

**COMMERCIAL AND PROFESSIONAL LIABILITY INSURANCE
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COMMERCIAL AND PROFESSIONAL LIABILITY INSURANCE

PREFACE

Volumes have been written about Liability insurance as used in business. There are many needs for liability insurance in conducting business in the United States and new needs arise continually. Each new “risk” may require either a new policy form, new Endorsement on an existing policy, or change of wording or definitions on existing policy forms. To describe in detail the technicalities of each and every Liability Insurance policy or Endorsement available would require several textbooks and many, if not most, of the risks covered would rarely, if ever, be seen by the average insurance agent, or required by a customer.

This text will concentrate on Commercial General Liability, the most used and well-known area of business liability insurance, with references to other types of business and Professional Liability coverages available. The knowledge of liability itself, and the problems that arise because of laws, statutes, ordinances or court decisions, will open the mind so that unusual or different liability coverage can be better understood.

The Commercial General Liability policy will be examined in detail, with typical wording from the Insurance Service Office and which is the ‘standard’ for other liability policies. Various jurisdictions may require additional or replacement wording, but if one understands the one policy form well, any differences can be quite easily understood also.

The term “Consumer Application” is used in this text as some states require that a “consumer application” be used to demonstrate how various situations and provisions apply to the consumer – the policyholder. These are not “case studies”, which are actual situations with legal ramifications, but for the most part, are fictitious in order to illustrate a point or provide an example. Incidentally, a “Consumer Application” may give an example that is not necessarily business, professional or commercial related, but is more applicable to “Personal” liability, such as that found in Personal Auto Policies. In these cases, the personal liability is easier to understand, the “principle” of the particular situation is what is important. For instance, it is easier to understand Contributory and Comparative Negligence when couched in personal liability terms.

Liability Insurance is fraught with legal consequences, perhaps more so than any other type of insurance as the definition of the risk – liability – is in most cases, a legal term that may require court definition or the determination of liability must be decided by a court. The court decisions and policy wording will vary by jurisdiction. Therefore, it is most important that it is understood that this text is an educational tool and should not be used for legal purposes. Any liability policy sold for business, professional or commercial purposes should be reviewed by the client’s attorney if any questions arise regarding the operation or coverage of the policy.

For those who engage in marketing liability insurance, they are encouraged to become a member of the Professional Liability Underwriting Society (PLUS). This organization provides continual education in Liability Insurance – for instance, in Feb. 2000, the Fourth Annual D&O (Director and Officer) Symposium which covers litigation, legal developments in Securities Fraud legislation, Reinsuring D&O, etc.



CHAPTER ONE – LIABILITY AND TORTS

According to “Black’s Law Dictionary”, the word “Liability” is defined as “...a broad legal term.” and “It has been referred to as the most comprehensive significance, including almost every character or hazard or responsibility, absolute, contingent, or likely”, “the word is not synonymous with ‘loss or damage’”, and “the term is therefore broader than the word ‘debt’ or ‘indebtedness’.”

One would usually assume that narrowing the definition to “Legal Liability” would help. However, that definition is “A Liability which courts recognize and enforce as between parties litigant.” Further, most legal definitions that are derived from case laws pertain to the relationship between debtor and creditor. Obviously, this “liability” is not covered under a commercial liability policy.

Historically and in a simplistic sense, “liability” as discussed herein, would pertain to determining who is at fault in a particular loss. Derived from the laws of cause and effect, and in trying to determine who is at fault, mankind has attempted to define the cause of loss since the beginning of time. Still under discussion is whether Eve was at fault for eating the apple in the garden, or was it the fault of the snake, or of that which the snake represented? Wars have been started over trying to determine who was at fault for some event. Battles have been won or lost because someone was “at fault.” The old story of the battle that was lost because the general’s horse threw a shoe so the general could not lead his army successfully; because the battle was lost – the war was lost. And because the war was lost, a nation fell and a king was exiled. So, in respect to the ultimate liability, was the blacksmith that did a poor job on the horse at fault for the kingdom falling? Or was the provider of the nail negligent, as the nail was inferior? Or was the general’s orderly at fault for not checking the horse before the general mounted? And so, on it goes.

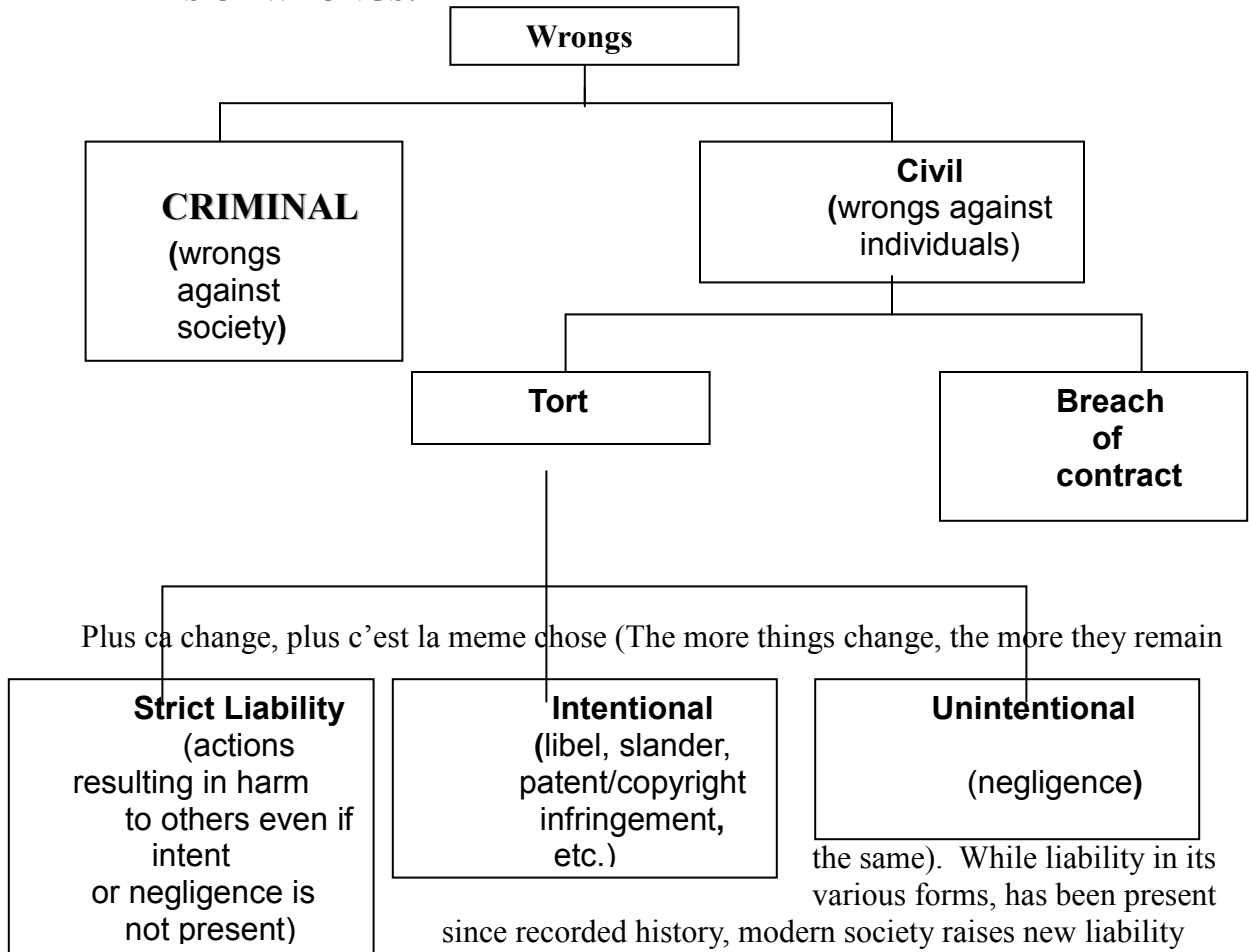
In order to determine who is at fault in a particular loss situation, obviously there are laws that state that an individual may not cause a particular loss and to do so, is an action against the “state” (read – “society). Other losses and causes of loss pertain only to those situations involving an individual personally, and not against the state.

