: Intermediate Form

BakerHostetler

- **Intermediate Form:** Indemnitor assumes responsibility for its own sole negligence or partial negligence. If the indemnitee is solely at fault, there is no indemnity.

  Shifts the risk where both parties have, in some percentage, contributed to the loss

  I.e. Both parties are jointly or contributorily at fault / responsible for the loss

- Example: To the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and hold harmless the Owner, Contractor, … their agents, consultants, and employees ... from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Subcontractor's work, …, but only to the extent caused in whole or in part by the negligent acts or omissions of the Subcontractor, regardless of whether or not such a claim, damage, loss or expense is **caused in part** by a party indemnified hereunder. This clause is not intended to indemnify and indemnified party for claims, damages, losses and expenses caused by the sole negligence of the indemnitee.

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Limited Form Indemnity

- Limited Form is not really indemnity at all since it does not indemnify a party for its own negligence. The key phrase to look out for with Limited Form is “only to the extent.”

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Types of Clauses: Limited Form

BakerHostetler

- **Limited Form:** Indemnitor assumes responsibility for its own sole negligence. There is no protection for an indemnitee who is partially or contributorily at fault.
  - Most favorable clause for subcontractors
  - Subcontractor only agrees to indemnify the General Contractor for the Subcontractor's own sole fault / negligence
- Example: The Subcontractor shall indemnify, defend and hold harmless the Owner, Contractor, …, their agents, consultants and employees from and against all claims, losses, costs and damages, including but not limited to attorney's fees, pertaining to the performance of the Subcontractor's work, …, **but only to the extent** solely caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's subcontractors, or anyone directly or indirectly employed by them.

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Enforceability – Court Interpretations will be based upon:

a) The intent of the parties which is the primary concern.

b) The wording of the contract.

c) Does the indemnification fit the circumstances of the injury based on evidence, documentation and testimony.

d) State regulations and statutes vary regarding anti-indemnification laws in Construction Contracts.

Many state exceptions apply to the table shown below. Please always consult with legal counsel, for current legal cases and findings.

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Types of Anti-Indemnity Statutes

- Construction
- Oilfield and Gas
- Maritime
- Environmental
- Motor Carrier / Transportation

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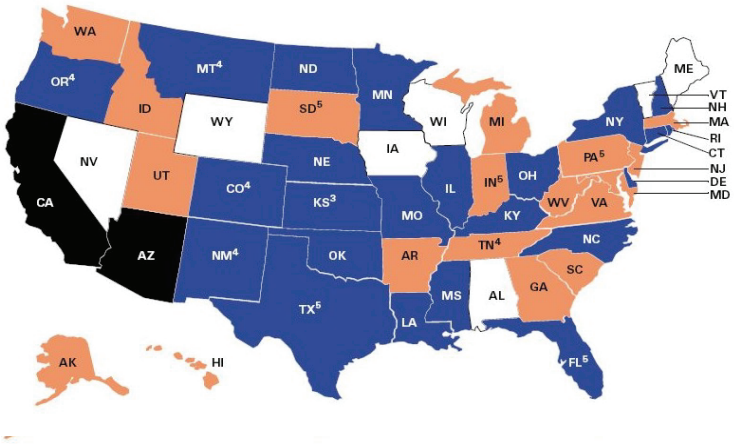
International Risk Management Institute- Older

CONSTRUCTION ANTI – INDEMNITY STATUTES



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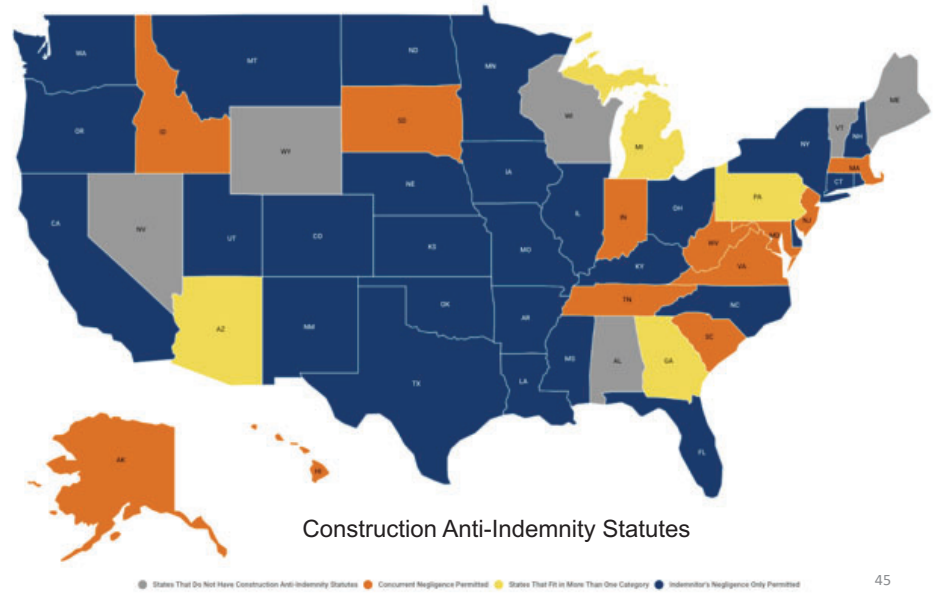
International Risk Management Institute- 2024

Construction Anti-Indemnity Statutes Quick Reference Guide



Construction Anti-Indemnity Statutes

States That Do Not Have Construction Anti-Indemnity Statutes · Concurrent Negligence Permitted · States That Fit in More Than One Category · Indemnitor's Negligence Only Permitted

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Maryland

Indemnity Allowed: Concurrent negligence

Md. Cts. & Jud. Proc. Code § 5-401 (2014)

The Maryland anti-indemnity statute applies to all construction contracts. No specific mention is made of design contracts or design professionals. Indemnity is permitted for the indemnitor's own negligence and concurrent negligence of the indemnitor and indemnitee. However, no indemnification is allowed for the sole negligence of the indemnitee, or the agents or employees of the indemnitee. The statute does not affect the validity of any insurance contract, workers compensation, or any other agreement issued by an insurer.

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New Jersey

Indemnity Allowed: Concurrent negligence

N.J. Stat. Ann – 2A:40A–1

N.J. Stat. Ann. – 2A:40A–2

New Jersey's anti-indemnity provisions are contained in two separate sections of the state statutes. Section 2A:40A–1 restricts permissible indemnity in all *construction and alteration contracts*. **The only indemnification permitted is for the indemnitor's own negligence and concurrent negligence of the indemnitor and indemnitee.** [intermediate form]

These restrictions do not affect the validity of any insurance contract, workers compensation, or agreement issued by an *authorized* insurer.

Section 2A:40A–2 pertains to all agreements where the indemnitee is a *design professional* and liability arises out of design services. Permissible indemnity under contracts of this kind is also limited to the indemnitor's own negligence and concurrent negligence of indemnitee and indemnitor.

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Pennsylvania

Indemnity Allowed: Concurrent negligence (with exceptions)

- *Pa. Stat. Tit. 68 § 491* (2014)
- The Pennsylvania anti-indemnity statute applies to all ***design contracts*** *i*n which a design professional is the indemnitee. The statute permits indemnity with respect to the indemnitor's own negligence.
- It also permits concurrent-negligence indemnity when the negligence is not related to design or supervision, but not for the indemnitee's concurrent negligence arising out of design and out of supervision where the negligent supervision was the primary cause of the injury or damage.
- ***Indemnity for the indemnitee's sole negligence is not permitted*.**

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Generally speaking, indemnification agreements are enforceable in Pennsylvania. Although Pennsylvania has what is known as an anti-indemnification statute, it is very limited in its scope. The statute only invalidates agreements entered into by owners, contractors or suppliers under which architects, engineers, or surveyors are indemnified for damages or defense costs arising out of (1) their preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or (2) the giving or failing to give instructions or directions provided that failure or giving of directions or instructions is the "primary cause" of the damage. 68 P.S. §491.

→ Unlike some jurisdictions, there is no statutory prohibition with respect to indemnification agreements in connection with construction projects in general, or with respect to indemnification agreements calling for a party to be indemnified for its own acts of negligence.

However, agreements to indemnify another party for liability stemming from its own acts of negligence are disfavored and are strictly construed against the party which drafted them. Hershey Foods Corp. v. General Electric Service Co., 619 A.2d 285 (Pa.Super. 1992).

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New York

Indemnity Allowed: Indemnitor's negligence

N.Y. Gen. Oblig. Law – 5–322.1
N.Y. Gen. Oblig. Law – 5–324

Section 5–322.1 of the New York anti-indemnity statute applies to all construction contracts, without specific mention of design contracts or design professionals. **It permits indemnity only to the extent of the indemnitor's own negligence**, *[limited form only responsible for your own negligence],*

and **does not affect the validity of any insurance contract, workers compensation agreement, or other agreement issued by an *admitted* insurer.**

Section 5–324 applies to all agreements where the indemnitee is a **design professional** seeking indemnity for liability arising out of defective maps, plans, designs or specifications. It permits indemnity only to the extent of the indemnitor's own negligence.

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Florida

SDV Law- 2018

State	Contracts Affected	Type of Indemnity Allowed			Statute	Application to Additional Insured
		Sole Negligence of Indemnitee	Concurrent Negligence			
			Full Indemnity	Partial Indemnity		
 Florida	All Construction and Design Contracts (see exception per FLA. STAT. § 725.08)	No, unless contract contains 1) monetary limit on the extent of the indemnification that bears a reasonable commercial relationship to the contract, and 2) is a part of the specification and bid documents.	No, unless contract contains 1) monetary limit on the extent of the indemnification that bears a reasonable commercial relationship to the contract, and 2) is a part of the specification and bid documents.	Yes	FLA. STAT. § 725.06. FLA. STAT. § 725.06 (2), (3) provides that public agency construction contracts may require the other party to indemnify and hold harmless to the extent of loss caused by the indemnifying party's negligence, recklessness, or intentional wrongful conduct, but otherwise it is not permitted. FLA. STAT. § 725.08. Allows a public agency to require a design professional to hold that agency harmless for design professional's negligence, recklessness or intentional wrongful conduct.	No *See Cone Bros. Contracting Co. v. Ashland-Warren, Inc.*, 458 So.2d 851 (Fla. Dist. Ct. App. 1984).

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FLORIDA INDEMNIFICATION LIMITATION IN SECTION 725.06 DOES NOT APPLY TO UTILITY / HORIZONTAL-TYPE PROJECTS

Posted on February 2, 2018 by David Adelstein

- Section 725.06 pertains to agreements in connection with "**any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith...**" If the contract requires the indemnitor (party giving the indemnification) to indemnify the indemnitee (party receiving the indemnification) for the indemnitee's own negligence, the indemnification provision is unenforceable *unless it contains a* "**monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any.**" It is important to read the statute when preparing and dealing with a contractual indemnification provision.

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- In a recent case, *Blok Builders, LLC v. Katryniok*, 43 Fla. L. Weekly D253b (Fla. 4th DCA 2018), the indemnitor argued the indemnification provision was not enforceable. Here, a utility company hired a contractor to improve its telecommunications services. Part of the work required the contractor to provide access to preexisting underground telecommunication lines located in neighborhood easements. The contractor hired a subcontractor to perform the required excavation to access the preexisting underground lines. This work resulted in a personal injury action where the injured person sued the contractor, subcontractor, and utility company.
- The contractor's subcontract with the subcontractor required the subcontractor to indemnify the contractor and its directors, officers, employees, and agents, from loss caused **wholly or partially** by the subcontractor. Thus, the indemnification provision required the subcontractor to indemnify the contractor for losses that were caused partially by the contractor's own negligence (otherwise, the indemnification provision would be limited to losses solely attributable to the subcontractor).

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- The contractor and utility owner both claimed that the subcontractor was responsible for contractually indemnifying them for all losses including attorney's fees. The subcontractor argued that the indemnification provision should be deemed unenforceable because it did not contain a monetary limitation on the extent of the indemnification.
- The appellate court affirmed the trial court that the indemnification provision as to the contractor was enforceable because the statute (s. 725.06) did not apply. **That is right, the statute did not apply because the statute does not apply to utility contracts.** What? **That is right, the appellate court held that the statute applies to "any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance" so if the excavation is not connected to a building, structure, appurtenance, or appliance, it does not apply**.
- Since the project dealt with underground utility lines, s. 725.06 did not apply so the contract did not need to contain a monetary limitation on the indemnification provision.

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- **Wisconsin Construction Anti-Indemnity Statute (As of June 2018)**
- There is no Wisconsin anti-indemnity statute. Although Wis. Stat. Ann. § 895.447 (2015) renders void any provision to limit or eliminate tort liability in a construction contract, Wisconsin courts have held that the statute does not apply to indemnity clauses. *See Gerdmann v. U.S. Fire Ins. Co.,* 119 Wis. 2d 367, 350 N.W.2d 730 (Wis. Ct. App. 1984) (indemnity clause was not void under § 895.49 because it did not attempt to relieve the owner from liability but, instead, required the contractor to insure it against loss that stemmed from liability). Applying common law as opposed to statutory law, Wisconsin courts have enforced broad form or intermediate form indemnity clauses in which the indemnitee seeks indemnity for its own negligence, holding that they do not violate public policy. Nevertheless, in order to be enforceable, the contract language must clearly and unequivocally state the intent to indemnify the indemnitee for its own negligence in the clause.
- *Deminsky v. Arlington Plastics Mach.,* 259 Wis. 2d 587, 657 N.W.2d 411 (2003); *Mikula v. Miller Brewing Co.,* 701 N.W.2d 613 (Wis. Ct. App. 2005); *Dykstra v. Arthur G. McKee & Co.,* 100 Wis. 2d 120, 301 N.W.2d 201 (1981); *Anderson v. Con/Spec. Corp.,* 214 Wis. 2d 591, 571 N.W.2d 924 (Wis. Ct. App. 1997).

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STATE	PROHIBITS BROAD INDEMNITY	PROHIBITS INTERMEDIATE INDEMNITY	ADDITIONAL INSURED PROHIBITED	APPLICATION	STATUTE	COMMENTS
PENNSYLVANIA				Architects, Engineers and Surveyors	68 P.S. § 491	Anti-indemnity statute limited to invalidating agreements in which architects, engineers, or surveyors are indemnified for preparation or approval of drawings, designs, or specifications or the giving of instructions or directions which cause damage. 68 P.S. § 491. No statutory prohibition with respect to indemnification agreements in connection with construction projects in general, or with respect to indemnification agreements calling for a party to be indemnified for its own acts of negligence. *Hutchinson v. Sunbeam Coal Corp.*, 519 A.2d 385, 390 (Pa. 1986).
RHODE ISLAND		X		Construction Contracts or Agreements	R.I. Gen. Law § 6-34-1	Not applicable to purchasing insurance for an entity's protection, or to construction bonds.
TEXAS		X	X		Tex. Ins. Code §§ 151.102, 151.103	Only applicable to registered architects or licensed engineers. Section 151.102, hidden in Tex. Ins. Code, invalidates indemnity in construction contracts. This has small effect in personal injury cases because statute allows indemnity against employer of injured employee. Most construction contracts are written such that employer provides indemnification for injuries to its employees.
UTAH		X		Construction Contracts and Agreements	Utah Code § 13-8-1	Indemnification provisions between owner and construction parties will result in pro-rata proportionate share of fault.

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Texas

Here is a brief synopsis of the Texas anti-indemnity statute, as amended.

- House Bill 2093 revises Texas's anti-indemnity law. Agreements in construction contracts executed after *January 1, 2012,* are void and unenforceable to the extent that the agreement requires an indemnitor to indemnify an indemnitee for a claim caused by the *negligence or fault* of the indemnitee or any party under the control of the indemnitee. The bill contains an *exception* permitting an indemnitor to indemnify an indemnitee against a claim for "the bodily injury or death of an *employee* of the indemnitor, its agent, or its subcontractor of any tier."
- The bill also *prohibits* provisions in construction contracts that require the purchase of *additional insured coverage* to the extent that it provides coverage that is *void under the bill.* [Emphasis added.]