CRIMINAL LAWS AND TORTS

Crimes against Society are created by the government who represents the Society in persecuting an individual for violations of its laws or statutes. The punishment for these violations is either monetary fines or some form of imprisonment. These laws can be passed and enforced by any level of government – city, county, state or federal. Some laws become laws by court decree or by executive fiat – but that is for another discussion.

Liability insurance does not ordinarily pertain to criminal law, but is concerned with civil liability. It is possible for a person to become involved with both criminal law and civil law in a single act – such as a person who drives a car while intoxicated, and injures another person &/or demolishes personal property. In this case, the individual would be prosecuted for driving while intoxicated (obviously a crime) and for injuring the individual, and at the same time, would be liable for the damage to the individual and his property. Of recent vintage is the O. J. Simpson trial wherein he was found not guilty of a criminal offense by a jury, but was found liable for damages for the injury and death of two individuals in a civil trial.

TYPES OF WRONGS:



Plus ça change, plus c'est la meme chose (The more things change, the more they remain the same). While liability in its various forms, has been present since recorded history, modern society raises new liability questions continually. While determining liability in a particular situation is extremely difficult in many cases, and has always been so, the question as to what is an action (or inaction) that creates liability continues to reach new heights almost every week.

Everyone's life and every business existence, is concerned with the liability question. Even the moral climate of today leans toward blaming everyone (except ones-self) for every wrong, real or imagined. Situations where the individuals involved agree that the situation was caused by an accident and that no one is really to blame are rare indeed in today's litigious society. The result has been that entire industries have suffered severe financial problems because of those situations that in earlier times would have been thought of as "accidents" where everyone had to take responsibility for his or her own actions.

Medical malpractice lawsuits have created huge insurance costs which are (1) partially passed on to the patient, (2) caused medical insurance premiums to rise to where employers have a difficult time financially in providing benefits to employees, and (3) created a large malpractice liability insurance market. Well-known and effective Directors of Corporations will not consider serving without liability insurance. The small airplane industry has nearly collapsed because of lawsuits involving 20 year-old airplanes. A business owner will not open the doors for business until there is insurance in place to protect them against a customer falling on their sidewalk or getting food poisoning from fruit purchased at the store. A community will not open a community-owned pool without liability insurance to protect them against some mishap at the pool.

The recent lawsuits against the tobacco industry points out how the courts can stretch the written law to where a major industry is in peril of surviving. Even though the cigarette packages have warnings posted clearly in simple English, in full compliance with regulations, the consumer who ignores such warnings and who smokes several packages of cigarettes a day (and therefore suffers the illnesses warned about on the side of the cigarette package) – bands together with others in similar situations and sues the tobacco industry for millions and millions of dollars.

Many years ago, it was discovered that a substance called “asbestos” would not burn at the heat ranges involved in structural fires. Also, it also had sound-deafening properties so it could be used between rooms so that the activity in one room would have a minimum effect on adjacent rooms. After serving its purpose for several decades and preventing untold fires, it was discovered that in certain circumstances asbestos could cause a lung condition. Again, after millions of dollars in lawsuits, the asbestos industry has all but disappeared and insurance companies have paid and continue to pay for the removal and elimination of this substance.

Dow Corning manufactured a breast implant that had been thoroughly tested and had passed the highest standards for safety. After several years of successful implants, a very few isolated implant recipient suffered illnesses or disabilities, which they blamed on the implants. It did not take long for attorneys and the news media to take up the hue-and-cry until many women started having “symptoms” that they had not had before and Dow Corning found itself involved in lawsuits to the extent that they could not afford to fight them all. Now that the producer of the implant has declared bankruptcy, strong evidence has come to light that indicates that the implants – even when ruptured – have caused injury or disability to only a miniscule number of recipients – if, indeed, any at all. But it is too late for the stockholders and employees of Dow Corning.

There are books written just on such matters, and liability lawsuits are now an accepted way of life and of doing business. In addition to the “blame-someone-else” attitude of today, another factor that has caused concern to businesses and insurers (and great glee to attorneys) is the concept of “punitive damages.” Even though liability insurance usually does not cover punitive damages, the mere threat of punitive damages has caused chaos in settling liability claims.

When a liability claim is settled, the actual damages will be awarded based upon the actual loss sustained by the plaintiff. However the court (a jury) will award additional damages because (1) the defendant – usually a business – can afford to pay the additional damages, (2) the plaintiff had suffered more than actual damages, and (3) the jury felt that the defendant should be “punished” monetarily. In some jurisdictions, the punitive damage amount may be “capped” by law, but in others, the “sky is the limit.” Usually there is no relationship between the actual damages and the punitive damages awarded. Therefore, attorneys will jump at the opportunity to sue for damages if punitive damages can be awarded. Since they will take most of the cases on a contingency basis, there will be many more lawsuits in those jurisdictions that allow for unlimited punitive damages.

CONSUMER APPLICATION

The Southern Health Insurance Company had been selling individual health insurance policies for 10 years. The owner and President of the company were well known locally and were active in local social and political events. The company was small and wrote business only in one state and had only the minimum of capital and surplus required by the state, requiring reinsurance from a large reinsurer for the risks. However, the President lived beyond his means, and money that was to be used for claims reserves was spent on personal items, such as a corporate jet.

When local hospitals and doctors started complaining about not being paid on a timely basis, some of their policyholders found themselves being sued for unpaid medical bills. They instituted lawsuits against Southern, with the result that all unpaid medical bills were paid. The State Insurance Department stepped in and took over operation of the company in order to make sure that policyholders were protected.

The courts determined that the actual damages were to be paid, but in addition, the plaintiffs (insureds) filed for punitive damages. They (11 plaintiffs) were awarded \$500,000 each for punitive damages.

Incidentally, the reinsurer did not participate in the punitive damages, as punitive damages are not reinsurable. The “punitive” award is to “punish” those responsible for the specified actions, and these “punishments” are usually determined not to be transferable to another.

CONSUMER APPLICATION

An actual situation that demonstrates damages, in particular punitive damages is before the Supreme Court of the U.S. as this text is being prepared. The following are the details as reported by the news media:

In 1994, Douglas Axen, age 56, collapsed when running. He was rushed to the hospital and the cardiologist diagnosed him as having life-threatening cardiac arrhythmia and prescribed a drug marketed under the name of Cordarone, which the FDA had approved in 1985.

Medical students as early as 1986 had linked this drug with vision loss and optic neuropathy, and the company was well aware of these findings. However, the warning for side effects on the package contained no warning about optic neuropathy.

After taking this medicine for a month, Axen noticed changes in his vision. His doctor took him off the medication but the deterioration continued and Axen is now legally blind.

Axen sued the American Home Products for intentional failure to warn that Cordarone could cause permanent loss of vision. Eventually a jury awarded his wife, who had joined in the suit, \$936,000 (reduced to \$500,000). The total award was \$22,843,657, which included \$20 million in punitive damages. The company protested that the award was irrational, ill considered and excessive. This amount was \$207,000 awarded for “economic damages, plus \$1.5 million for “non-economic damages.” Then the jury tacked on \$20 million to punish American Home Products.

The Oregon’s Court of Appeals ruled that, given the gravity of the company’s misconduct and the extent of Axen’s injuries, the sum was not constitutionally excessive.

(Interestingly, the reason the case has gone to the U.S. Supreme Court is that under the laws of the State of Oregon, Oregon automatically takes 50% of any punitive damage awards in that state – several other states have enacted similar laws. Since the 8th Amendment prohibits “excessive fines”, the company has maintained that the 50% retained by Oregon is a “fine.”)

Even as this text is being composed, there are discussions about liability arising out of persons doing work in their homes. The government has threatened to enforce OSHA regulations regarding safety in the home because of performing work in the home, and various other conceived problems. The public outcry has stopped this bureaucratic invasion, at least temporarily. At the same time, the highly publicized forecast Y2K problem frightened much of the business section of the country because of the fear that they could be liable for any problems with their customers that would arise because of computer problems. Many attorneys were salivating at the prospects of high-limit liability lawsuits because of a computer glitch. .

DAMAGES

Punitive Damages have already been discussed, but it is important to recognize the various types and degrees of Damages. The legal definition of “Damages” is “a pecuniary compensation of indemnity, which may be recovered in the courts by any person who has suffered loss, detriments, or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another.” One might say that liability is the risk, negligence is the changing of a risk into a claim, and damages are the form in which the claim is awarded. Forms of Damages or Types of Damages can be listed as follows:

ACTUAL DAMAGES

Real, substantial and just damages or the amount awarded to a complainant in compensation for his/her actual and real loss or injury, as opposed to “nominal”, “punitive” or “exemplary” damages.

CIVIL DAMAGES

Those damages awarded, as an example, against a liquor-seller to the relative, guardian or employer of the person to whom the sales were made, in a showing that the plaintiff has been thereby injured in person, property or means of support.

COMPENSATORY DAMAGES

Compensatory Damages are such as will compensate the injured party for the injury sustained, and nothing more. Compensatory Damages are designed to simply make good or replace the loss caused by the wrong or injury.

CONSEQUENTIAL DAMAGES

Such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act.

CONTINUING DAMAGES

Continuing damages are such as accruing from the same injury or from the repetition of similar acts, between two specified periods of time.

DAMAGES ULTRA

Additional damages claimed by a plaintiff not satisfied with those paid into court by the defendant.

DIRECT DAMAGES

Direct damages are those damages that follow immediately upon the act done.

DOUBLE DAMAGES

Twice the amount of actual damages as found by the verdict of a jury allowed by statute in some cases of injuries by negligence, fraud, or trespass. In most cases this has been replaced by punitive damages.

EXCESSIVE DAMAGES

Damages awarded by a jury which are grossly in excess of the amount warranted by law on the facts and circumstances of the case – unreasonable or outrageous damages.

EXEMPLARY DAMAGES

Exemplary damages are damages on increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called “punitive” or “punitory” damages or “vindictive” damages and (vulgarly) “smart money.” This definition was the result of the case of *Springer v. Fuel Co.*, a Pennsylvania case and is quoted because of the detail of the definition of “Exemplary Damages” which will

arise frequently in liability judgements. (It can also be used to illustrate the length of a single sentence in legal definitions).

GENERAL DAMAGES

General damages are such as the law itself implies or presumes to have accrued from the wrong complained of, for the reason that they are its immediate, direct, and proximate result, or such as necessarily result from the injury, or such as did in fact result from the wrong, directly and proximately, and without reference to the special character, condition, or circumstances of the plaintiff. (Another wordy legal definition)

INADEQUATE DAMAGES

Inadequate damages are those damages that occur when such a recovery at law would not compensate the parties and place them in the position in which they originally stood.

NECESSARY DAMAGES

This is used in a wider scope than “pecuniary” damages. It embraces all those consequences of an injury usually called “general” damages, as distinguished from special damages. Pecuniary Damages per se covers a smaller class of damages within the larger class of “general” damages.