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CALIFORNIA

Has it's own system of classifying Indemnity Agreements

TYPE I, TYPE II, and TYPE III

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NEWSFLASH !!

- The California Supreme Court does NOT recognize Type I, Type II and Type III indemnity agreements !
- Like all other states, they recognize:
  - LIMITED
  - INTERMEDIATE
  - BROAD

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STATE	PROHIBITS BROAD INDEMNITY	PROHIBITS INTERMEDIATE INDEMNITY	ADDITIONAL INSURED PROHIBITED	APPLICATION	STATUTE	COMMENTS
CALIFORNIA	X	X		Construction Contracts	Civ. Code §§ 2782 New § 2782.5 also prevents indemnity of GC, CM, or other subcontractor for "active negligence." § 2782(a)	Applicable to contracts entered into after January 1, 2013. Neither public nor private owner can force subcontractor to indemnify or insure another party for that other party's "active negligence or willful misconduct," for defects in the project's design provided to the subcontractor, or for claims arising outside the scope of the subcontractor's work. (Exceptions: (1) private owner acting as contractor or supplying materials/equipment § 2782(c)(1), or (2) private owner performing improvement to sing-family dwelling § 2782(c)(3). Indemnity for sole negligence still applies to these two exceptions). List of inapplicable circumstances to which new § 2782.05(a) does not apply found in § 2782.05(b). § 2782(a) appears to narrow, but not completely prohibit circumstances under which subcontractor can be required to name a GC, CM, or another SC as additional insured.

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California Anti Indemnity Statute Changes

Revised 1/1/13 – SB 474

- Now applies to a broader group of people: Contractors, subcontractors, or suppliers of good and services
- Now applies to agreements for renovations, utility, water, sewer, oil, and gas lines
- No Type I indemnity agreements
  - Cannot be indemnified or defended for your ACTIVE NEGLIGENCE or WILLFUL MISCONDUCT
  - **Only Passive negligence**- failure to identify dangerous situation; no active involvement
  - Any agreement attempting to do so, will be null and void
  - Must arise out of the obligations/work set forth in the contract
- Applies to all construction contracts for Private Commercial Projects entered into on or after 1/1/13 (previous law already applied to public projects)
- There are exceptions:
  - Residential construction
  - Design Professionals
  - WRAP-UP projects (OCIPS/CCIPS)
  - Owners of privately owned real property to be improved, who are not acting as a contractor or supplier
- The law is attempting to level the playing field, and shift the risk from the SUB, back to higher tier participants.

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Type I Classification

In the first classification — referred to as a Type I clause — the indemnitor (the subcontractor in this example) is liable for loss or damage to the indemnitee (the contractor) regardless of whose fault it was (the contractor's, the subcontractor's, or both), except in cases where the indemnitee exhibited active negligence or willful misconduct.

Typical wording might say that "the subcontractor agrees to hold the general contractor free and harmless of any loss or liability except for loss or liability caused by the general contractor's sole willful conduct or active negligence."

Type II Classification

The next classification, Type II, is also known as the general indemnity clause. Type II holds the indemnitor liable for loss or damage resulting from the indemnitee's passive negligence only. Passive negligence and active negligence have been defined by the California Supreme Court in this way:

"Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform."

Type III Classification

The final classification, Type III, protects the indemnitor from paying for any loss or damage caused by the indemnitee. The indemnitor is liable only for any loss or damage they cause.

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The third type of provision only indemnifies the indemnitee for liability caused by the indemnitor if the indemnitee is in no respect responsible for the indemnified injury. Under a Type III provision, *any* negligence on the part of the indemnitee city will bar indemnification whether or not the contractor is also at fault, even if primarily at fault.[9] Repeat: if the city is *in any respect* at fault, it cannot seek indemnification under a Type III provision. Hence, Type III indemnity clauses should be avoided as they generally provide insufficient protection.

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California Construction Anti-Indemnity Statute

(As of October 2023)

Three different sections of the California Civil Code discuss indemnity provisions in construction contracts (collectively "the California construction anti-indemnity statute"). The following provides a summary of the California construction anti-indemnity statute.

Statute:*Cal. Civ. Code § 2782* (2023); *Cal. Civ. Code § 2782.05* (2023); *Cal. Civ. Code § 2782.8* (2023)

Applies to: Construction (Cal. Civ. Code §§ 2782 and 2782.05) and design (Cal. Civ. Code § 2782.8) contracts

Maximum Indemnity Allowed: Limited form (indemnitor's negligence)

Exceptions:

- Numerous exceptions exist. Some of the exceptions are discussed in the "Additional Details." Please refer to the above referenced statutes, as well as Cal. Civ. Code §§ 2782.05, 2782.1, 2782.2, 2782.5, and 2782.6 for all of the exceptions.

Contains an Insurance Savings Clause? Yes (for construction contracts)

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Closes Additional Insured Loophole? Yes (for construction contracts)

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This statute seeks to apply comparative fault principles to construction contracts in an effort make all parties responsible for their own conduct. This will result in a significant impact upon a general contractor's burden of proof and ability to support a claim for defense and indemnification. Under traditional Type I indemnity provisions, the indemnity provision would require the subcontractor to defend and indemnify the general contractor for not only the subcontractor's own negligence, but also for the general contractor's negligence. Civil Code § 2782.05 will now limit the subcontractor's defense and indemnity obligations to its proportionate share of fault. For example, if a general contractor can only establish that a given subcontractor was 1% at fault for damages related to a given claim, the subcontractor is only obligated to fund 1% of the general contractor's defense and indemnification. Moreover, if the general contractor is found to have been actively negligent, it will be precluded from receiving any defense or indemnification.

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THE DISTINCTION BETWEEN "ACTIVE" AND "PASSIVE" NEGLIGENCE

Given the language used in Civil Code § 2782.05, understanding the distinctions between "active" and "passive" negligence is essential to evaluating future liability exposure for all construction contracts starting January 1, 2013. The Supreme Court of California has described the distinction as follows:

"Passive negligence is found in mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty imposed by law. Active negligence, on the other hand, is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform. 'The crux of the inquiry is to determine whether there is participation in some manner by the person seeking indemnity in the conduct or omission which caused the injury beyond the mere failure to perform a duty imposed upon him by law.'" Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 629.

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According to the construction plan, two parallel trenches were to be dug for the installation of sewer pipes. Shortly after the excavation of both trenches, two Pylon employees entered the trench to work. Although shoring material was available, the employees proceeded into the trench without shoring it because it was easier and faster than waiting for supports to be installed. Unfortunately, the trench caved in, killing one worker and injuring another. The surviving worker and the heirs of the deceased worker brought suit against Rossmoor (the owner) for personal injury and wrongful death and recovered a sizable verdict. Rossmoor then sought indemnity from Pylon for the amount of the judgment. A significant issue raised at trial was whether Rossmoor, the party seeking indemnification, was actively or passively negligent.

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Pylon, the contractor, argued that Rossmoor was actively negligent because Rossmoor hired the party who prepared the excavation plans, participated in preparing the plans, had numerous safety personnel present at the project, and should have known that the existence of parallel trenches created an unsafe condition. Rossmoor countered that it was not actively negligent because it was Pylon's failure to shore the trench in violation of state safety laws which was the cause of the accident, and at most, it was only passively negligent. Ultimately, the Court agreed with Rossmoor and concluded that the contractor was actively negligent, while the Rossmoor was only passively negligent. As a result, Pylon owed Rossmoor indemnity.

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CALIFORNIA LAW WILL BE APPLIED

Civil Code § 2782.05 provides that if the property on which the construction is performed is located in California, then California law will apply regardless of any choice-of-law provision or place of execution of the contract. This type of choice-of-law mandate is similarly provided in multiple states and seeks to preclude a party with superior bargaining power from selecting the law of the state most favorable to its position. In essence, if you want to participate in construction in California, you must be bound by its laws.

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ADDITIONAL INSURED COVERAGE IS LIMITED TO PROPORTION OF FAULT

Civil Code § 2782.05 precludes full defense and indemnity from any additional insured carrier. Alternatively, the additional insured carrier's defense obligations will likely be limited to the named insured's actual fault. The question remains, however, if the fault must be proven before the defense obligation is triggered. We will likely see a great deal of litigation on the coverage front with this new law.

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Anti-Indemnity Statutes

- Three types of States
  - Some states bar sole negligence
  - Some states allow sole negligence
  - Some states bar sole negligence……

EXCEPT…. when Insurance applies

if provided by an authorized, admitted (NY-sole or partial fault) or licensed insurer [not self-insurers] [Cover can be written with a non-admitted carrier if contract is not sole fault]

*****The requirement to procure Insurance coverage is separate and distinct from the requirement to indemnify, not governed by Anti-Indemnity Statutes*****

SAVINGS CLAUSE… " To the fullest extent permitted by Law….."

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Insurance Exception..

"Most anti-indemnity statutes specifically state that they do not apply to insurance requirements in construction or design contracts.

In other words, even though anti-indemnity statutes prohibit indemnification of the indemnitee for its own negligence, they do not prohibit requiring an indemnitor to provide insurance that exceeds the allowable scope of indemnity."

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Risk Transfer Provisions

- Insurance Provisions and Anti-Indemnity Statutes
  - Despite statutory restrictions involving indemnity agreements, such restrictions don't always apply to insurance
    - Indemnitor may still be required to provide insurance.

Example: Additional insured status for indemnitor may be broad enough to respond to the sole negligence of the indemnitee despite statutory prohibition involving indemnification agreements.

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ISO AI Endorsements 2013 Changes- Alignment of Coverage

- **All of the ISO additional insured endorsements are being revised to better align coverage in the endorsement to the coverage required in the underlying written contract and the coverage legally enforceable in that jurisdiction.**
- **First,** language is added to only afford coverage to an additional insured within the constraints of law. In other words, if anti-indemnity statutes, for example, restrict the extent of coverage permissible, the additional insured will be limited to that coverage.
- **Second**, language is added to restrict the coverage afforded an additional insured to the coverage requested in the underlying written contract. For example, if the written contract does not require personal and advertising injury liability coverage, then this coverage will not be applicable to the additional insured.
- **Third,** language is added to restrict policy limits to the lesser of the amount required by the underlying written contract or the maximum amount available under the policy.

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STATES THAT APPLY ANTI-INDEMNITY RESTRICTIONS TO ADDITIONAL INSURED REQUIREMENTS

- California [Cal. Civil Code 2782.05(b)(6)]
- Colorado [Col. Rev. Stat. § 13–21–111.5(6)(d)(I)]
- Kansas [Kan. Stat. Ann. 16–121(c)]
- Montana [Mont. Code Ann. § 28–2–2111]
- New Mexico [N.M. Stat. §56–7–1(F)]
- Oklahoma [Okla. Stat. §15–221(b)]
- Oregon [ORS § 30.140]
- Texas [Tex. Ins. Code §151.104]
- Utah [Utah Code Ann. §13–8–1]

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Connecticut

Indemnity Allowed: Indemnitor's negligence

Conn. Gen. Stat. – 52–572k

The Connecticut statute applies to construction contracts, making no specific mention of design contracts or indemnity pertaining to design professionals. **It permits indemnity only with respect to the indemnitor's [Sub's] own negligence**.
[limited form only responsible for your own negligence]

The law provides that it shall not affect the validity of any insurance contract, workers compensation agreement, or other agreement issued by a *licensed* insurer.

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Connecticut RR Claim

- Large Contractor does work for RR in Connecticut
- RR makes them sign indemnity agreement up to and including the RR's sole fault
- Contractor's attorney says go ahead and sign, CT anti indemnity statute prohibits sole negligence
- Contractor working on RR track, RR shuts down power on tracks so trains can't come through
- Forgot that Diesel trains don't need electrical power
- Huge accident -$4mil settlements
- RR pays and then exercises indemnity agreement with contractor
- Court says that CT does have an Anti-Indemnity statute that prohibits sole negligence, but a RR is subject to Federal regulation and Fed regulation trumps State Statute. It is a valid contract. Pay!

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

Exclusions: This insurance does not apply to:

b. Contractual Liability

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

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

(2) ***Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.."*** (doesn't say it has to be in writing)

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CGL "Insured Contract"

- EXCLUDED
  - – Exceptions to exclusions – "insured contracts"
    - **L**ease of Premises (except fire)
    - **E**asements
    - **A**greement with Municipality – [Ordinances / not work]
    - **S**idetrack Agreements
    - **E**levator Maintenance Agreements
    - **+ Tort Liability *assumed* in a contract (BI and PD only)**

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"Insured Contract" Means:

a. A contract for a **lease** of premises
b. A **sidetrack** agreement;
c. Any **easement** or license agreement
d. An obligation, as required by ordinance, to **indemnify a municipality**
e. An **elevator maintenance** agreement;

f. That part of **any other contract** or agreement *pertaining to your business* (including an indemnification of a municipality in connection with work performed for a municipality) under **which you *assume* the tort liability of another party to pay for "bodily injury" or "property damage" to a *third person* or organization.** Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

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

(1) That ***indemnifies*** a **railroad** for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing; [CG2417] + [CA 2070]

(2) That **indemnifies** an **architect, engineer or surveyor** for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities.

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BAP Exclusions

B. Exclusions

This insurance does not apply to any of the following:

1. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

2. Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

a. Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or

b. That the "insured" would have in the absence of the contract or agreement.

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BAP "Insured Contract"

- EXCLUDED
  - – Exceptions to exclusions – "insured contracts"
    - **L**ease
    - **E**asements
    - **A**greement with Municipality – [Ordinances / not work]
    - **S**idetrack Agreements
    - **+ Tort Liability *assumed* in a contract (BI and PD only)**
    - **++ Liability *assumed* in an auto rental or lease contract (no Property Damage to auto itself)**

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BAP "Insured Contract"

H. "Insured Contract"

1. A **lease** of premises;

2. A **sidetrack** agreement;

3. Any **easement** or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

4. An obligation, as required by ordinance, to **indemnify a municipality**, except in connection with work for a municipality;

5. **That part of any other contract** or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;

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BAP “Insured Contract” – cont’d

“Insured Contract”

6. <u>That part of any contract or agreement entered into as part of your business, pertaining to the rental or lease, by you or any of your "employees", of any "auto".</u>

<u>However</u>, such contract or agreement shall **<u>not</u>** be considered an "insured contract" to the extent that it obligates you or any of your "employees" to pay for <u>"property damage"</u> to any "auto" rented or leased by you or any of your "employees".

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BAP - “Insured Contract” – Cont’d.

An "insured contract" **<u>does not include</u>** that part of any contract or agreement:

a. **<u>That indemnifies a railroad</u>** for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing; [CA 2070 + CG 2417]

b. That pertains to the **<u>loan, lease or rental of an "auto"</u>** to you or any of your "employees", if the "auto" is loaned, leased or rented ***<u>with a driver</u>***; or [black car / limo]

c. That holds a person or organization engaged in the business of **<u>transporting property by "auto" for hire harmless</u>** for your use of a covered "auto" over a route or territory that person or organization is authorized to serve by public authority.

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"Incidental Contract Examples" "a-e"

IRMI

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CATEGORIES OF INSURED CONTRACTS:

(a) Lease of premises, except with respect to an obligation to indemnify for fire damage to the leased premises

(b) A sidetrack agreement

(c) Any easement or license agreement, except with respect to construction or demolition operations on or within 50 feet of a railroad

(d) An obligation under a city ordinance to indemnify a municipality, except in connection with work for a municipality

(e) An elevator maintenance agreement

(f) That part of any other contract related to the insured's business operations in which the insured assumes the *tort liability of another* party with respect to third-party "bodily injury" or "property damage"

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Note that with respect to items (a)–(e) in this list, the contractual liability coverage extends to liability assumed in such agreements without limitation on the source of liability, while in item (f) it extends only to tort liability.

Thus, under a lease agreement, the indemnitee (the party the contractor agrees to indemnify) does not have to be liable in tort for the coverage to apply. For example, suppose a contractor sublets space for its corporate offices from another tenant. In its lease with the original tenant, the contractor agrees to assume any liabilities the tenant had assumed in its contract with the landlord. The landlord is subsequently sued in connection with a bodily injury sustained within the contractor's premises. The landlord tenders the claim to the original tenant, who tenders it to the contractor. The contractor's liability for such a claim is not based in tort law, but in contract law. Nevertheless, the contractor's CGL policy would respond.

The definition of "insured contract" does not require that contracts be made in writing. Thus, liability assumed in verbal contracts or implied contracts is eligible for coverage.

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Nor is there any limitation with respect to the scope to the indemnitee's negligence. Therefore, as long as the loss arises out of a valid and enforceable "insured contract," coverage applies whether the claim is the result of the indemnitee's sole negligence, joint negligence, or contributory negligence.

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What Does Tort Liability Mean ?

Malecki on Insurance

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- Mutual Indemnity Agreements where each party is responsible to indemnifying the other
  - Any assumption of liability ? NO
  - Still an "insured contract" as a) through e) do not require assuming someone's tort liability
- **Railroad Easement divides insured's property. H/H in favor of RR. After a trucker leaves the mfgrs. premises and crosses the RR tracks it is struck broad side by a train, which causes the train and many boxcars to derail. If the RR seeks payment for its damage, there is coverage in light of the easement agreement, despite the lack of any tort liability allegation on the part of the insured.**
  [(f) does not apply]

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"Insured Contract" Means:

a. A contract for a **lease** of premises
b. A **sidetrack** agreement;
c. Any **easement** or license agreement
d. An obligation, as required by ordinance, to **indemnify a municipality**
e. An **elevator maintenance** agreement;

f. That part of **any other contract** or agreement *pertaining to your business* (including an indemnification of a municipality in connection with work performed for a municipality) under **which you *assume* the tort liability of another party to pay for "bodily injury" or "property damage" to a *third person* or organization.** Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

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Examples

- Computer Store Inc has a unendorsed CGL policy through your office. Will the CGL policy defend and indemnify Computer Store under contractual liability, if it agreed to indemnify and hold harmless the Landlord in its lease, for BI or PD to a third party?
- Will we cover Computer Store if they are sued for Breach of Warranty?
- Does Computer Store's CGL policy cover it for assuming all injuries and damages under a written contract ?
- If Computer Store enters into a contract and assumes another person's tort liability, does that other person automatically become an additional insured under Computer Store's CGL ?

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Example of Misunderstood Contractual Liability

- Lease requires insured to name Landlord as Additional Insured
- Insured does not comply – policy not endorsed
- Claim happens– landlord is sued
- LL tenders defense and indemnity to Tenants Ins Co who denies coverage
- Landlord's carrier settles claim and subrogates—same reply – no coverage
- Isn't the landlord automatically an additional insured since this is required in an "insured contract" ??
- Landlord points to contractual obligation in lease to name him AI

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NO !

- Please don't confuse blanket additional insured endorsements with contractual liability [tort liability assumed in an "insured contract"]
- Courts are very clear that liability assumed in a contract has nothing to do with the insured's failure to perform the contract [breach of contract]—such as the promise of the tenant to add the landlord as AI.
  - Olympic, Inc v. Providence Wash Ins. Co (1982)
- "A contractual duty to indemnify and hold harmless is not the legal equivalent of a duty to procure insurance coverage for that indemnity obligation"
  - A.F. Lusi, Inc v. Peerless Ins Co (2002)

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Indemnity

- Insurance coverage for an "insured contract" is solely concerned with an insured's obligation to hold harmless or indemnify another.
- If an insured agrees to indemnify another for BI or PD, and that indemnity agreement is part of an "insured contract", then in most situations, the contractual liability insurance of the CGL will pay what the insured must pay because of the indemnity agreement.
- Easiest way to explain an Indemnity agreement is to focus on the idea of "answering for the liability of another".

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Indemnity Agreements

- Indemnity agreements are NOT insurance
- Therefore indemnitees are NOT insureds
- Although Insurance may pay for obligations assumed in an indemnity agreement, insurance is completely independent of the obligation to indemnify.
- The Contractual obligation to add a person or organization as AI is NOT accomplished if that insurance obligation happens to be part of an "insured contract".
- We spend a lot of time drafting H/H agreements. How can you be sure Indemnitors have complied with your contractual Indemnification requirements?

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Indemnity vs. Additional Insured

- While an indemnitee may benefit from the indemnitors CGL policy, the indemnitee is not a party to the indemnitors insurance policy.
- Insureds, including additional insureds, are parties to the insurance contract and have rights afforded to that type of insured.
  - Right to tender a claim directly to the carrier
  - Right to demand defense
  - Right to sue insurer for breach of contract

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Contractual Liability Endorsements

- CG 2426 (0704) Amendment of Insured Contract Definition
- CG 2139 (0704) Contractual Liability Limitation

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CG 2426 Amendment of Insured Contract Definition

9. "Insured contract" means:

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

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NON-ISO CGL POLICY with built-in CG 24 26

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NON ISO CGL POLICY -- WILL NOT COVER THE TRANSFER OF SOLE NEGLIGENCE OF THE INDEMNITEE TO THE INDEMNITOR

PART f. of the definition of an "insured contract".

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

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CG 2139 Contractual Limitation

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

"Insured contract" means:

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

b. A **sidetrack** agreement;

c. Any **easement** or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An **agreement [**obligation], as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An **elevator** maintenance agreement.

f. ?????

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Current Contractual Coverages Available for Use

1. Unendorsed CGL providing broad form contractual--including sole fault (If permitted by law)
2. Indemnitees partial, but less than sole fault; by using CG 2426 (Amendment of IC definition)
3. Contractual liability that excludes assumption of another's tort liability, by using CG 2139 (Contractual Limitation Endt.)

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What impact do CG 2426 and CG 2139 have in New York ?

- CG 2426 has little impact -- IF there are no circumstances an indemnity agreement for sole negligence is enforceable.
  - CT Railroad Claim
- CG 2139 can be problematic. Labor Law, Section 240 imposes strict liability for injuries involving heights, often permits indemnity agreements to be enforced.
- CG 2139 removes (f) from the definition of "insured contract" can leave the indemnitor without any coverage for the enforcement of a valid indemnity agreement

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CG 2139 Example- NY

- Contractors employee is injured at jobsite (not a grave injury), and sues Owner for violation of Labor Law
- The typical approach is for Owner to seek recovery from the Contractor via contractual indemnification
- The owner would be liable, but not for negligence (based upon Statute), and thus the indemnity would be enforceable
- Without paragraph (f) of "insured contract" the Contractor would have no coverage.

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Defense of Indemnitee (GC)

9) Contractual liability defense expense

a) The Supplementary Payments section further discusses "damages" to include Attorney's Fees and clarifies if within or outside the limits of the policy.

b) Those defense expenses meeting all policy requirements – paid as supplemental expense [joke !]

c) Those defense expenses not meeting all policy requirements – paid within limits

d) Limits – Errors and Omission (E&O)

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CGL Wording Only

b. Contractual Liability

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

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

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. **Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or *for a party other than an insured* are deemed to be damages because of "bodily injury" or "property damage", provided:**

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

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Requirements for Direct Defense under Supplemental Payments

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

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Defense of Indemnitee

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments.

Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability, **such payments** will not be deemed to be damages for "bodily injury" and "property damage" and **will not reduce the limits of insurance**.

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Defense Obligation- One Word Makes a Big Difference

- "SUB agrees to hold harmless and *indemnify* GC for any loss, costs or expenses, including attorney fees and costs attributable to bodily injury or property damage, arising out of …"
- "SUB agrees to *defend ,* hold harmless and indemnify GC for any loss, costs or expenses, including attorney fees and costs attributable to bodily injury or property damage, arising out of …"

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Responsibility to Indemnify

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

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Contractual Liability Confusion

July 2009 IRMI
Craig Stanovich

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Indemnity Agreements

- Three parties involved:
  - Indemnitor (one making the promise)
  - Indemnitee (accepting/demanding the promise)
  - Third party who suffers BI or PD

  - While three people MUST be involved the first two are the only parties to the contract.
  - Third party is not a party to the contract and retain all of his/her legal rights against any party

- ***<u>If you don't' have three parties- you DO NOT have an indemnity agreement</u>***

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Indemnity Agreement Example

- Sole Tenant agrees (as part of lease) to hold harmless and indemnify the Landlord, for any and all injury or damage that takes place on the premises of the tenant, unless the injury or damage is caused by the sole negligence of the Landlord.

- Tenant = Indemnitor
- Landlord = Indemnitee

- Tenant has, in most instances, agreed to assume the liability of the Landlord, and be financially responsible for the landlord's negligence.
- The law would not normally impose liability on the Tenant for any of the Landlord's negligence
- The source of the Tenants liability to the Landlord is the Tenant's promise to pay for the Landlords legal liabability for any and all damage….

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Indemnity Agreement Example

- As a result of a small fire within the building, a patron of the tenant was seriously injured by burns and smoke inhalation. There was no damage to the building.
- The patron sued both the landlord and the tenant for his injuries.
- Remember all of the rights and remedies of the law are available to the third party (patron), despite the indemnity agreement between the landlord and tenant.
- At trial it was determined that the fire was caused by the Tenants employee, who failed to extinguish his cigarette properly, and the Tenant was found 20% negligent in causing the patrons injuries
- The landlord failed to maintain or keep in working order smoke detectors or the automatic sprinkler system, and was found 80% negligent.

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Indemnity Agreement Example

- The court awarded the patron $500,000
- The Tenant was required to pay $100,000
- The Landlord was required to pay $400,000

- Immediately after the trial, the landlord sought to enforce the indemnity agreement to recover the $400,000 of damages the landlord had to pay to the patron
- Since the tenant had “assumed the liability of the landlord”; the tenant was contractually obligated to indemnify the landlord and pay the landlord $400,000
  [as long as landlord was not solely negligent and the indemnity agreement was enforceable in that jurisdiction].

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Indemnity Agreement Example

- Notice that the Indemnity agreement involved three parties
  - Tenant
  - Landlord
  - Third Party – Patron
- Contractual liability was designed to pay on behalf of the Tenant, the $400,000 of damages the Tenant owed the Landlord, due to the Landlords liability for damages to the patron
- The liability of the Tenant WAS NOT IMPOSED BY LAW--- the court did impose liability on the Tenant, but only for $100,000.
- The Tenant agreed to be financially responsible for the actions of the Landlord--- including the Landlord's failure to maintain the alarm and sprinkler system, etc.

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Indemnity Agreement Example

- Notice that other than the reference to contractual liability insurance, there was no mention made of INSURANCE throughout this example.
- IMPORTANT:
  - Indemnity Agreements are NOT Insurance
  - Indemnitees are NOT Insured's

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Indemnity Agreement Example

- **The Tenant is liable to the Landlord for the $400,000 of damages regardless of whether the Tenant had purchased liability insurance or not.**
- Although an indemnitor, the Tenant is not an Insurance Company
- The indemnity agreement found in the real estate lease, [is a contract]; but it is not an Insurance Policy
- In short, the liability of the Tenant to the landlord was created by a contract that is not an insurance policy, and is outside of any insurance the Tenant may have purchased.
- Indemnity agreement are often referred to NON-INSURANCE Contractual Risk Transfer

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Indemnity Agreement Example

- IMPORTANT:
  - Indemnity Agreements are NOT Insurance
  - Indemnitees are NOT Insured's

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Contractual Liability Insurance

- In most cases the Tenant would have a CGL policy to fund the Tenant's liability to the Landlord, in this example.
- The unendorsed ISO CGL policy provides coverage for BI and PD for "liability for damages assumed in a contract or agreement that is an "insured contract", provided the BI or PD occurs after the execution of the contract.

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Contractual Liability Insurance

- Benefits of being AI are obvious, however less obvious may your need to pursue the indemnity agreement:
  - If you are not added as AI to Tenants CGL
  - You don't trigger blanket AI endorsement
  - Indemnity agreements don't have exclusions
  - Indemnity agreements don't have limits
  - Indemnity agreements may allow broader and/or greater recovery options over AI

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Modified Example

- In our previous illustration Tenant agreed to be responsible “any and all injury or damage that takes place on the premises of the tenant, unless the sole negligence of the Landlord.
- Would this be considered “…liability for damages assume under contract or agreement…?”
- Let’s assume a tornado caused substantial damage to the building that will cost the landlord $750,000 to repair it.
- Landlord hires a contractor and begins repairs and hands the bill to the Tenant for payment, with a letter referencing the above provision in the lease.
- Is this also an Indemnity agreement?
- If so, is this an “insured contract” ?

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Modified Example

- The agreement to accept responsibility for damage to the landlords building is NOT an indemnity agreement
- The landlord has no liability imposed on it by law to repair its own building.
- Since there is no liability, the costs to repair the building are not “damages from the viewpoint of the landlord.
- **More importantly, you can see the agreement doesn’t involve three persons. The landlord is NOT liable to a third person.**
- **Contractual Liability does not apply.**

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Policy Exclusions and Contractual Liability

- In our previous example, the more obvious answer is not whether the agreement is an "insured contract", but rather that the CGL policy excludes PD for property the named insured rents or occupies (CCC)
- **It is CRITICAL to remember that the contractual liability coverage that is provided via the exception to the contractual liability exclusion (ie. insured contract) IS SUBJECT TO EVERY OTHER EXCLUSION IN THE CGL POLICY**
- The notion that liability assumed in an "insured contract" overrides the exclusions in the CGL is erroneous.

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The Tavern Example

- Let's add one additional fact to our previous example, all other facts remain unchanged.
- Tenant operates a tavern and engaged in the business of selling and serving alcohol.
- Tenant over-serves a patron and in his intoxicated state injures another patron.
- Injured patron sues both Tenant and Landlord, alleging violation of Dram Shop Act.
- This case goes to trial and the judge makes the following awards:
  - Patron = $100,000
    - Tenant 50% responsible
    - Landlord 50% responsible (Dram Shop Act)

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The Tavern Example

- Landlord seeks recovery from Tenant via enforcement of the Indemnity agreement.
- Will the Tenants policy pay the landlord?
- Did we assume the liability of the landlord for damages to a third party ?
- Is this an “insured contract” ?
- While the tenant is liable to the landlord via the indemnity agreement, and the agreement is an “insured contract” the CGL will NOT respond; because of the Liquor exclusion in the CGL for the Tenants serving or selling of alcohol.
- Does that change the Tenant’s responsibility to the Landlord ?

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ISO CGL - CG 00 01 (0413)

c. Liquor Liability

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

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

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CGL Exclusions

d. Workers Compensation and Similar Laws Exclusion

e. Employer's Liability Exclusion
   1) Excluded Losses
      a) Consequential Bodily Injury
      b) Dual Capacity
      c) Third party complaints
      d) "Leased workers" are included as "employees", thus excluded parties.

2) Exception – Liability assumed under an "Insured Contract"

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Employers Liability Exclusion

ISO CGL (0413)

e. Employer's Liability

"Bodily injury" to:

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

(a) Employment by the insured; or

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

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

Dual capacity

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

Third Party Over Action

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

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Employers Liability Exclusion and Contractual Liability

- The CGL policy excludes liability for BI to its employees arising out of and during the course of employment by the insured.
- However, there is a very important exception to that exclusion, for liability assumed by the insured in an "insured contract".
- Many carriers are using endorsements to modify this exception, thereby prohibiting coverage where there has always been coverage

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Employers Liability Exclusion and Contractual Liability

- GC enters into a construction contract with SUB.
- Included in contract is an indemnity agreement, which states that SUB agrees to indemnify the GC for "*any injury or damage arising out of the work, except injury or damage that is caused by the sole negligence of the GC*"
- The SUB's employee is injured on the job, and after collecting Work Comp., the employee sues the GC for unsafe workplace conditions.
- Injured employee is awarded $200,000.
- The GC is found partially responsible in causing the injury, and his CGL policy pays the $200,000.
- GC then enforces the Indemnity agreement to be reimbursed the $200,000.
- Will the SUBS CGL policy pay ?