NOMINAL DAMAGES

Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but the law still recognizes a technical invasion of his rights or a breach of the defendant’s duty or in cases where, although there has been a real injury, the plaintiff’s evidence entirely fails to show its amount.

PECUNIARY DAMAGES

Pecuniary damages are damages that can be estimated in and compensated by money. Not merely the loss of money or salable property or rights, but all such loss, deprivation or injury as can be made the subject of calculation and or recompense in money.

PROSPECTIVE DAMAGES

Damages which are expected to follow from the act or state of facts made the basis of a plaintiff’s suit; damages which have not yet accrued, at the time of the trial, but which, in the nature of things, must necessarily, or most probably, result from the acts or facts complained of.

PROXIMATE DAMAGES

Proximate damages are the immediate and indirect damages and natural results of the act complained of, and such as are usual and might have been expected.

REMOTE DAMAGES

Remote damages are the unusual and unexpected result, not reasonably to be anticipated from an accidental or unusual combination of circumstances – a result beyond which the negligent party has any control. (Note that this is the reverse of the Proximate Damages described immediately above).

SPECULATIVE DAMAGES

Speculative damages are prospective or anticipated damages from the same acts or facts constituting the present cause of action, but which depend upon future developments which are contingent, conjectural or improbable.

SUBSTANTIAL DAMAGES

A sum assessed by way of damages, which is worth having; opposed to nominal damages which are assessed to satisfy a bare legal right. Consideration in amount and intended as a real compensation for a real injury

TEMPORARY DAMAGES

Damages allowed for intermittent and occasional wrongs, such as injuries to real estate, where cause thereof is removable or abatable.

CONTRACT AND TORT LAW

Civil Law may be divided into two sections: (1) Contract Law and (2) Tort Law. Since they are both part of Civil Law, it is important to be familiar with both, and to be able to determine which law would apply in certain situations.

CONTRACTS

The law of contracts specifically applies in insurance, as the insurance contract (policy) is the very basis of insurance. The laws of Contracts are extensive and voluminous; most of which are beyond the scope of this text. Certain elements of contract law should be learned and reviewed on a regular basis as many questions regarding insurance should be answered and explained to the satisfaction of a policyholder or applicant, if the laws of contract are invoked.

To review the structure of Contracts, there are four elements to a Contract:

AGREEMENT.

One party has to make an offer and the other party must accept it. The offer must specifically express the intent to make an agreement in terms that may be so construed, and they must be communicated to the other party. These terms are accepted if transmitted to the person to whom the offer is made, the terms are unconditional and definite, and the terms are transmitted to the person making the offer. An insurance agent is normally considered as a solicitor of the offer, and the offer is the insurance application. A policy is considered as an acceptance. In some types of insurance, the agent has binding authority, and in others they do not have the authority (usually in life and health insurance).

COMPETENT PARTIES.

A party to a contract may be considered as incompetent if they are a minor, insane, under the influence of alcohol or drugs, or possibly a corporation (considered by law as an "artificial person") which doesn't have the authority to enter into such a contract. By law, many incompetents are given the opportunity to extract themselves from a contract if it was entered into while they were incompetent. In nearly all situations involving insurance, the policy

may be cancelled by the insured by law. Even if the insured is found by a court to be incompetent without the knowledge of the insurer, the law usually allows a full return of premium to the insured.

CONSIDERATION.

Consideration is whatever one person asks another to do in return for the promise offered under the contract. Insurance consideration is the payment of premium or the promise to pay a premium at a specified later date. In some insurance policies, pre-payment of premiums is required. Life insurance coverage will not be effective until the full first premium is paid, however in Property & Liability insurance pre-payment is not usually required, but the insured has an obligation to pay the premium as soon as coverage commences.

LEGAL PURPOSES.

Insurance contracts must involve a legal subject matter and this is usually not a serious problem. However, articles that may not be legally possessed may not be insured. For instance a vehicle used for illegal purposes cannot be insured under an automobile insurance policy.

INSURANCE CONTRACTS

Insurance contracts have certain unique features in addition to the qualifications listed above. These features are discussed below, but a more detailed discussion or explanations are beyond the scope of this text.

CONDITIONAL CONTRACTS

Insurance policies are dependent upon an uncertain event. Under most other contracts, the contracts are based upon some acts being performed. In insurance, the acts may never occur and therefore are considered as “conditional.”

CONTRACTS OF ADHESION.

The normal contract can be added to or subtracted from, but an insurance contract is a “take-it-or-leave-it” type of offer. In other words, the insured must adhere to the agreements of the contract; hence it is a contract of “adhesion.”

ALEATORY CONTRACTS.

A typical contract involves items of similar value; e.g. an automobile is purchased for a stated amount, which approximates the value of the automobile. An insurance contract consideration, conversely, is usually uneven. Rarely does the consideration of both parties become equal. The Aleatory concept is that the contract is dependent upon an uncertain event.

UNILATERAL CONTRACTS.

Only one party in an insurance contract makes an enforceable promise. The policyholder pays a premium; the other party makes a unilateral promise.

CONTRACTS OF UTMOST GOOD FAITH.

Insurance contracts by their very nature are considered as a contract of utmost good faith. The applicant must disclose all material facts, and the insurer must deal with its clients in complete honesty and good faith.

CONTRACTS OF INDEMNITY.

Insurance contracts are contracts of indemnity by which the injured party is compensated for the losses suffered by means of a financial settlement.

TORT LAW

Black’s Law Dictionary defines “Tort” as “A private of civil wrong or injury. A wrong independent of contract”, “A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction,” “There must always be a violation of some duty owing to plaintiff, and generally such duty must arise by operation of law and not by mere agreement of the parties.”



There are three elements of every tort action:

- 1. Existence of legal duty from defendant to plaintiff,**
- 2. Breach of duty, and**
- 3. Damage as proximate result.**

A Tort is a legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual. In the former case, no special damage is necessary to entitle the party to recover. In the latter two cases, such damage is necessary.

CONSUMER APPLICATION (Contract Law)

Johnson Air Conditioning contracts with Nosam Advertising to develop an article for the newspapers in the neighboring cities and towns introducing a new product that “cuts air conditioning bills in half” and such advertising was to appear in a special section that would appear only on a particular weekend. Nosam informed Johnson that they were on schedule, but when it came time to place the ad, Nosam claimed to have lost part of their paperwork and had a key employee resign, so they were unable to meet the deadline. The following week Johnson’s principal competitor introduced the same new product, with the result that Johnson lost new customers and even old customers who went with the other air conditioning firm in order to take advantage of the new product. Since this was a valid contractual agreement, Nosam would be held legally responsible for the damage caused by the failure to perform under the contract.