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Claim Example

- Trade Contractors enters into a construction contract with Gencon Construction Co.
- Trade agrees to defend and indemnify Gencon for bodily injury or property damage arising from Trade's own negligence or their joint negligence (i.e., an intermediate form indemnity agreement).
- One of Trade's employees is injured on the job, collects workers compensation benefits from Trade and sues Gencon, alleging that Gencon contributed to his injuries by failing to maintain a safe work site.
- The indemnity agreement in the construction contract would be considered an "insured contract" and Trade's obligation to indemnify Gencon would be covered by its CGL policy.

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Business Auto Policy and Third Party Over Actions

Insured Status for the Owner of a Leased or Rented Vehicle

IRMI –July 2010

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The renting or leasing of a vehicle to a commercial insured raises one issue in particular that is common to most contractual risk transfer situations: the possibility of a suit brought by an injured employee of one of the contracting parties against the other party—a third-party-over action, in other words.

When the risk transfer between the two parties to a vehicle lease includes additional insured status for the lessor, as it virtually always will because of the BAP "who is an insured" provision or the attachment of endorsement CA 20 01, the question of coverage for third-party-over claims against the lessor requires application of the BAP "separation of insureds" condition. That condition has been a subject of some litigation.

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In Centennial Ins. Co. v. Ryder Truck Rental, 149 F.3d 378 (5th Cir. 1998) [see CGLRptr], a federal circuit court of appeals ruled that third-party-over claims against a vehicle lessor are covered by virtue of the lessor's insured status under the lessee's business auto policy. Ryder leased a truck to a commercial insured and asked for additional insured status under the lessee's BAP, which was arranged.

An employee of the lessee was injured when he fell from the truck's loading ramp. The injured employee brought suit against Ryder for his injuries, and Ryder submitted the claim to the lessee's BAP insurer, as an additional insured under that policy.

The insurer denied coverage on the basis of the BAP exclusion applicable to bodily injury" to an "employee" of the "insured" arising out of and in the course of employment by the "insured."

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The insurer argued that the bodily injury in question was to an employee of the insured—the named insured lessee—and that the injury had occurred in the course of that employee's employment by the insured. Ryder, seeking coverage as an additional insured, argued that the exclusion applied only when the injury was to an employee of the insured seeking coverage under the policy, and that that was not the case with respect to the claim against it.

Ryder offered as support for this reading of the exclusion the BAP policy's definition of "insured," which contains the following "separation of insureds" language:

Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.

The circuit court agreed with Ryder.

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It found that a majority of courts asked to determine the effect of an automobile insurance policy's severability of interests clause worded like the separation of insureds provision (i.e., a severability of interests clause containing the phrase "against whom a claim or 'suit' is brought" or very similar language) on policy exclusions relating to workers compensation and employee injury like those in the [named insured's] policy have, for various reasons, construed the clause to limit the exclusions to instances where the insured claiming coverage is being sued by its employee.

The BAP exclusion pertaining to injury to an employee of the insured eliminated coverage only for the insured that employs the insured person.

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Watch Manuscript Endorsements

- Eliminating coverage for Contractual Liability assumed by insureds.
  - CG 2139

Unendorsed ISO CGL Language:

Employer's Liability

"Bodily injury" to:

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

(a) Employment by ***the*** insured; or

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

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CG 2139 Contractual Limitation

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

"Insured contract" means:

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

b. A **sidetrack** agreement;

c. Any **easement** or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An **agreement [**obligation], as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An **elevator** maintenance agreement.

f. ?????

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Watch Manuscript Exclusions

AI Endorsements

- Modifying EL exclusion to exclude injuries sustained by employees of ***ANY*** insured

Unendorsed ISO CGL Language:

Employer's Liability

"Bodily injury" to:

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

(a) Employment by ~~the~~ insured; or

(a) Employment by **ANY** Insured; or

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Danger in the surplus-lines zone

Dan Corbin, CPCU

PIA Resource Center

March 5, 2018

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- PIANJ has heard from members about a disturbing development with general liability policies written in the surplus-lines market. They are seeing third-party over exclusion endorsements routinely added on property owner policies written by surplus-lines insurers. This has significant implications for property owners when they are sued by a worker who is injured on their premises.
- Suppose a landlord or property owner hires a contractor to paint the building. The contractor's employee falls off a ladder provided by the property owner and injures himself. The employee files a lawsuit against the property owner alleging negligence in providing a defective ladder. As a provision of the painting contract, the contractor agreed to indemnify the property owner against liabilities that may arise from the performance of the work and name the property owner as additional insured. In this way, the property owner is attempting to shift potential liability onto the contractor.
- However, it frequently turns out the contractor has a third-party over exclusion on his commercial liability policy; that is, there is no coverage for workers injured at the premises. Consequently, the additional insured property owner has no coverage and the indemnification of the property owner is not funded by the contractor's policy. And, in the case of casual transactions, there typically is no service contract with an indemnification agreement or an obligation to provide additional insured status.

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- That's bad enough, but since surplus-lines insurers are adding these restrictive endorsements to the property owner's commercial liability policy, there is no coverage in the property owner's policy to back up the contractor's failed coverage. The result is that the property owner must rely on the contractor's other financial and tangible assets to fulfill the agreement to indemnify, if there even is a service contract to fall back on.
- Since these restrictive endorsements are being added to surplus-lines policies, they are going to be nonstandard forms. This requires careful review of the endorsements to understand the impact on coverage. To avoid errors-and-omissions problems, be sure to document your disclosure to the property owner. Of course, the first line of defense is the contractor, so the property owner should attempt to hire contractors by written agreement and try to avoid these exclusions in their policies.

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Watch Manuscript Endorsements

- Add an Independent Contractors Exclusion-
  " No BI to an employee of a contractor for which any insured may be liable in any capacity"
- Add Exclusion for Scaffold, Gravity Related, or Fall from Height injuries
- Limits coverage only for those operations described within the listed class codes

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION – CROSS LIABILITY

This endorsement modified insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to any actual or alleged "bodily injury", "property damage", "personal injury" or "advertising injury" to:

1. Any business enterprise in which any insured owns an interest, is a partner, or which is a parent, affiliate, subsidiary or sister company of any insured;
2. Any business enterprise directly or indirectly controlled, operated or managed by a business enterprise described in **1** above;
3. A present, former, future or prospective partner, officer, director, stockholder or employee of any insured;
4. Any insured; or
5. The spouse, child, parent or sibling of any of the above as a consequence of **1,2,3,** or **4** above.

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Commercial General Liability

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS – CG 00 01

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.

   CG 24 04 Waiver of Transfer of Rights of Recovery Against Others To Us

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Business Auto

CA 00 01

SECTION IV – BUSINESS AUTO CONDITIONS

5. If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing ***after "accident" or "loss" to impair them***.

   CA 04 44 Waiver of Transfer Of Rights Of Recovery Against Others To Us (Waiver of Subrogation)

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Workers Compensation

PART ONE- WORKERS COMPENSATION INSURANCE – WC 00 00 00 A

G. Recovery From Others

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. ***You will do everything necessary to protect those rights for us and to help us enforce them.***

PART TWO- EMPLOYERS LIABILITY INSURANCE

H. Recovery From Others

We have your rights to recover our payment from anyone liable for an injury covered by this insurance. ***You will do everything necessary to protect those rights for us and to help us enforce them.***

PART FOUR - YOUR DUTIES IF INJURY OCCURS

5. ***Do nothing after an injury occurs that would interfere with our right to recover from others.***

1. **State Statute - NJ, KA*, MO*,NH, KY]** [*construction only]
2. WC 00 03 13 Waiver of Our Rights to Recover from Others

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CA 04 44 Waiver of Subrogation

- Amends Transfer of Rights of Recovery Against Others to Us condition so it does not apply to persons or organizations shown in the schedule, but only to the extent that subrogation is waived prior to the accident or loss, under a written contract with that person or organization
  - To be used in certain contractual situations
    - Municipality requires trash dumper to waive subro

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CARRIER'S SUBROGATION RIGHTS

Tropic Pollo I Corp. d/b/a Tropic Pollo Restaurant v. National Specialty Insurance Company, Inc., 818 F. Supp. 2d 559 (E.D.N.Y. 2011),

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Tropic Pollo I Corp. d/b/a Tropic Pollo Restaurant v. National Specialty Insurance Company, Inc., 818 F. Supp. 2d 559 (E.D.N.Y. 2011),

- The Court held that the policyholder breached this provision of the policy:
- It is undisputed that by May 30, approximately seven weeks after the initial incident, plaintiff had removed the damaged ductwork, replaced the fire suppression system and completely cleaned the fire scene. Since this action prevented a full inspection to be completed by the engineers and subrogation targets, plaintiff's actions impaired defendant's subrogation rights by, e.g., affecting defendant's ability to meet its burden of proof in future litigation against the third-party targets. Moreover, Plaintiff's failure to obtain the approval of defendant prior to ripping out the ductwork and replacing the suppression system, also violated his obligation to do "everything necessary" to preserve defendant's rights. The court concludes, therefore, that plaintiff failed to comply with the plain terms of the policy.

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Tropic Pollo I Corp. d/b/a Tropic Pollo Restaurant v. National Specialty Insurance Company, Inc., 818 F. Supp. 2d 559 (E.D.N.Y. 2011),

- ***The case is a warning to policyholders, public adjusters, and counsel for policyholders that clean up and other return to business operations that destroy or alter evidence could lead to a claim denial. The best practice is to get prior approval from an insurer before those activities to avoid this situation.***

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Waiver of Subrogation vs Waiver of All Rights Of Recovery

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Subrogation and Waiver of Subrogation

- Whose rights are they ?
- The INSUREDS !
- The Insured can do anything they want with their rights– BEFORE the loss
- The CGL, BAP and CP policy permits such

- The Insured can waive them against anyone they want to
- The Insured does not need the carrier's permission
- Nor does the Insured need an Endorsement
- Adding someone as AI, often also Waives Subrogation whether you intended to or not !
- Anti-Subrogation Rule

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Tenant Signs Lease with Landlord that Includes a Mutual WOS

- Tenant turns down heat in building too low
- Pipes freeze and burst
- $100,000 damage to landlords building
- Landlord files a claim with her own carrier
- Carrier pays $50,000
- $100,000 loss less the landlords $50,000 deductible
- Carrier cannot subrogate against the Tenant for the $50,000 payment
- Landlord sues Tenant for the $50,000 deductible !

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Waiver of all Rights of Recovery

- The lease agreement only waived subrogation to the extent of the insurance coverage ($50,000)
- WOS does NOT apply to the deductible
- WOARR would apply to ALL of the Landlords rights of recovery, including the deductible

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Solution ?

- Damage to Premises Rented (a/k/a Fire Legal)
- Legal Liability Coverage – CP 00 40

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- LET'S TAKE A BREAK !
- SEE YOU BACK HERE IN 10 MINUTES !

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The Lowest Bidder

It is unwise to pay too much, but it is worse to pay too little. When you pay too much, you lose a little money—that is all. When you pay too little, you sometimes lose everything, because the thing you bought is incapable of doing what it was bought to do. The common law of business balance prohibits paying a little and getting a lot—it can't be done. If you deal with the lowest bidder, it is well to add something extra for the risk you run. And if you do that, you will have enough to pay for something better"

John Ruskin (1819-1900)

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James K. Ruble Seminar

a proud member of Risk & Insurance Education Alliance

Section 3

Cannabis, An Evolving Topic - It's Not Just A Drug

Cannabis, an Evolving Topic—It's Not Just a Drug!

Casey Roberts, CIC, ACSR, AFIS, CAIP, PLIC

THE NATIONAL ALLIANCE for Insurance Education & Research

1

Our Objectives for Today

2

- A brief history of cannabis in the US
- How the 2018 Farm Bill changed the landscape
- Current ISO policy challenges
- Other related insurance issues for hemp and cannabis

2

A Brief History Of Cannabis—
in the U.S. and the Rest of the World

3

Oldest Written Record

4

- Herodotus, Greek historian and geographer, makes a reference to Scythian cannabis steam baths (484 – 425 BCE?).
- Scythians, nomadic Siberian people (900–200 BCE), use hemp flowers on hot stones.
- They then enjoy the smoke that emanates.
- It is reported that the Scyths, “Shout for Joy,” after enjoying the baths.

4

Use Among Ancient Greeks and Romans

5

- Pliny the Elder, a Roman writer, records several medical uses (23–79 CE).
- Greek writers report the use of cannabis in treating horses, especially for dressing sores and wounds—and for treating humans as well!
- Recreational consumption of cannabis seeds is attested first by the comic poet, Ephippus, in the 4th century BCE and again by the scientist and philosopher, Galen, in the second century CE.
  - Journal of Cannabis Therapeutics, Vol. 2, 2002, Issue 2

5

Entrance to the Western Hemisphere

6

- Spaniards brought it to Chile for use as a fiber in 1545.
- Cultivation occurred around 1600 with Jamestown settlers.
- Primary uses entailed:
  - Fiber
  - Cloth
  - Rope

6

Western Hemisphere (continued)

7

1619 the Assembly of Virginia passed legislation—required every farmer to grow hemp.

This came out of an order by the King of England.

Hemp was a necessary product in England, and its growth in the Colonies was greatly encouraged by the Crown as a result.

Washington and Jefferson both grew it on their properties.

7

Western Hemisphere (continued)

8

- Growth (pun intended) continued in the U.S. until well after the Civil War.
- Its impact, however, lessened due to multiple developments including:
  - The development of iron cables (replacement for rope)
  - Cheaper alternatives—growth of jute
  - Other agricultural staples became more profitable—tobacco was one of the primary alternative crops.

8

Continued Growth in the U.S.

9

- Used as a medicinal from the 1850s until 1937.
- Minor recreational use occurred during this time.
- Volstead Act came into play in 1920.

- Some then considered cannabis as an attractive alternative.
- Mexican immigrants to the U.S. during that time brought marijuana with them as their primary intoxicant.

9

Passage of the Marijuana Tax Act

10

- 1937 Passage of the Marijuana Tax Act
- Criminalized marijuana
- Placed all cannabis under the regulatory reach of the U.S. Treasury
- Taxing of such (all cannabis) made hemp cultivation problematic for farmers.

10

Then Came World War II

11

- Access to Manila hemp fiber from the Philippines was shut down.
- Jute from India also difficult to procure.

- U.S. formed War Hemp Industries, Inc.
- 1942 farmers planted 36,000 acres of hemp.

- After the end of the war, imports increased.
- Local production again dried up due to the reinstitution of pre-war legal restrictions.

11

Passage Of The 2014 Agricultural Act (Farm Bill)

12

- Allowed universities and State Departments of Agriculture to grow hemp.

- Only allowed if used for research purposes.

- They had to register with their respective states.

- Also required that they be subject to various state laws and regulations regarding the production of hemp.

12

The 2018 Farm Bill

13

- Prior to its passage, 41 states had passed industrial hemp-related legislation.
- This was done primarily to differentiate it from marijuana.
- Farm Bill altered the legal status of cannabis sativa L, as long as its THC levels were no more than 0.3% on a dry weight basis.
- Amended the Controlled Substances Act (CSA) and Agricultural Marketing Act of 1946 (AMA).

13

The 2018 Farm Bill (continued)

14

- This redefined the definition and treatment of industrial hemp at the Federal level.
- Prior to passage of the FB of 2018—ANY FORM of cannabis was treated as a controlled substance under the CSA.
- Even with the FB passage—many items were still required to be met to legally grow hemp.