CONSUMER APPLICATION (Tort Law)

Beacam Pharmacy was located in downtown Spruce Falls, Wisconsin, which was subject to heavy snowfall. After a blizzard struck Spruce Falls, Paul Beacam, the owner of the pharmacy, got into an argument with the City Works Department about the snowplow throwing snow onto his sidewalk. To “prove his point”, he refused to shovel the snow and ice from his sidewalk, even though all of the other business owners in the area had cleaned their walks.

Helen needed a prescription filled for her arthritis, and drove to the pharmacy, parking in a cleared section of the street. However, when she attempted to enter the pharmacy, she slipped on the ice and broke her hip.

The pharmacy had a legal duty to make every effort to avoid all hazards to its customers (cleaning the walk), which it failed to do (breach of duty), and with the result that Helen suffered serious injuries and incurred medical bills because of the fall (damage as a proximate result).

Interestingly, a court has very recently ruled that if a business does not shovel the sidewalk in a similar situation, the business is not liable if someone is injured because of the accumulation, as the snow and ice were beyond the control of the business. However, if the business had made an effort to clear the sidewalk on a person slipped on ice that remained, then the business would be liable for any injured.

To further describe Tort Law, the point must be made that in the insurer’s society and under the laws of the United States, a person owes a duty to other to not deliberately do anything to (deliberately) injure another person, or to cause damage to another person’s property. Note the emphasis on “deliberate.”

A person, who commits a tort (a Tortfeasor”) and is subsequently judged liable for his /her actions, normally must pay damages to the party who was injured (or wronged). Liability insurance usually does not apply to *intentional* torts – even though the wronged individual may in many cases, have the right to sue for damages for those intentional acts. Conversely, if the acts were *unintentional*, liability insurance usually does apply.

STUDY QUESTIONS

1. A practical definition of liability in the insurance sense, is
 - A. determining who is at a fault in a loss.
 - B. being financially liable for a debt.
 - C. showing the debts of obligations on an accounting sheet.
 - D. determining the relationship between a debtor and a creditor.

2. Liability insurance does not pertain to _____, but is concerned with _____.
- A. civil liability - criminal law
 - B. torts - statutory law.
 - C. debts per se - collection of debts
 - D. criminal law - criminal liability.
3. When a liability claim is settled, damages will be awarded
- A. based upon the actual loss sustained by the plaintiff.
 - B. based upon the actual loss sustained by the defendant.
 - C. only upon what the defendant can afford to pay.
 - D. based upon the criminal activity creating the loss.
4. Real, substantial and just damages are called
- A. Civil Damages.
 - B. Compensatory Damages.
 - C. Consequential Damages.
 - D. Actual Damages.
5. "Damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by violence on the part of the defendant," is the definition of
- A. exemplary damages.
 - B. general damages.
 - C. actual damages.
 - D. prospective damages.
6. Civil Law may be divided into two sections:
- A. Contract Law and Criminal Law.
 - B. Contract Law and Tort Law.
 - C. Criminal Law and Tort Law.
 - D. Tort Law and Common Law.
7. The laws of _____ specifically apply in insurance matters.
- A. Contracts
 - B. Torts
 - C. Negligence
 - D. Criminal Intent
8. Which of the following is NOT an element of tort action?
- A. breach of duty
 - B. Corpus Delicti
 - C. existence of legal duty from defendant to plaintiff
 - D. damage as proximate result.

9. A Tort is a _____ wrong committed upon the person or property independent of contract.
- A. monetary
 - B. legal
 - C. imaginary
 - D. non-consequential
10. A person who commits a tort is called
- A. the plaintiff.
 - B. a tortfeasor.
 - C. a criminal
 - D. a committor

ANSWERS TO STUDY QUESTIONS

1A 2D 3A 4D 5A 6B 7A 8B 9B 10B



CHAPTER TWO - LEGAL RIGHTS AND REMEDIES

With the elements of Torts as described above, present in a particular situation, a situation would exist wherein someone had a legal right, someone violated that right (committed a tort), and a legal remedy existed to redress that violation. Violations of rights against which tort law provides protection are:

1. Bodily injury
2. Loss of personal freedom
3. Loss of property
4. Undue interference with an economic right or advantage
5. Damage to public esteem
6. Interference with family relationships
7. Undue psychological trauma



The law provides two major remedies for the rights of an individual: (1) direct action on the part of the victim and (2) judicial remedy.

DIRECT ACTION

The action of the victim must be weighed against the reasonableness of the harm suffered. As an example, a person has the right to defend himself against physical attack in a reasonable way. A victim must use an amount of force considered reasonable in view of the amount of force of the attack

CONSUMER APPLICATION

Application One:

Barbara got into an argument with her friend Agnes over a statement that Barbara's boyfriend had made. Agnes became very upset and slapped Barbara. She immediately apologized, and then as the argument continued, she drew back her hand to strike Barbara again. Barbara pulled a handgun from her purse and shot Agnes. This would be excess force and is not reasonable.

Application Two:

The Brown Shoe Store has problems with employees of other stores in the area using their customer parking lot. The owner posted signs warning of towing. He contracted with a towing service to tow cars away that do not belong in this lot. This is permissible and not excessive.

Application Three:

Sally is a track star at her college. While shopping in the mall one day, a man grabbed her purse and ran away. Sally ran after him, overtook him, tackled him and retrieved her purse. The thief suffered a broken elbow when Sally tackled him. Sally has the right to pursue the thief and recover her property.

(Continued)

Particularly applicable in Application Three, is the point that Direct action must be reasonably prompt. If Sally had not pursued the thief immediately, her inaction would compromise that right, and she could not see him later in the day and tackle him to get her property. She would have to seek a judicial remedy.

JUDICIAL REMEDIES

The judicial remedy that one would pursue is available because the law provides legal remedies as an essential element in the definition of tort. If direct action did not or will not result in a remedy, judicial action is required. Three legal remedies exist. The court can:

1. Award monetary damages
2. Grant an injunction
3. Require restitution

Damages are discussed in detail in the section on DAMAGES later in this text. Briefly, in the discussion of Judicial Remedies, one should understand that money damages are normally *compensatory*, in other words, reasonably related to the extent of the injury involved. Damages can also be symbolic or *nominal* in amount, legally indicating the existence of the tort. *Nominal* damages could be awarded in situations such as simple trespass where no damage to the land was involved. Damages can be *punitive* or far in excess of the actual monetary harm involved when the court views tortious behavior as being particularly repugnant. Usually, punitive damages are awarded in addition to compensatory damages and are labeled as such.

INJUNCTIONS

An *injunction* is a court order (writ) which prohibits a person from continuing a particular action, or to stop a present activity. There are several forms of injunction, but basically it is used when monetary damages are not adequate to redress the wrong. An injunction might be issued to stop someone from trespassing, or it can be used as to prohibit future trespass or it can be used as a temporary relief until an issue is resolved by the court.

Usually, before an injunction can be ordered, the burden of proof falls on the victim who must prove that money damages would be an inadequate remedy.

Some of the types of injunctions are:

Final Injunction:

A final injunction is granted when the rights of the parties involved have been adjudicated or otherwise determined.

Interlocutory Injunction

An injunction granted prior to a final hearing and determination of the matter in issue, and which is to continue until answer, or until the final hearing, or until further order of the court.

Mandatory Injunction

An injunction which commands the defendant to do some particular thing or take particular action, and which prohibits him from refusing to do or permit some act to which the plaintiff has a legal right, or restrains the defendant from permitting his previous wrongful act to continue operative, thus virtually compelling him to undo it, as by removing obstructions or erections, and restoring the plaintiff or the place or the subject-matter to the former condition.

Permanent Injunction

An injunction intended to remain in force until the final termination of the particular suit.

Perpetual Injunction

This is an injunction which finally disposes of the suit and is indefinite in point of time.

Preliminary Injunction

An injunction granted at the inception of a suit which restrains the defendant from doing or continuing some act, the right to which is in dispute and which may either be discharged or made perpetual, according to the result of the controversy, as soon as the rights of the parties are determined. The object is to preserve the status quo until the merits can be heard.

Preventative Injunction

This is an injunction, which prohibits one from performing certain act and commands him not to do it.

Provisional Injunction

This is another name for the preliminary or temporary injunction.

Special Injunction

This is an injunction by which parties are restrained from committing waste, damage, or injury to property.

Temporary Injunction

This is a preliminary or provisional injunction, as opposed to a final or perpetual injunction.

CONSUMER APPLICATION

Roland and Barry are neighbors with a large old oak tree on the boundary line of the property, which shades a terrace that Roland had built in his back yard. Neither of them have had a survey as they inherited the properties and felt no such survey was needed. Barry decided to put a swimming pool in his back yard and does not want oak leaves to foul up his pool pump, so he contracted to have the tree removed. Roland obtained an injunction before the tree could be removed.

In this boundary dispute illustration, money damages, if the boundary dispute were ultimately adjudicated in favor of the victim, would not be an adequate remedy for the loss of the shade of the old oak tree wrongfully cut. A preventative injunction would be used before the trees are cut.

CONSUMER APPLICATION

Bill's Hardware was having vandalism problems. Bill erected an 8-foot chain-link fence around his property, but by doing so he shut off access to the back entrance to a mobile home park. To compensate, he put a gate to provide the rear exit from the park, but at night, he would chain and lock the gate. The tenants of the park complained that they had to drive quite some distance at night to use the front entrance. The mobile home part owners had obtained easement rights for the rear entrance when they established the park.

The attorney for the park asked for and was granted a Mandatory Injunction, which instructed the owner of the store not to impede or in any way hinder the usual flow of traffic to and from the mobile home park by the rear entrance. Further, he was required to remove the fence and gate that would impede the traffic.

Restitution is the act of restoring, restoration of anything to its rightful owner, or the act of making good or giving equivalent for any loss, damage or injury, and indemnification. Although this term has the general meaning of compensating for a wrong, in tort laws it means precise return of property, and not in monetary or some other basis.

CONSUMER APPLICATION

Mary was to inherit a necklace from her grandmother. It had been given by Queen Victoria to her court favorite, the Queen's Cousin Mary. The necklace had been passed down to the child who has been named Mary for every generation since. It is made of soft white gold with diamonds and rubies and was handmade by a silversmith and regardless of the appraisal of \$100,000, it was considered priceless by Mary for sentimental reasons. Mary's mother had kept the necklace until Mary reached age 21 but her mother died when Mary was 20. Mary's older sister, Billie, was executor of the estate but when Mary turned 21, she refused to give it to Mary, instead keeping it to give to her daughter (who was not named Mary).

In this situation, restitution is the only compensation that would be acceptable as the article cannot be replaced and to the rightful owner, it is priceless.

INVASIONS OF RIGHTS

One can be harmed by many methods, and tort law protects against an individual's invasion of rights, which include battery, assault, false imprisonment, and loss of property.

BATTERY AND ASSAULT

Although used interchangeably, and in some jurisdictions by criminal law definition, they are the same. In Tort law, *Battery* is an intentional touching of another person without that person's permission or the taking of some other privilege in a manner offensive to the person touched. *Assault* means the threat of battery; that is, putting someone in fear that he or she will be physically harmed. Assault is the threat; battery is actual physical contact.

FALSE IMPRISONMENT

False imprisonment is the restraint of a man's personal liberty and/or coercion exercised upon a person to prevent the free exercise of his powers of locomotion. A person does not have to be jailed to have suffered false imprisonment.

Both battery and false imprisonment are tortious only when the act occurs without the victim's consent. Also, the rights of a person to freedom from bodily injury and to freedom of movement carry with them the right to use reasonable force in self-defense.

CONSUMER APPLICATION

Simon went to the store on a cold day, wearing a heavy coat, scarf and gloves. Once in the store, he removed his gloves and placed them in his coat pocket. Unfortunately, he was standing in front of the glove counter where he had purchased gloves only 2 days earlier. A store security guard saw him put the gloves into his pocket and asked Simon to accompany him to the store manager's office, which Simon did. In the office he told the guard that he had purchased his gloves 2 days earlier and offered to get the receipt and return to the store. The guard refused to let him go, even after Simon explained that he had to leave in a few minutes to pick his son up at school.

This is an example of false imprisonment. While Simon agreed to go to the office, he did not agree to stay there.

PROPERTY LOSS

Obviously, everyone is entitled to the quiet enjoyment and exclusive use of their property. This includes both peaceful possessions of that property and rights to any profits arising from its use. Real property is subject to the torts of trespass and nuisance.