14

The 2018 Farm Bill (continued)

15

- With its passage, 90,000 acres of hemp were planted in 2018—the largest amount since 146,000 in 1943.
- By the end of 2019, hemp was allowed to be planted legally in all states, except…
  - Idaho
  - Mississippi
  - South Dakota

15

The 2018 Farm Bill (continued)

16

- Effectively, the passage of the 2018 Farm Bill meant…
- Hemp is removed from being a scheduled 1 drug.
- Hemp is removed from being treated as a controlled substance.
- Individuals with felony convictions may not produce it.
- States and tribes do retain a right to regulate its production.
- States and tribes are therefore no longer allowed to prohibit—
  - Its transportation
  - Its shipment
  - The shipment of hemp products

16

The 2018 Farm Bill—Acreage and Growing Requirements

17

Proper licensing of the grower is required.

USDA is the issuer of the initial license.

Crops are to be tested within 15 days of their anticipated harvest date.

Testing of the hemp crop is to be handled by an approved FDA lab.

If it tests within the 0.3% limit of THC as measured by dry weight—it is then considered to be hemp.

17

The 2018 Farm Bill—Acreage and Growing Requirements

18

- If it is above the 0.3% limit, it is considered cannabis, and as such the hemp crop must be destroyed.
- Farmer could potentially be considered negligent.
- Three negligent findings in five years makes the farmer ineligible to grow hemp for the next five years.
- Documentation of measurements and destruction of the crop is required and must be done by an approved company.

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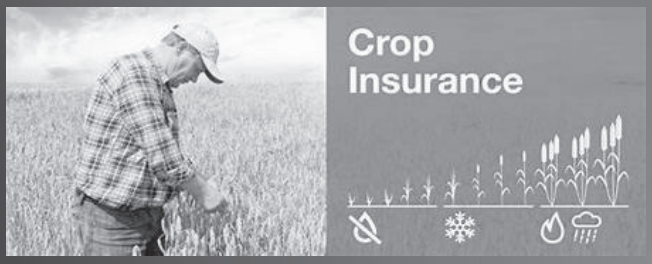

Crop Insurance and Hemp

THE NATIONAL ALLIANCE for Insurance Education & Research

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USDA Establishment of Crop Insurance

- 2019 USDA published a pilot program for hemp production.
- It provided APH (Actual Production History) coverage under the MPCI (Multi-Peril Crop Insurance).
- Certain counties were allowed to participate in the states of:
  - Alabama, California, Colorado, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Minnesota, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin

20

USDA Establishment of Crop Insurance (cont.)

21

- Initially coverage is provided for hemp that is grown for fiber, grain, or CBD for the 2020 crop year.
- To participate in the crop insurance program, the farmer must be in compliance with numerous laws.
- Federal, State, and Tribal all apply.

21

Producer Requirements Include—

22

- At least one year of prior hemp production.
- Have a settled contract for the sale of the hemp crop.
- Must be part of a state or university research pilot—or licensed under a USDA Ag Marketing Service interim rule issued in October 2019.
- Crops which are “too hot” are not a covered loss.
- Hemp does not quality for replant payments or prevented plant payments under MPCI.

22

Revisions in the 2021 Crop Insurance Program

23

- These clarified how the amount of insurable acreage is determined if the processor contract specifies both an acreage and a production amount.
- Updated rules include—
  - Licensing
  - Record keeping
  - Procedures for testing the THC levels of the crop
  - Procedures for disposition of non-complying plants
  - Procedures for handling violations

23

More Growing Information

24

- 2021 producers insured some 12,189 acres.
- 59 policies issued to protect $10.9 million in liabilities.
- APH policy is now available through these programs—
  - Whole Farm Revenue Protection
  - Nursery Crop Insurance Program
  - Nursery Select Pilot Crop Insurance Program

24

Noninsured Crop Disaster Assistance

- This program is available via the USDA Farm Service Agency for losses against the following where no permanent crop insurance program is available.
  - Lower yields
  - Destroyed crops
  - Prevented planting

25

Hemp Production in 2022 Crop Acres (USDA)

26

27

Hemp Production in 2022

- In 2021, U.S. Producers planted 54,500 acres of indoor and outdoor hemp.
- 2022 plantings reduced to 28,400 acres—a 48% decline.
- 2021 production valued at $824m—2022 production valued at $238m.
- CBD sales are predicted to grow to $4.5B in 2024—could go as high as $6B with positive guidance from the FDA.
- In January 2023, FDA said it wouldn't regulate CBD products because its existing regulatory frameworks were inadequate.
- FDA punted to Congress.

27

28

Hemp Production in 2022—Kentucky, a Bellwether

- In 2019, that state planted some 26,500 acres.
- 2020 saw only 5,000 acres planted.
- Last two years (2021 – 2022) have seen only about 1,000 acres planted.
- Mostly planted for CBD production.
- Number of growers shrank from 978 in 2019 to 240 in 2022.

28

Hemp vs. Marijuana/Cannabis—The Differences

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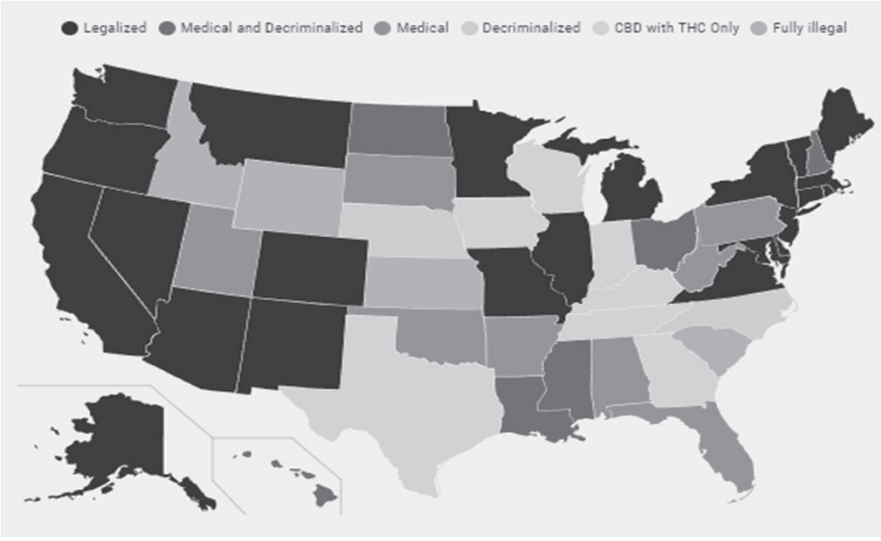
29

30

Legality by State as of August 1, 2023



30

What Is Cannabis?

31

- Cannabis is a genus of flowering plants in the cannabaceae family.
- There are three primary species—
  - *Cannabis sativa*
  - *Cannabis indica*
  - *Cannabis ruderalis*

31

Three Species of Cannabis

32

32

Cannabis Ruderalis

33

- It has thick foliage but is short in stature—20–25 inches.
- It is not known to be highly psychotropic.
- Its primary use is as a source of genetic material for breeders and cultivators.
- It is used because it thrives in more northerly climates and grows faster than the other two primary species.

33

Ruderalis—Primary Uses

34

- It is not used for chemical, textile, or typical industrial uses or products.
- The true value of *Cannabis ruderalis* lies in its abilities to autoflower and to grow quickly.
- Breeders have crossed common cannabis strains with *C. ruderalis* to improve growing time and flowering without decreasing cannabinoid content.
- Its main use—is as a breeding plant.

34

Cannabis Indica

35

- Grows three-to-six-feet tall, a bushy plant with rounder leaves than *sativa*.
- It is often grown indoors because of its stature.
- It is the preferred plant of “stoners.”
- It flowers faster than *sativa*—used for hashish due to its higher resin count.

35

Indica—Primary Uses

36

- Most *indicas* have a higher CBD content than *sativas* (which tend to be more abundant in THC).
- Uses include:
  - The promotion of sleep
  - Stress and anxiety relief
  - Inflammation decrease and pain reduction

36

Cannabis Sativa

37

- It grows to heights of 15 feet.
- It flowers more slowly than other species.
- It grows best in hotter climates.
- It is relatively high in THC, though not as high as *indica.*
- It is often grown outdoors due to its height.
- It is the most common choice of smokers.

37

Sativa Primary Uses

38

- A plant with various uses—it is the most versatile of all cannabis plants.
- This is one of the oldest medicinal plants used by humans.
- It is used as an additive for food products.
- It is used in hempseed oil production.
- Used in the manufacture of fiber, paper, and rope.
- Used in building materials.

38

What Is Hemp?

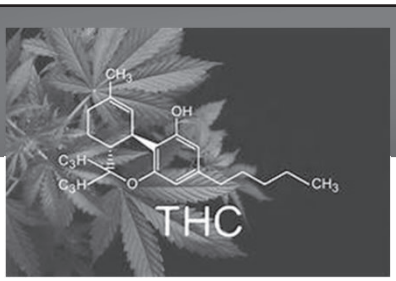
39

- Varieties of cannabis that contain 0.3% (or less) of THC content (dry weight) are classed as hemp.
- Generally used to describe non-intoxicating cannabis that is harvested for industrial uses.
- Believed to be one of the first cultivated crops.
- Used in food, rope, clothing, paper, and housing materials.

39

What Is THC?

40



- Tetrahydrocannabinol (THC)
- THC is the principal psychoactive constituent of cannabis.
- Cannabis plants and derivatives that contain no more than 0.3 percent THC (dry weight) are no longer controlled substances under federal law.
- This definition is the direct result of the 2018 Farm Bill.

40

The Difference

41

- **Hemp**, as commonly described, are *cannabis sativa* plants containing no more than 0.3% of THC when measured by dry weight.
- **Cannabis** is the term used to describe varieties of the cannabaceae family that contain greater than 0.3% when measured by dry weight.

41

Why the 0.3% Measurement?

42

- The work of Canadian, Dr. Ernest Small, entitled The Species Problem With Cannabis, published in 1971—was written primarily to establish a biological taxonomy.
- Set the dividing line at 0.3%.
- Adopted as the US government standard.
- European Union has adopted a 0.2% standard.

42

43

Four Key Differences Between Cannabis and Hemp

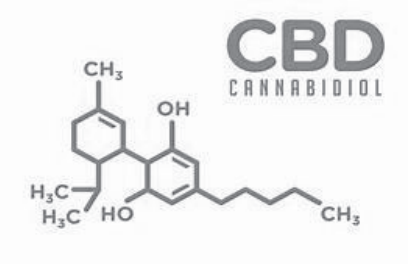
- Composition
  - THC content is of paramount importance.
- Legality
  - The line of 0.3% or less of THC content is critical.
- Cultivation
  - Hemp is grown in extremely dense plantings—cannabis with greater plant separation does not allow for more flowers.
- Usage
  - Cannabis is known for its hallucinogenic qualities.
  - Hemp is valued for its industrial uses.

43

44

What Is CBD?

- CBD stands for cannabidiol.
- It is the second most prevalent of the active ingredients of cannabis.
- CBD is an essential component of medical marijuana.
- It is derived directly from the hemp plant.
- It is non-hallucinogenic.



44

Insurance Challenges, Coverages, Exclusions, and Endorsements

45

Farm Coverage Forms

46

FP 00 13 04 16 – Farm Property – Farm Personal Property Coverage Form

FP 10 60 04 16 – Causes of Loss Form – Farm Property

FL 00 20 04 16 – Farm Liability Coverage Form

46

FP 00 13—Farm Property – Farm Personal Property Coverage Form

47

- Allows the insured to select coverage for various types of Farm Personal Property, among those are:
  - Grain, threshed seeds and beans, ground feed, silage, "livestock" feed, fodder—
    - **Fodder—**is food, especially dried hay or feed, for cattle and other livestock.
    - **Silage—**is grass or other green fodder compacted and stored in airtight conditions, typically in a silo, without first being dried, and used as animal feed in the winter.

47

FP 00 13—continued

48

- Hemp can be used as a feed and meets the definition of fodder.
- If it is stored in the open as fodder—then it would be subject to a potential stack limit of $10,000 in value (unendorsed).
- If in a stack in the open, then the covered causes of loss would only include fire or lightning, windstorm or hail, vandalism, vehicles, and theft.

48

FP 10 60—Causes Of Loss Form – Farm Property

49

- One form provides covered causes of loss including Basic, Broad, or Special.
- Hemp would only (at best) be covered for Basic or Broad.
  - Note: Basic includes loss by theft.
- There would be no coverage for growing crops.
- There is no coverage for intentional destruction of a crop due to higher than acceptable THC levels.

49

FL 00 20—Farm Liability Coverage Form

50

- The production of crops—including hemp—meets the definition of "farming," and so liability coverage would apply.
- Exclusion **2.x** would seem to apply if the THC levels were to exceed the 0.3% limitation of content measurement.
- Exclusion **2.x** is the Controlled Substances exclusion – it deletes BI and PD coverage arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Controlled Substance(s) as defined by the Federal Food and Drug Law at 21 U.S.C.A. Section 811 and 812.

50

The CGL and Multiple Endorsements

51

- CG 00 01 04 13—Commercial General Liability Coverage Form
- Farm related endorsements—
  - FL 04 11 04 16 used in conjunction with CG 00 01 when insuring farms
  - FL 04 12 04 16 used in conjunction with CG 00 01 when insuring farms
  - FL 04 37 04 16 used in conjunction with CG 00 01 when insuring farms
- Multiple Cannabis endorsements and exclusions used with the CG 00 01

51

CG 00 01 04 13—Commercial General Liability

52

Unendorsed the CGL provides no obvious coverage issues with cannabis.

However, insurers utilize multiple exclusionary endorsements applicable to both cannabis and hemp when it comes to BI & PD.

When the CGL is used to insure farms and farming operations, then a number of farm related coverage forms come into play.

52

53

FL 04 12 04 16—Personal Liability

- Used with the CG 00 01—provides Personal Liability coverage for the farm owner/operator.
- Operates similarly to the Personal Liability language one would see in a Homeowners product.
- Contains the same exclusionary language that is seen in the FL 00 20.
- This is in exclusion **A. 2. r. Controlled Substances**.

53

54

FL 04 11 and FL 04 37

Basic Farm Premises Liability, FL 04 12 04 16

Broad Farm Premises Liability, FL 04 37 04 16

Both forms define "farming," and the uses as previously discussed would not preclude coverage.

54

CGL—Exclusionary Endorsements

55

- CG 40 14 12 20, Cannabis Exclusion
- CG 40 15 12 20, Cannabis Exclusion With Hemp Exception
- CG 40 16 12 20, Cannabis Exclusion With Hemp And Lessors Risk Exceptions
- **NOTE:** The initial endorsement issue dates of each of the preceding were 12/19. The ONLY difference between the 12/19 and 12/20 endorsement dates is the insertion of the preposition "of" in the portion of the language regarding wrongful eviction, etc., in lieu of "or."

55

CG 40 14 12 20—Cannabis Exclusion Adds the Following Exclusion

56

- This insurance does not apply to:
- **1.** "Bodily injury", "property damage" or "personal and advertising injury" arising out of:
- **a.** The design, cultivation, manufacture, storage, processing, packaging, handling, testing, distribution, sale, serving, furnishing, possession or disposal of "cannabis"; or

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

56

CG 40 14 12 20—Cannabis Exclusion (cont.)

57

- This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", or the offense which caused the "personal and advertising injury", involved that which is described in Paragraph A.1. or A.2. above.

57

CG 40 14 12 20—Cannabis Exclusion (cont.)

58

- **B.** The exclusion in Paragraph **A.** does not apply to "personal and advertising injury" arising out of the following offenses:
- **1.** False arrest, detention or imprisonment; or
- **2.** The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.

58

CG 40 14 12 20—Cannabis Exclusion (cont.)

59

- **C.** The following definition is added to the Definitions section:
- "Cannabis":
- **1.** Means:
- Any good or product that consists of or contains any amount of Tetrahydrocannabinol (THC) or any other cannabinoid, regardless of whether any such THC or cannabinoid is natural or synthetic.

59

CG 40 14 12 20—Cannabis Exclusion (cont.)