TRESPASS

(See section on Negligence later in this text) Trespass is defined as unlawful, intentional entry onto land by a person (walking on the land) or by an object (dumping trash on someone's property). A *private nuisance* is something, which unreasonably interferes with one's use of his or her real estate. It is an intangible interference such as loud noises, smoke, dust, or fumes.

Personal property is subject to the torts of conversion and trespass to chattels (personal property). Direct Conversion is the act of actually appropriating the property of another to his own beneficial use and enjoyment or to that of a third person, or destroying it or altering its nature.

CONSUMER APPLICATION

Ralph has used a store on Main Street for 20 years to sell clothing and such articles. The building actually belongs to his cousin Peter, but as far as anyone knows, it is Ralph's store and has never paid rent. Peter passes away and his widow never says anything to Ralph about the store building. Later, when Ralph decides to retire, he arranges to sell his business to Henry, and included the store in the transaction.

This is an example of conversion as the property never belonged to Ralph and he is attempting to transfer it to another person.

TRESPASS TO CHATTEL

Trespass to chattel is an intentional act that interferes with the owners' right to have physical control over an object. While conversion involves interference with an owner's legal claim to the property, trespass involves interference with an owner's right to control the property.

UNDUE INTERFERENCE WITH AN ECONOMIC RIGHT OR ADVANTAGE

A person is protected by Tort law to enjoy honest economic activity. Not only is the personal enjoyment of property protected, the efforts to acquire property is also protected. Deceit, inducing breach of contract, and disparagement are examples of undue interference with an economic right.

DECEIT

- Deceit is a fraudulent misrepresentation or contrivance, by which one person deceives another, who has no means of detecting the fraud, to the injury and damage of the latter.
- Deceit is an undue perversion of the truth of a material fact, acted upon by the victim to the victim's detriment.
- Parties to a contract have a right to the enforcement of contractual promises. Under tort law, one who acts intentionally to induce another to breach a contract has committed a tort.

CONSUMER APPLICATION

Melissa is an aspiring actress who was offered a part in a movie. She hired an Agent, Sid, to represent her and the contract was entered into. Before the movie was completed, she was offered a part in a daytime soap opera with tremendous potential, but she had to start immediately. Melissa asked Sid what she should do and to see if she could get out of her movie contract. Sid instructed her to go the daytime program filming and to ignore the movie contract as her part had already been completed. Unfortunately, the movie Production Company decided to rewrite the script, which would call for Melissa to play a more prominent role in the movie.

Sid has committed a tort by inducing, or attempting to induce Melissa to breach her contract.

DISPARAGEMENT

Disparagement is defined as any unprivileged communication to the public that

1. Is known by the maker to be false
2. is derogatory to the victim's title to its property, the quality of its goods or services or to its business activities generally,
3. Is intended to discourage the public from dealing with the victim, and
4. Causes direct economic harm to the victim.

CONSUMER APPLICATION

Jim started a clothing store two doors away from Ralph's clothing store. Jim's men's clothing was a more expensive line than that carried by Ralph. Every time a potential customer of Jim's inquired about the difference in cost between Jim's suits and Ralph's suits, Jim would state that Ralph's clothes were an inferior brand or poor workmanship and anyone who purchased any of his clothing could expect it to wear out quickly and seams to split.

Jim is guilty of Disparagement.

DAMAGE TO PUBLIC ESTEEM

Direct economic loss is not the only damage that can be given to an individual, in many cases one's reputation is of inestimable and intrinsic value, even though it may not result in direct economic loss. The two rights established under tort law must be protected: (1) the right to be protected from the spread of falsehoods which would be injurious, and (2) the right to be protected from the spread of confidential information which, even though accurate, would subject the entity to derision.

CONSUMER APPLICATION

Ralph, the owner of Ralph's Men Clothing, felt that glasses would make it easier for him in his everyday activities. Neil Wilson, of Wilson's Optometrists, tested his eyesight and discovered that Ralph was quite colorblind. Ralph had been aware of this, of course, but no one other than his wife who worked in the store also, knew of his colorblindness.

At his weekly poker party, Neil jokingly told his friends, "Isn't it hilarious that Ralph owns a clothing store and he can't tell the difference between a blue suit and a brown suit."

This caused Ralph great distress and damage to his esteem. Even though he may not be able to prove that his customers are going elsewhere and he may not lose money on other knows that he is colorblind, Neil is still guilty of committing a tort.

DEFAMATION

Defamation is the taking of one's reputation or injuring one's character, fame or reputation by false and malicious and slander. The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a man into his private life, or pry into his domestic concerns, and it never attacks the individual, but only his work

INVASION OF PRIVACY

Invasion of privacy is a tort that involves a person's right to be let alone. Invasion of privacy occurs if any of the following four specific rights are violated:

1. To be let alone
2. To prohibit one's name or identity from being used to promote products or causes without permission
3. To prohibit *private* information about oneself from being publicized
4. To prohibit public information about oneself from being publicized in a misleading manner

INTERFERENCE WITH FAMILY RELATIONSHIPS

A family has a right, protected by tort law, to the enjoyment of the family's service, affection, and companionship. Spouses have the right of sexual relations (consortium). Any person that disrupts these marital or family relationships can be the basis of tort action.

The old common law treated a wife's identity as secondary to that of the husband and her identity was absorbed into the husband's identity, and they became as one person under the law. Therefore, the husband, as breadwinner upon whom all members of his family existed, enjoyed a greater measure of protection than did his wife. As an example, a husband possessed the rights to his wife's consortium or the right to her sex, service and society. However, the reverse was not so. In case the wife was injured, both she and the husband had claims against the negligent party, but if the husband was injured, the wife could not claim to right to consortium of the husband. Laws in recent years have reduced this inequity substantially.

Parent-child relations are based on the rights of parents to the services, company, and affection of their children who are still dependent members of the household and not emancipated or reached age of majority.

It is a tort to wrongfully deprive a parent of this service, company, and affection.

PSYCHOLOGICAL TRAUMA

When an injury that is not physical is suffered, such as the result of false imprisonment, defamation of character, or where an individual suffers a "nervous breakdown" as a result of defamation, it is considered psychological trauma.

Psychological trauma, which is not associated with another recognized tort, is less widely accepted by courts but does exist. Involved are such torts as assault, infliction of mental distress, malicious prosecution, or wrongful civil proceedings.