60

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

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

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

  (1) Resin, oil or wax;

  (2) Hash or hemp; or

  (3) Infused liquid or edible cannabis;

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

60

CG 40 15 12 20—Cannabis Exclusion With Hemp Exception

61

Contains the exact same language regarding the following as seen in the Cannabis Exclusion CG 40 14:
BI/PD PI/AI exclusion
"Property Damage" to "cannabis"
Definition of "cannabis"
Personal and Advertising Injury language exception

61

CG 40 15 12 20—Cannabis Exclusion With Hemp Exception (cont.) but Then Adds This Language

62

- **B.** The exclusion in Paragraph **A.** does not apply to:
- **1.** "Bodily injury", "property damage" or "personal and advertising injury" arising out of goods or products containing or derived from hemp, including, but not limited to:
    - **a.** Seeds;
    - **b.** Food;
    - **c.** Clothing;
    - **d.** Lotions, oils or extracts;
    - **e.** Building materials; or
    - **f.** Paper.
- **2.** "Property damage" to goods or products described in Paragraph **B.1.** above.

62

CG 40 15 12 20—Cannabis Exclusion With Hemp Exception (cont.) but Then Adds This Language

63

- However, Paragraphs **B.1.** and **B.2.** above do not apply to the extent any such goods or products are prohibited under an applicable state or local statute, regulation or ordinance in the state wherein:

  (1) The "bodily injury" or "property damage“ occurs;

  (2) The "occurrence" which caused the "bodily injury" or "property damage“ takes place; or

  (3) The offense which caused the "personal and advertising injury" was committed.

63

CG 40 15 12 20—Cannabis Exclusion With Hemp Exception (cont.) but Then Adds This Language

64

- **3.** "Personal and advertising injury" arising out of the following offenses:

  a. False arrest, detention or imprisonment; or

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

64

CG 40 16—Cannabis Exclusion With Hemp And Lessors Risk Exceptions

65

- Same language as in the preceding CG 40 15—adds this language:
- **B.** The exclusion in Paragraph **A.** does not apply to:
- **3.** "Bodily injury", "property damage" or "personal and advertising injury" arising out of the ownership, maintenance or use of a premises
- leased to others by you; or

- The **OR** portion is simply the previous give back of coverage regarding PI & AI arising out of false arrest, detention, imprisonment, and the wrongful eviction from, wrongful entry into, etc.

65

Endorsements That Apply to Aggregate Limits

66

CG 23 04 12 20, Cannabis Activity Coverage Aggregate Limit

CG 23 05 12 20, Cannabis Exclusion With Hemp Exception Subject To Hemp Aggregate Limit

CG 23 06 12 20, Cannabis Exclusion With Designated Product or Work Exception Subject To Cannabis Products/Completed Operations Aggregate Limit

66

CG 23 04 12 20—Cannabis Activity Coverage Aggregate Limit

67

- Contains the same definition of “cannabis” as shown previously.
- Provides for a scheduled aggregate limit for injury or damage arising out of “cannabis activity” under coverages **A., B., C.—**limit will be shown in the Schedule or on the Decs.
- Two other exclusions are also added:
  - “Cannabis activity” that occurs when a required license is not in effect.
  - “Cannabis activity” that is not permissible under state or local law.

67

CG 23 04 12 20—Cannabis Activity Coverage Aggregate Limit (continued)

68

- The exclusion regarding “Cannabis activity” that is not permissible under state or local law—does not apply to BI or PD for which an insured may be held liable by reason of an applicable state or local statute, regulation or ordinance imposing such liability for;
- **a.** Causing or contributing to the intoxication of any person; or
- **b.** The selling, serving or furnishing of "cannabis" to a person who is under:
  - **(1)** The legal age for "cannabis" consumption; or
  - **(2)** The influence of "cannabis".

68

CG 23 04 12 20—Cannabis Activity Coverage Aggregate Limit (continued)

- **D.** For the purposes of the coverage provided under this endorsement, the following definitions are added to the **Definitions** section:
- **1.** "Cannabis activity" means the design, cultivation, manufacture, processing, packaging, handling, testing, storage, distribution, sale, serving, furnishing, use, possession or disposal of "cannabis".

CG 23 05 12 20—Cannabis Exclusion With Hemp Exception Subject To Hemp Aggregate Limit

- With the same definitions as previously reviewed—
- Allows insurers to exclude cannabis related exposures while providing for an exception to BI, PD, PI, AI arising out of goods or products containing or derived from hemp.
- Subject again to the Schedule or Limits shown on the Decs.

CG 23 06 12 20—Cannabis Exclusion With Designated Product or Work Exception Subject To Cannabis Products/Completed Operations Aggregate Limit

71

- Precludes coverage for BI or PD included in the products-completed operations-hazard arising out of a range of cannabis-related activities.
- Endorsement stipulates that the exclusion does not apply to specific products or work listed in the endorsement's schedule, subject to a "cannabis products/completed operations aggregate limit."
- Wording is same as shown in the CG 40 14 Cannabis Exclusion, IE:
  - Exclusion applies during the entire life cycle of cannabis.
  - Excludes situations involving contact with cannabis.

  Applies even if there are allegations of negligent supervision, hiring, etc.

71

Commercial Property Forms and Endorsements

72

CP 00 10 10 12, Building & Personal Property Coverage Form
CP 10 30 09 17, Causes Of Loss – Special Form
CP 99 03 12 19, Cannabis Exclusion
CP 99 04 12 19, Cannabis Exclusion With Hemp Exception
CP 10 34 10 12, Exclusion Of Loss Due To By-Products of Production Or Processing Operations (Rental Properties)
CP 99 06 10 21, Cannabis Coverage

72

CP 00 10 10 12—Building & Personal Property
CP 10 30 09 17—Causes Of Loss – Special Form

73

- Cannabis and/or Hemp would qualify as BPP or BPP of Others.
- Hemp is not considered to be contraband—so the **Property Not Covered** language of **A. 2. e.** would not apply.
- **Property Not Covered** language applies to grain, hay, straw, or other crops while outside of buildings.
- If the government were to seize/destroy it, then no coverage would apply (this is a Cause of Loss exclusion applicable in all COL forms).

73

CP 99 03 12 19—Cannabis Exclusion

74

- Amends the **Property Not Covered** language to include “cannabis.”
- The definition of “cannabis” as reviewed previously is the same in this form.
- Also excludes any Business Income loss (with or without extra expense) under the CP 00 30, CP 00 32, and CP 00 50 (EE form).

74

CP 99 04 12 19—Cannabis Exclusion With Hemp Exception

75

- "Cannabis" is added to **Property Not Covered**.
- Definition of "cannabis" remains as previously reviewed.
- Provides for the same exceptions applicable to Hemp as previously reviewed—if Hemp is not prohibited by state or local statute, regulation, or ordinance.

75

CP 10 34 10 12—Exclusion Of Loss Due To By-Products Of Production Or Processing Operations (Rental Properties)

76

- Could be a problem for a tenant or landlord (lessor) if there were to be loss or damage to a rental building or unit in the building shown in the Decs.
- Applies to the whole building and BPP—not just the affected unit.
- Excludes coverage caused by or resulting from smoke, vapor, gas, or any substance released in the course of production operations or processing operations performed at the rental unit(s) described in the Schedule. This exclusion applies regardless of whether such operations are:
  - **1.** Legally permitted or prohibited;
  - **2.** Permitted or prohibited under the terms of the lease; or
  - **3.** Usual to the intended occupancy of the premises.

76

77

CP 99 06 10 21 - Cannabis Coverage

This endorsement provides an opportunity for the insured to purchase coverage for four (4) distinct coverage areas:

1. Your Cannabis Stock

2. Cannabis Stock Of Others

3. Cannabis Business Income

4. Cannabis Extra Expense

77

78

CP 99 06 10 21 - Cannabis Coverage

- Endorsement starts with a “Cannabis” exclusion
- That definition follows verbatim the language we have already reviewed in the CG 40 14 12 20—Cannabis Exclusion
- Each of the endorsement’s four optional coverages then specifies that its provisions do not apply to goods or products containing or derived from hemp
- It then provides us with the same litany of items used previously in the description in regards to Hemp
  - Seeds, food, clothing, lotions, oils, extracts, building materials or paper

78

79

CP 99 06 10 21 - Cannabis Coverage (continued)

- The schedule on the form requires us to indicate which of the four coverages is desired
- The Cause of Loss also needs to be selected and shown on the schedule – Basic, Broad, Special
- Endorsements that may restrict or supplement coverage provided by the endorsement are to be indicated on the schedule
- An optional deductible may be chosen for "cannabis stock" – be it the insured's or others
- Cannabis Stock can also be subject to "Market Value" language as shown on the endorsement

79

80

CP 99 06 10 21 - Cannabis Coverage (continued)

- **Your Cannabis Stock**
  - Provides coverage for direct physical loss of or damage to as long as:
    - It is permitted under an applicable statute, regulation or ordinance
    - As long as its loss is by a covered cause of loss
  - Deletes from Property Not Covered insured's "Cannabis Stock"
  - Deletes from Property Not Covered the growing crops description
  - If "cannabis" "stock" is being cultivated
    - Only applies to cannabis being grown in a greenhouse or other building designed for the indoor commercial cultivation of such

80

81

CP 99 06 10 21 - Cannabis Coverage (continued)

- **Cannabis Stock of Others**
- Follows the same language as in the preceding slide regarding direct damage and causes of loss
- Same greenhouse or cultivation language applies as well as the removal of cannabis from Property Not Covered
- Payment for loss or damage will only be for the account of the owner of the stock
- Most that will be paid is the amount shown in the schedule
- Amount in the schedule is part of and not in addition to the limit of insurance shown I the Decs for Property Of Others

81

82

CP 99 06 10 21 - Cannabis Coverage (continued)

- Valuation of Stock is at Replacement Cost without deduction for depreciation EXCEPT WHEN:
- 1. Cannabis Stock Of Others is subject to a written contract governing the insured's liability for loss – not to exceed the lesser of the Replacement Cost or the applicable Limit Of Insurance
- 2. That which has been sold but not delivered is at the selling price less discounts and expenses insured otherwise would not have had
- 3. That which is subject to "market value" is valued at such "market value" less unpaid taxes and paid or determined taxes that are refundable pursuant to applicable law

82

83

CP 99 06 10 21 - Cannabis Coverage (continued)

- "Market Value", as used in this endorsement, means the price which the property might be expected to realize if offered for sale in a fair market at the time of loss or damage.

83

84

CP 99 06 10 21 - Cannabis Coverage (continued)

- **Cannabis Business Income**
- If a limit is shown on the schedule, that limit applies to the insured's loss of income due to a slowdown or cessation of their business which is attributable to "cannabis activity"
- Activities must be allowed by appropriate state or local law
- "Cannabis activity" means the design, cultivation, manufacture, processing, packaging, handling, testing, storage, distribution, sale, serving, furnishing, use, possession or disposal of "cannabis"
- Most that will be paid is the amount shown on the schedule and DOES NOT increase the applicable Business Income limit

84

85

CP 99 06 10 21 - Cannabis Coverage (continued)

- **Cannabis Extra Expense**
- Pays the necessary Extra Expense incurred during the "period of restoration" that would not have been incurred had there been no direct physical loss or damage at the premises described
- Must be by a covered cause of loss and to loss of "your cannabis stock" or "cannabis stock of others"
- Applies ONLY to expense incurred to avoid or minimize the "suspension" of business and to continue "operations", or to minimize "suspension" if the insured cannot continue such "operations" as long as those operations are permitted under law
- Most paid will be the amount shown in the schedule which is also part of the existing limit of insurance for Business Income shown in the Decs

85

86

Businessowners Policy and Endorsements

- BP 00 03 07 13, Businessowners Coverage Form
- BP 15 30 09 19, Cannabis Property Exclusion
- BP 15 31 09 19, Cannabis Property Exclusion with Hemp Exception
- BP 15 32 09 19, Cannabis Liability Exclusion
- BP 15 33 09 19, Cannabis Liability Exclusion With Hemp Exception
- BP 15 34 09 19, Cannabis Liability Exclusion With Hemp and Lessors Risk Exceptions

Suffice it to say—if you understood the preceding exclusionary endorsements and their exceptions—then you understand these.

86

87

Associated Issues

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87

88

Banking Challenges for the Cannabis Industry

- Banking of monies, especially with federally insured deposits, remains quite difficult for cannabis businesses.
- Regardless of how the various states treat it—cannabis remains a Schedule 1 drug (controlled substance) under Federal law.
- Essentially it remains an unbankable business at the Federal level.

88

89

Banking Challenges for the Cannabis Industry

- The American Bankers Association (ABA) has a very definitive position.
- It has expectations that the Federal Government is due to address the inequities of how cannabis monies are treated.
- ABA backs passage of proposed laws that are currently under consideration by both the Senate and the House.
- Time will tell what will happen.

89

90

SAFE Act (Secure and Fair Enforcement Banking Act)

Originally passed the House in 2022.

Reintroduced in a bipartisan effort in April of 2023.

However, we are fast approaching another election year.

That will either stimulate progress or slow any potential response.

Stay tuned.

90

SAFE Act (Secure and Fair Enforcement Banking Act)

91

- What would the SAFE Act do? It would remove these restrictions:
  - Prohibit, penalize, or discourage a bank from providing financial services to legal cannabis businesses.
  - End or limit a bank's FDIC insurance if the bank provides financial services to a legal cannabis business.
  - Recommend or incentivize a bank to halt or downgrade providing banking services to a legal cannabis business.
  - Take any action on a loan to an owner or operator of a cannabis business.

91

Transportation Concerns for Drivers

92

- Drivers of trucks regulated by the FMCSR may not use cannabis products.
- If a driver has a medical need to use cannabis, say to alleviate nerve pain or nausea issues—
- Even if allowed in their state—
- Cannabis is still a Schedule 1 drug, and
- DOT states that medical marijuana is not a valid medical explanation for a positive drug test on a driver.

- Federal law still trumps state law!

92

93

Transportation Concerns—Transporting the Products

- Legality of varies from state to state, and transportation of cannabis can be an issue.
- Loss of a harvested crop (hemp) could be difficult to insure.
- Losses are normally insured on an ACV basis—and that may not be acceptable to either the shipper or owner of the property.
- Transporting of cannabis across state lines is illegal.
- Transporting of hemp is not illegal if it was produced under the 2018 Farm Bill stipulations.
- Big Sky Scientific LLC vs. Idaho State Police is one significant court case.

93

94

Medical Marijuana and Workers' Compensation

- On a state-by-state basis, drug testing for cannabis pre-employment can be an issue.
- Some states disallow—other do not.
- Most states do not recognize protections for medical cannabis use by employees.
- Some states require reimbursement of expenses for medical marijuana use under workers' compensation—others do not.
- Some states flat out prohibit it.
- Again, another segment of the law—since workers' compensation is a state statutory issue—will play out at the state level.

94

What Is CBD?

95

- As mentioned before, CBD stands for cannabidiol.
- It is the second most prevalent of the active ingredients in cannabis.
- CBD is an essential component of medical marijuana.
- Derived directly from the hemp plant.
- It is a non-hallucinogenic.

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C B D

96

- It is one of over 1000 cannabinoids found in cannabis plants.
- It is not considered to be adversely psychotropic.
- The FDA has essentially two routes to consider with CBD—
  - 1. Approval of CBD as a drug
  - 2. Approval of CBD as a food additive

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C B D And The FDA (continued)

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- Because of the FDAs approval of Epidiolex, a drug used to treat epilepsy, CBD has now been “recognized” as a drug.
- That approval, however, does not implicitly apply to CBD in other drugs.
- CBD is not GRAS approved by the FDA (Generally Recognized As Safe).
- Because it may not be used in foods, we also need to recognize that the FDA’s jurisdiction over foods only applies to products that cross interstate lines.

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C B D And The FDA (continued)

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- So, what is the FDAs current stance on CBD in foods?
- The FDA is sending warning letters to manufacturers engaged in interstate commerce who make health-claim statements regarding the uses of CBD.
- This remains a very murky and difficult area of the law (not completely enforced by any measure) regarding whether approval is or is not granted.

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Product Liability

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Most policies in this realm will be manuscripted.

There is definitely a lack of reliable underwriting data.

Definitely an E and S play.

Most jurisdictions do not have, nor enforce, any labeling standards.

Edibles remain quite the problem since dosing is hard to regulate.

99

Other Insurance Considerations

100

- D & O can be difficult to place—especially when one considers the potential premiums to be charged.
- Crime Coverages can be exceedingly difficult to procure because most businesses are “cash heavy.”
- Cyber remains its own issue.

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Other Insurance Considerations

- EPLI—because this has been a rapid and high growth industry, EPLI purchases have remained difficult and are for the most part lacking.
- The need is there—but not many takers.
- E & O and Medical Professional Coverages are difficult to obtain.
- Arizona and Missouri are requiring the purchase of various types of either Professional Liability or Medical Professional.

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Section 4

Commercial Property, Key Items To Understand

RISK & INSURANCE
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Overview

- Commercial Property insurance policies are fraught with a minefield of exclusions, limits, conditions, and endorsements.
- It is important to understand the policy language so that the buyer of the product will be covered to the extent that they expect.
- We will review a number of these areas and attempt to solve some of the issues which could be most concerning to policyholders, especially after a loss has occurred.

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Learning Objectives

1. Understanding Ordinance or Law Needs
2. What Did you Define as “Building?”
3. Debris Removal, the Most Important Additional Coverage?
4. Pollutant Clean Up & Removal
5. Increase In Rebuilding Expenses Following Disaster
6. The “Breaking Bad” of Exclusions
7. Property Valuations and Loss Settlements

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Learning Objective # 1

Understanding Ordinance or Law Needs

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Ordinance or Law, Why Needed?

- Codes are constantly changing – whether we know it or not.
- NFPA (National Fire Protection Association)
  - Publishes more than 300 codes & standards
  - Intend to eliminate death, injury, property and economic loss due to fire and related hazards
  - Began in 1896 because of a need for sprinkler standards
  - Updated every three to five years

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States Have Their Own Jurisdictions

- California has a triennial code adoption cycle.
- San Francisco & LA adopt state codes and then modify others to their own desires.
- Update requirements are state specific.
- Some states also have counties & cities that have their own codes.
  - Illinois = Chicago, Dupage County, South Holland

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What Codes Might Be Addressed?

To name just a few…

- Electrical
- Plumbing
- Fuel gas
- Wildland Urban interfaces
- Sewage
- Roofing materials
- Insulation

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Don’t Go To Sleep On The ADA

- Do not forget compliance with the Americans With Disabilities Act of 1980.
  - ➢ Applies to all places of public accommodation
  - ➢ Essentially any place that offers goods or services to the public

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All Cause of Loss Forms

Basic, Broad, Special all preclude coverage for loss resulting from compliance with or enforcement of ordinances or laws that regulate the:

a. Construction of property
b. Demolition of property
c. Repair of property
d. Use of property

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What Triggers The Need For Coverage?

One of two considerations:

1. The Percentage Rule
2. Jurisdictional Authority Rule

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The Percentage Rule

- States that if the building in question is damaged beyond a certain percentage
  - ➢ Then the entire structure must be brought into compliance with current building codes
  - ➢ Typical percentages may range from as little as 30% to as great as 60%.

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Jurisdictional Authority Rule

The authority that exercises jurisdiction is allowed to decide when (at what point) a structure has experienced major damage.

- Could be based upon 40%, 50%, 60% of the building's value
- Could be based solely upon the building's safety, age, or zoning conditions applicable

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CP 04 05 – Ordinance or Law

Used to add coverage for the direct damage portion of this loss exposure regardless of which rule is utilized by the jurisdiction

An example is illustrated to work with throughout this section.

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Defined

Ordinance or Law Coverage — coverage for loss caused by enforcement of ordinances or laws regulating construction and repair of damaged buildings. Older structures that are damaged may need upgraded electrical; heating, ventilating, and air-conditioning (HVAC); and plumbing units based on city codes.

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Two Forms May Be Used

1. CP 04 05 04 12 edition (older editions are not discussed in this presentation)
2. CP 04 05 09 17 edition

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Both Work The Same, HOWEVER…

- The 09/17 edition will also apply to ordinances or laws that are promulgated or revised after the loss but before the start of reconstruction or repair.
- The "older" editions (04/12 and older) do not allow for this provision of coverage.
- Which is your insurer using?
- Have you "checked the box" on the 09/17 edition?

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CP 04 05 04 12

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SCHEDULE

Building Number/ Premises Number	Coverage A	Coverage B Limit Of Insurance	Coverage C Limit Of Insurance	Coverage B And C Combined Limit Of Insurance
/	☐	$	$	$ *
/	☐	$	$	$ *
/	☐	$	$	$ *

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

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

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CP 04 05 09 17

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SCHEDULE

Building Number/ Premises Number	Coverage A	Coverage B Limit Of Insurance	Coverage C Limit Of Insurance	Coverages B And C Combined Limit Of Insurance
/	☐	$	$	$ *
/	☐	$	$	$ *
/	☐	$	$	$ *

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

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

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

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The Coverages

- Coverage A – Coverage For Loss To The Undamaged Portion Of The Building
- Coverage B – Demolition Cost Coverage
- Coverage C - Increased Cost of Construction Coverage

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Coverage A

- CP forms pay for Direct damage to the building.
- No limit needs to be selected.
- It pays the difference between the value of the damaged part of the property and the total building limit specified.

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Coverage A

- If the limit selected was too low (i.e., the building limit will not meet what was needed by the insured to rebuild) Coverage A will also likely be too low.
- Coinsurance could be an issue.

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Coverage B

What will it cost to tear down and remove the undamaged portion of the building? Many dependencies including:

- Local demolition costs
- Type of building
- How much of the building was not damaged?
- At what point is it required to be torn down?
- Are there any special issues to be dealt with: mold, asbestos, other?

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Coverage B

Ways to calculate:

- Determine a worst-case scenario.
- Convert that into the affected square footage.
- Contact a number of local demo contractors; determine average cost per square foot.
- Do the remaining math.

Coinsurance does NOT apply to this coverage.

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Coverage C

Things to consider:

- Understand that Replacement Cost is often misunderstood by the insured.
- Their likely expectation is what it should be in their mind after the loss.
- We are only going to replace what was there just prior to the loss – unless we have this endorsement.

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Coverage C

Probably the hardest component to calculate:

- Some people use a percentage per year-built basis.
- We are trying to mitigate the insured's expense to bring the building up to code.
- Coinsurance does not apply to this coverage.

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Coverages B & C

- B can have its own separate limit.
- C can have its own separate limit.
- A combined limit of coverage can be selected to be shared by both B & C.

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Learning Objective # 2

What Did You Define as "Building?"

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Building

a. Building, meaning the building or structure described in the Declarations, including:

(1) Completed additions;

(2) Fixtures, including outdoor fixtures;

(3) Permanently installed:

(a) Machinery; and

(b) Equipment;

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Building

(4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:

(a) Fire-extinguishing equipment;

(b) Outdoor furniture;

(c) Floor coverings; and

(d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;

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Building

(5) If not covered by other insurance:

(a) Additions under construction, alterations and repairs to the building or structure;

(b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure.

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Building Is…OK, But What About

2. Property Not Covered

- Covered Property does not include:

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Property Not Covered

a. Accounts, bills, currency, food stamps or other evidences of debt, money, notes or securities. Lottery tickets held for sale are not securities;

b.* Animals, unless owned by others and boarded by you, or if owned by you, only as "stock" while inside of buildings;

c. Automobiles held for sale;

d.* Bridges, roadways, walks, patios or other paved surfaces;

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Property Not Covered

e. Contraband, or property in the course of illegal transportation or trade;

f.* The cost of excavations, grading, backfilling or filling;

g.* Foundations of buildings, structures, machinery or boilers if their foundations are below:

(1) The lowest basement floor; or

(2) The surface of the ground, if there is no basement;

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Property Not Covered

h. Land (including land on which the property is located), water, growing crops or lawns (other than lawns which are part of a vegetated roof);

i. Personal property while airborne or waterborne;

j.* Bulkheads, pilings, piers, wharves or docks;

k. Property that is covered under another coverage form of this or any other policy in which it is more specifically described, except for the excess of the amount due (whether you can collect on it or not) from that other insurance;

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Property Not Covered

l.* Retaining walls that are not part of a building;

m.* Underground pipes, flues or drains;

n. Electronic data

o. Cost to restore valuable papers

p.* Vehicles or self-propelled machines

q. The following property outside of bldgs

(1) Grain, hay, straw, other crops

(2) Fences*, radio or TV antennas et al

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Building & Property Not Covered

- What is included as building?
- Equally as important – what is not included as “property not covered”?
- You may look at it and think it is part of the building – so might the insured.
- If the language says it is not, then it is not – 18 specific types of property are excluded.
- A number of items can be added back in as “covered property” by using one of two endorsements.

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CP 14 10 06 95

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL COVERED 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

The following is withdrawn from PROPERTY NOT COVERED and added to COVERED PROPERTY:

SCHEDULE*

Prem. No.	Bldg. No.	Paragraph Reference	Description of Property	Type of Property Coverage (Enter BUILDING or PERSONAL PROPERTY)

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CP 14 10 06 95

- Complete the endorsement.
- When done properly we have conveyed to the underwriter, insured, and claims adjuster:
  - That certain items are now considered to be Covered Property
  - Can apply to Building or Personal Property

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CP 14 15 07 88

39

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL BUILDING PROPERTY

This endorsement modifies insurance provided under the following:

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

SCHEDULE

Prem. No.	Bldg. No.	Additional Building Property

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CP 14 15 07 88

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- Often referred to as “the clarifying” endorsement
- It clarifies for all who care, certain items, that might seem to be or could meet the definition of “personal property” to now be treated as “Building.”
- Better (potentially) from a coverage and a pricing standpoint

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Learning Objective # 3

Debris Removal,

the Most Important Additional Coverage?

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Debris Removal

Coverage for the cost of removal of debris of covered property damaged by an insured peril. This coverage is included in most commercial property insurance policies.

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Why Debris Removal

- Coverage limit for Debris Removal is part of – not in addition to – the building Limit of Insurance
- Among the considerations when trying to determine an adequate limit we could include:
  1. Existence of any hazardous materials
  2. Age of the building
  3. Proximity to other buildings
  4. Type of construction originally used

Paragraph (3) (a) Tells Us

(3) Subject to the exceptions in Paragraph (4), the following provisions apply:

(a) The most we will pay for the total of direct physical loss or damage plus debris removal expense is the Limit of Insurance applicable to the Covered Property that has sustained loss or damage.

Paragraph (3) (b) Tells Us

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(b) Subject to **(a)** above, the amount we will pay for debris removal expense is limited to 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage. However, if no Covered Property has sustained direct physical loss or damage, the most we will pay for removal of debris of other property (if such removal is covered under this Additional Coverage) is $5,000 at each location.

45

Coverage (unendorsed) Applies To

46

CP 00 10 10 12, **Additional Coverage a. Debris Removal** provides for an additional amount of coverage.

- $25,000 additional debris removal coverage in addition to the applicable limit of insurance
- The debris must be on the described premises and resulting from a Covered cause of loss.

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Older Editions of The Form

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- The older editions provided for an additional limit of $10,000 (current policy provides 25,000).
- Did not provide all of the additional provisions of property as in the 10/12 edition

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Paragraph (4) Tells Us

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(4) We will pay up to an additional $25,000 for debris removal expense, for each location, in any one occurrence of physical loss or damage to Covered Property, if one or both of the following circumstances apply:

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Paragraph (4) (a) & (b) Tell Us

(a) The total of the actual debris removal expense plus the amount we pay for direct physical loss or damage exceeds the Limit of Insurance on the Covered Property that has sustained loss or damage.

(b) The actual debris removal expense exceeds 25% of the sum of the deductible plus the amount that we pay for direct physical loss or damage to the Covered Property that has sustained loss or damage.

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SO…

Therefore, if **(4)(a)** and/or **(4)(b)** applies, our total payment for direct physical loss or damage and debris removal expense may reach but will never exceed the Limit of Insurance on the Covered Property that has sustained loss or damage, plus $25,000.

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Examples

1. One example used will be when the Limit of Insurance is adequate and provides for enough Debris Removal Coverage by using the Additional Coverage Debris removal language

2. A second example will be used illustrating when the limit of Insurance is needed for the rebuilding of the damaged building and an additional limit is needed for debris removal. This example will utilize the CP 04 15 10 12 Debris Removal Additional Insurance endorsement.

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Example # 1

Limit of insurance	$1,000,000
Deductible	$1,000
Amount of loss	$500,000
Loss payable is	$499,000
Debris removal expense is	$50,000

Debris removal expense amount paid is $50,000

($50,000 is 10% of $500,000 – the amount of the loss)

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Example # 2

Limit of insurance	$1,000,000
Deductible	$1,000
Amount of loss	$900,000
Loss payable is	$899,000
Debris removal expense is	$150,000

The debris removal expense amount paid is $100,000.

This is calculated using paragraph 3 as our guideline.

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However

- Paragraph **(4)(a)** states that if the total of the actual debris removal expense plus the amount we pay for direct physical loss or damage exceeds the Limit of Insurance on the Covered Property that has sustained loss or damage, we will pay an additional $25,000
- In example #2, we would pay the $1,000,000 limit of insurance PLUS an additional $25,000 for the additional debris removal – $25,000 would still remain unpaid.
- We paid $900,000 + $100,000 + $25,000. As debris removal was $150,000, insured is short $25,000

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Coverage Applies To

Certain types of debris are excluded from coverage:

- Removing deposits of mud or earth from the described premises
- No coverage for the removal of pollutants from land or water
- No coverage applies to remove debris of:
  1. Property of the insured that is not insured under the policy
  2. Property of the insured's landlord – unless contractually responsible
  3. Property excluded under the "property not covered" language

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CP 04 15 10 12
Debris Removal Additional Insurance

DEBRIS REMOVAL ADDITIONAL INSURANCE

This endorsement modifies insurance provided under the following:

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

SCHEDULE

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

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

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

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Learning Objective # 4

Pollutant Clean Up & Removal

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Pollutants

- Pollutants are a type of debris - but they are excluded from the Debris Removal policy language.
- CP 00 10 provides only $10,000 for Pollutant Clean Up expense.
- That amount is essentially gone when the Pollutant Clean Up people arrive at the insured's location.

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Pollutants

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The definition of “Pollutants” as used in the CP Form is actually quite broad:

2. "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.

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In Order For This Additional Coverage To Apply

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- The pollutant must have resulted from a covered cause of loss.
- Look to the “Specified Causes of Loss” to determine which Cause of Loss is provided for.
- The $10,000 limit is an Annual Aggregate Limit.
  - Applies only to the clean up of land or water on the insured premises
- Other debris would probably be covered under the Debris Removal additional coverage (hopefully).

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d. Pollutant Clean-up And Removal

61

We will pay your expense to extract "pollutants" from land or water at the described premises if the discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused by or results from a Covered Cause of Loss that occurs during the policy period. The expenses will be paid only if they are reported to us in writing within 180 days of the date on which the Covered Cause of Loss occurs.

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d. Pollutant Clean-up And Removal

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This Additional Coverage does not apply to costs to test for, monitor or assess the existence, concentration or effects of "pollutants". But we will pay for testing which is performed in the course of extracting the "pollutants" from the land or water.

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d. Pollutant Clean-up And Removal

63

The most we will pay under this Additional Coverage for each described premises is $10,000 for the sum of all covered expenses arising out of Covered Causes of Loss occurring during each separate 12-month period of this policy.

63

Cause of Loss, CP 10 30 09 17
B. Exclusions, 2.l. Applies

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2. We will not pay for loss or damage caused by or resulting from any of the following:

l. Discharge, dispersal, seepage, migration, release or escape of "pollutants" unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the "specified causes of loss". But if the discharge, dispersal, seepage, migration, release or escape of "pollutants" results in a "specified cause of loss", we will pay for the loss or damage caused by that "specified cause of loss".

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Specified Causes Of Loss

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For our purposes:

2. "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.

NOTE: Sinkhole collapse is subject to further defining language.

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CP 04 07 10 91

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POLLUTANT CLEAN UP AND REMOVAL
ADDITIONAL AGGREGATE LIMIT OF INSURANCE

This endorsement modifies insurance provided under the following:

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

SCHEDULE*

Prem. No.	Additional Aggregate Limit of Insurance	Deductible	Additional Premium

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CP 04 07 10 91

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- Increases the $10,000 annual aggregate to the new amount shown in the schedule – and then states:

  B. We will not pay under this endorsement for "pollutants" clean up or removal costs in any occurrence until the total of all such costs exceeds the sum of:

  1. The $10,000 aggregate limit from the basic Pollutant Clean Up and Removal Additional Coverage, less any prior payments for the same policy year; plus

  2. The Deductible shown in the Schedule (Note: the schedule's deductible is the only one that applies to this endorsement)

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CP 04 07 10 91
Example

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- We will then pay the costs in excess of that sum, until the Additional Aggregate Limit of Insurance shown in the Schedule is used up during the applicable 12-month period.
- Example: The cost of "pollutants" clean up and removal is $40,000.

The remaining aggregate from the basic Additional Coverage (assuming $4,000 has previously been paid for the same policy year) is $6,000 .

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CP 04 07 10 91
Example

- The Deductible shown in the Schedule is $10,000
- The Pollutant Clean Up and Removal Additional Aggregate Limit of Insurance is $25,000
- We will determine the most we will pay under this endorsement as follows:

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CP 04 07 10 91
Example

- The cost incurred $40,000
- Less the sum of the remaining basic Additional Coverage aggregate $ 6,000 and the Deductible $10,000 - $16,000
- The most we will pay under this endorsement is $24,000 (remember, the additional amount purchased was $25,000)
- The remaining benefit under this endorsement for costs incurred for the policy year is $1,000.

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Learning Objective # 5

Increase In Rebuilding Expenses Following Disaster

Increase In Rebuilding Expenses Following Disaster, CP 04 09 10 12

When there is significant loss to a large number of buildings in a specific area (e.g., wildfire, hurricane), building costs can significantly increase, i.e, demand surge*.

1. Supply of labor is limited.
2. Building materials increase in cost.

*Demand Surge — increase in the cost of repair or replacement of damaged property that may occur following a large-scale disaster when many individuals and organizations vie for a limited supply of labor and materials needed for repair.

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What It Does

Endorsement addresses increase in expense, if ALL of the following are met after the event that caused the loss:

1. There was a declaration of a state of disaster by federal or state authorities, or the event occurs in close temporal proximity to the disaster.
2. Expenses for labor and materials for the repair or replacement increase as a result of the disaster and these expenses exceed the applicable limit of insurance because of the increase.

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What it Does

3. The insured repairs or replaces the damaged building.
4. The insured had notified the insurer, within 30 days of the completion of improvements, additions, or alterations that had increased the replacement cost of the building by 5% or greater – and – the insured accepted the increased limits as provided by the insurer.

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What To Show On The Schedule

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- The amount of the increase to be provided for is shown as a percentage on the endorsement's schedule.
- If coverage was written on a Blanket Basis then the increased percentage applies to the value of the building as shown in the most recent Statement of Values multiplied by the coinsurance factor.
- If a coinsurance penalty applies, the percentage provided for in the increased costs will be reduced by said coinsurance penalty.

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Additional Considerations

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If more than one event occurs in an annual term:

- When payments reach the maximum amount of the coverage – no more will be paid for those subsequent events – i.e., annual aggregate applies.
- If payments did not exceed the additional limit, the remaining amount of the limit would be available for subsequent losses in that policy year.

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Additional Considerations

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- Debris Removal: up to 20% of the amount payable under this expense can be used for debris removal expenses – this does not increase the limit payable.
- Ordinance or Law under Coverage C: up to 20% of the payable amount may be used – this does not increase the limit payable.

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Additional Considerations

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- If there is a newly acquired or constructed building provided coverage, then the highest percentage shown in the schedule will be applied to such.
- When determining the expenses payable under this form, any expenses recovered by the insured under their Business Income coverage will be deducted from these expenses.

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Increase In Rebuilding Expenses Following Disaster, CP 04 09 10 12

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

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM

SCHEDULE

Premises Number	Building Number	Additional Expense Coverage Percentage
		%
		%
		%

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

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Learning Objective # 6

The "Breaking Bad" of Exclusions

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Why the "Breaking Bad" of Exclusions?

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The "need" for this endorsement came about in the 2012 ISO Property revisions due to rental units being damaged by residues from methamphetamine operations that damaged buildings.

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The Seminal Court Case, Graff v. Allstate, 2002

82

Graff v. Allstate Ins. Co. 113 Washington Appeals Court in 2020

The details of that loss and resultant litigation were:

- Graff rented his house to a tenant.
- Tenant cooked meth at the house (unknown to the insured, Graff).
- Graff filed a claim for clean up expenses to the home.
- Allstate denied the claim citing their policy's contamination exclusion.

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82

The Court Held

83

- We hold that operation of a methamphetamine laboratory is vandalism.
- Vandalism is a covered event under the policy.
- The claim is therefore not barred under the contamination exclusion.

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83

The Court Also Cited

84

Bethany Bowers v. Farmers Insurance Exchange, Washington Court of Appeals in 2000

- Mrs. Bowers had a rental home which she rented to a tenant who grew a large amount of marijuana in it. Subsequent mold damage occurred.
- The trial court found in favor of Farmers that there was no coverage owed.
- The appellate court reversed this finding and ruled that coverage was applicable under the vandalism and malicious mischief policy language.

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84

Enter the CP 10 34 10 12

85

CP 10 34 10 12, Exclusion of Loss Due To By-Products of Production or Processing Operations (Rental Properties)

A schedule is to be used showing:

- The premises number applicable
- The Building number applicable
- A description of the rental unit

The endorsement is to be used for policies issued to tenants as well as to the building owners.

85

Intent of the Endorsement

86

Eliminate coverage for loss to the premises described in the schedule due to or resulting from:

- Smoke
- Vapor
- Gas
- Or substances released in the course of production or processing operations at the rental units shown in the schedule
  - ➢ Losses due to fire or explosion of the release of the by-product are still covered

86

What Else Does It Do?

87

- The exclusion applies to not just the rental unit(s) and their contents – it applies to the totality of the building and the contents therein.
- The exclusion would also affect the application of Business Income coverage.

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87

And More

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The exclusion applies regardless of whether or not such operations are:

- Legally prohibited or permitted
- Permitted or prohibited under the terms of the lease
- Usual to the intended occupancy of the premises

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88

Finally

89

The tenant's production or processing will also not be considered to be vandalism, again regardless of whether or not such operations are:

- Legally prohibited or permitted
- Permitted or prohibited under the terms of the lease
- Usual to the intended occupancy of the premises

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The Schedule

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EXCLUSION OF LOSS DUE TO BY-PRODUCTS OF PRODUCTION OR PROCESSING OPERATIONS (RENTAL PROPERTIES)

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM
BUSINESS INCOME (WITHOUT EXTRA EXPENSE) COVERAGE FORM
EXTRA EXPENSE COVERAGE FORM
STANDARD PROPERTY POLICY

SCHEDULE

Premises Number	Building Number	Description Of Rental Unit

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

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Learning Objective #7

Property Valuations and Loss Settlements

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92

From a Risk Management Perspective

There are four (4) purposes of property valuation:

1. To set coverage limits
2. To meet coinsurance requirements
3. To calculate insurance premiums
4. To use as a basis for loss adjustment

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Property Loss Settlements Come Down To Three Choices

- Actual Cash Value
- Replacement Cost
- Functional Replacement Cost

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94

What Does ACV Really Mean?

Actual Cash Value (ACV) — in property insurance – one of several possible methods of establishing the value of insured property to determine the amount the insurer will pay in the event of loss. ACV is typically calculated one of three ways:

1. the cost to repair or replace the damaged property, minus depreciation;
2. the damaged property's "fair market value"; or
3. using the "broad evidence rule," which calls for considering all relevant evidence of the value of the damaged property.

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Replacement Cost Minus Depreciation

95

Do not look to the coverage form as depreciation:

- is NOT defined in insurance policies.
- Depreciation used is true depreciation, not the depreciation used for accounting purposes.

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95

What Might Be Included

96

- Physical deterioration
- Functional obsolescence
- Economic obsolescence due to causes independent of the property
- Effective age as compared with other properties considering renovations and reconstruction
- Future life expectancy

Note: various courts (i.e., states) may define ACV differently.

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Fair Market Value

One court says: the price a willing purchaser who is under no obligation to buy would pay to a willing owner who is under no obligation to sell.

Another says: depending upon the type of building involved, its capacity to produce income and its location, along with its age, condition, fitness for the buyer's purpose and similar conditions, would be relevant in determining the building's fair market value.

97

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Broad Evidence Rule

A valuation rule that has evolved in some states and does not adhere to the principle that the traditional measure of actual cash value (ACV) (replacement cost less depreciation) is the sole measure of value at the time of loss. This rule provides for the examination of every standard of value having a bearing on the property under consideration, such as the age of the property, the profit likely to accrue on the property, and the property's tax value. Ultimately, it calls for the selection of that "value," which, in the event of a total loss, will provide complete indemnification and no more.

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Broad Evidence Rule

- Calls for all relevant evidence of the value of the covered property to be considered in determining its ACV
- Based on an original court decision known as McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928)

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What's Replacement Cost

A property insurance term that refers to one of the two primary valuation methods for establishing the value of insured property for purposes of determining the amount the insurer will pay in the event of loss. It is usually defined in the policy as the cost to replace the damaged property with materials of like kind and quality, without any deduction for depreciation.

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Replacement Cost (continued)

101

- Essentially looked at as “new for old”
- Also means that I am going to replace it as I found it – I am not going to improve it
- It is indemnification of the insured.

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Replacement Cost (continued)

102

The amount of insurance purchased equals the cost new of all eligible insured property on the day of the loss;

- i.e., the insured is valuing their property as though it were new and, as such, is paying a premium based upon said valuation

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Functional Replacement Cost

103

The cost of acquiring another item of property that will perform the same function with equal efficiency, even if it is not identical to the property being replaced.

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Another Way To Consider It

104

The valuation of property at a cost necessary to replace the damaged property with new property, but of unlike kind and (possibly) lesser quality to perform the same general function as the damaged property

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104

When Might This Be Appropriate

105

- The insured cannot rebuild the same square footage – perhaps due to the application of building codes.
- When the insured does not want to build the same square footage
- When lower cost materials can or should be used
- If the insured does not need all of the functions of the property

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Two Functional Replacement Cost Endorsements To Consider

106

- CP 04 39 10 90, Functional Personal Property Valuation (other than stock)
- CP 04 38 09 17, Functional Building Valuation

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106

The Schedule

107

FUNCTIONAL PERSONAL PROPERTY VALUATION OTHER THAN STOCK

This endorsement modifies insurance provided under the following:

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

SCHEDULE*

Prem. No.	Bldg. No.	Description of Personal Property	Limit of Insurance

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Things To Know

108

- For the property shown in the schedule, the only limit that will apply to that property is the limit shown.
- Need to establish a value today of outmoded or obsolete equipment in advance of the loss
- Coinsurance does not apply to <u>the item</u> of personal property in question.

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108

Adds This Valuation Clause

109

If you do repair or replace w/in 180 days of the loss, the insurer will pay the least of the following:

- The limit of insurance shown in the schedule
- The cost to replace on the same site the damaged property with the most closely equivalent property available
- The amount the insured actually spends to repair or replace the item

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109

If The Insured Did Not Follow The Preceding, Then…

110

The insurer will pay the smallest of the following:

- The limit of insurance shown in the schedule
- The market value of the lost or damaged item
- The amount it would cost to repair or replace with like kind and quality but allowing for depreciation and deterioration

A definition for “market value” is also added by the endorsement.

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"Market Value"

111

D. The following DEFINITION is added:

> **"Market Value,"** as used in this endorsement, means the price which the property might be expected to realize if offered for sale in a fair market.

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111

CP 04 38 09 17, Functional Building Valuation, The Schedule

112

FUNCTIONAL BUILDING VALUATION

This endorsement modifies insurance provided under the following:

BUILDING AND PERSONAL PROPERTY COVERAGE FORM
CONDOMINIUM ASSOCIATION COVERAGE FORM

SCHEDULE

Premises Number	Building Number	Limit Of Insurance
		$
		$
		$
Post-Loss Ordinance Or Law Option: Yes ☐ No ☐		
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

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Things To Know

113

- For the property shown in the schedule, the only limit that will apply to that property is the limit shown
- Coinsurance does not apply.
- Ordinance or Law Coverage does apply – the insured may also elect to take the "Post-Loss Ordinance or Law option."
- The Ordinance or Law coverage does not increase the limit of insurance.

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113

Add This Valuation Clause

114

If the insured contracts for repair or replacement w/in 180 days of the date of loss for the same occupancy and use, the insurer will pay the smallest of:

- The limit of insurance shown in the schedule as applicable to the damaged building
- In the event of a total loss, the cost to replace the damaged building with a less costly building on the same site (or on a different site if the ordinance or law requires it) that is functionally equivalent to the damaged building

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If A Partial Loss

115

In the event of a partial loss, the insurer will pay:

- The cost to repair or replace the damaged portion with less costly material, if available, in the architectural style that existed before the loss or damage occurred, and
- The amount the insured actually spends to demolish and clear the site of the undamaged portions of the building

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If The Insured Did Not Follow The Preceding, Then…

116

If the insured does not make a claim as shown in the preceding, then the insurer will pay the smallest of:

- The limit of insurance shown in the schedule
- The market value of the damaged building, exclusive of the land value, at the time of loss; or
- The amount it would cost to repair or replace the damaged building on the same site, with less costly material in the architectural style that existed before the loss occurred, less allowance for physical deterioration and depreciation

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116

“Market Value”

117

F. The following definition is added:

"Market value", as used in this endorsement, means the price which the property might be expected to realize if offered for sale in a fair market.

117

Proportionate Loss Payments

118

- The endorsement also addresses proportionate loss payments under Ordinance or Law assuming that one portion of the loss is a covered cause of loss and another portion of the loss is not.
- The example as provided by the coverage form follows.

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Proportionate Loss Payments (example)

- Wind is a Covered Cause Of Loss; Flood is an excluded Cause Of Loss
- The building sustains a partial loss
- Total direct physical damage to building: $100,000
- Portion of direct physical damage that is covered (caused by wind): $30,000
- Portion of direct physical damage that is not covered (caused by flood): $70,000

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Proportionate Loss Payments (example)

- The cost to repair the building includes $60,000 attributable to enforcement of an ordinance (Coverage C)
- Step 1: Determine the proportion that the covered direct physical damage bears to the total direct physical damage. $30,000 to $100,000 = .30
- Step 2: Apply that proportion to the Ordinance or Law loss. $60,000 x .30 = $18,000

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Proportionate Loss Payments (example)

- In this example, the most we will pay under this endorsement for the Coverage C loss is $18,000, subject to the applicable Limit of Insurance and any other applicable provisions.

- NOTE: The same procedure applies to losses under Coverages A and B of this endorsement.

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Review of Learning Objectives

1. Understanding Ordinance or Law Needs
2. What Did you Define as “Building”?
3. Debris Removal, the Most Important Additional Coverage?
4. Pollutant Clean Up & Removal
5. Increase In Rebuilding Expenses Following Disaster
6. The “Breaking Bad” of Exclusions
7. Property Valuations and Loss Settlements

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Thank You

123


Thank
You !