STUDY QUESTIONS

1. Don and Sue go to a bar with Bill and Alice. Bill calls Don a nasty name; thereupon Don hits Bill in the nose. Sue threatens to do the same thing with Alice.
 - A. Don is guilty of Battery; Sue is guilty of Assault.
 - B. Don is guilty of Assault; Sue is guilty of Battery.
 - C. Don is guilty of Battery; Sue is not guilty of anything.

D. No one is guilty of anything.

2. Henry sells insurance and discovers that a former co-worker at another agency has been telling Henry's clients that Henry has lost his license because he has been representing an insurance company that will not pay its claims. This is an example of
 - A. deceit.
 - B. disparagement.
 - C. both deceit and disparagement.
 - D. honest sales practices.

3. Ralph sued Norm for Loss of Consortium. Which is the most probable situation?
 - A. Norm stole Ralph's taxi, leaving him without means to make a living.
 - B. Norm hit Ralph in the face and Ralph had to have plastic surgery, losing over a month of work.
 - C. Ralph's wife moved in with Norm and then divorced Ralph.
 - D. Norm stole Ralph's credit cards, which cost Ralph a lot of money.

4. Bruce confided to a co-worker, John, that he was born with three nipples and asked that he not tell anyone. John told everyone in his work unit and Bruce was subject to many lewd and disparaging remarks, making it so uncomfortable that he became agitated that he was no longer able to work. Bruce suffered what type of damage?
 - A. Disparagement
 - B. Deceit
 - C. Defamation
 - D. Damage to Public Esteem

5. Cindy used to weight 150 pounds more than she does now. She told Marianne about this in casual conversation, and told her that she had lost the weight because of exercise and calorie counting. Marianne sells a weight reduction product, Fatt-Off, and she develops a sales brochure without the knowledge or approval of Cindy, using before-and-after photos of Cindy and attributing her weight loss to Fatt Off. Marianne is guilty of what Tort?
 - A. Defamation
 - B. Damage to Public Esteem
 - C. Invasion of Privacy
 - D. Disparagement

6. The law provides two major remedies for the rights of an individual, one of which is
 - A. judicial remedy.
 - B. incarceration.
 - C. performing public service.
 - D. flagellation.

7. Under a Tort action, a person has the right to defend him/herself against physical attack
 - A. in a reasonable way.
 - B. using whatever forces the victim feels necessary.
 - C. including the taking of the life of the assailant if the assault was at night.
 - D. only if they are a police officer.

8. Jean was the victim of a purse-snatcher. Three days later she spotted the man at a grocery store and hit him in the face with a can of mushrooms.
- A. This would not be considered as reasonable, as she did not take DIRECT action.
 - B. Jean operated completely within her rights.
 - C. If Jean had pulled a gun and shot the purse-snatcher, she would have been within her rights.
 - D. It would not have made any difference when this happened as Jean couldn't take any action or any kind against the purse-snatcher as it is only a misdemeanor.
9. An injunction which commands the defendant to do some particular thing or take particular a action, and which prohibits him from refusing to do or permit some act to which the plaintiff has a legal right, or restrains the defendant from permitting his previous wrongful act to continue operative, thus virtually compelling him to undo it, as by removing obstruction or erections, and restoring the plaintiff or the place of the subject matter to the former condition. This is what type of Injunction?
- A. Final Injunction
 - B. Perpetual Injunction.
 - C. Mandatory Injunction
 - D. Preventative Injunction
10. Robert wants to build a retaining wall around his swimming pool. Mark, next door, does not want him to build the wall until a survey and study can be completed to make sure that run-off rainwater will not gush into his yard because of the retaining wall. The first action that Mark should take (after Robert told him that it was none of his business) is
- A. to build a retaining wall in his own yard to make the water run back to Robert's yard.
 - B. to get a Preliminary Injunction.
 - C. to get a Permanent Injunction.
 - D. to call the Sheriff.

ANSWERS TO STUDY QUESTIONS

1A 2C 3C 4D 5C 6A 7A 8A 9C 10B



CHAPTER THREE - TYPES OF TORTS AND NEGLIGENCE

Torts can be divided into three categories, depending upon the types of action that is involved in creating the Tort. These categories are (1) Intentional Torts; (2) Strict Liability; and (3) Negligence. These categories differ so much that each must be discussed in more detail.

WILLFUL TORTS

As the name implies, a Willful (or Intentional) Tort is an action that is taken by the Tortfeasor with the deliberate intent to harm another. "Willful" implies intent or purpose to injure. Further, it involves elements of intent or purpose and malice or ill will, but malice or ill will may be shown by indifference to safety of others, with knowledge of their danger; or failure to use ordinary care to avoid injury after acquiring such knowledge.

CONSUMER APPLICATION

Sarah's neighbor accidentally ran over her cat when the cat was in the neighbor's driveway. While this was clearly an accident, as the cat had been sleeping behind the wheel of the neighbor's car parked in the driveway, the more Sarah thought about it, the madder she became. In retaliation, that night Sarah threw a poisoned steak into the neighbor's yard whose dog ate the steak and died. Unfortunately for Sarah, another neighbor happened to see her throw the steak over the fence.

Sarah would be guilty of a Willful Tort.

STRICT (ABSOLUTE) LIABILITY

In certain situations, an individual may be liable for damages on the basis of law, regulation, or court decision (or any combination thereof). This area of liability seems to expand as society demands more responsibility for the action of others. To put it simply, if a person performs an act that a reasonable person could construe to be harmful to others, they could be held liable under this type of liability.

This type of liability is primarily applied when dangerous &/or hazardous materials are involved, or dangerous animals are involved. In these situations, regardless of how many precautions the owner or operation takes, the potential for damage to others is so great that they can be held liable, even without any intent to do harm.

CONSUMER APPLICATION

At the winter quarters of Barnes Circus, the principal equestrian performer offers riding lessons to children in the community to supplement the circus income. She uses trained circus horses for this purpose, and is quite popular as children love to ride the highly trained, intelligent and very tame animals. However, her son is an animal trainer and for a short period each year, he brings 2 lions and 2 tigers to his mother's quarters, and works with the animals in cages he erected near her home.

One afternoon, after working with a tiger that was in a circular workout cage; the son left the tiger momentarily to check on another animal. At that moment, one of the mother's students hurried to the barn where the horses were kept and not noticing the tiger, brushed against the cage near where the tiger was resting. The tiger was startled and swung at the child in reaction to the sound, inflicting serious damage to the child's arm.

By the fact that wild animals were kept in this area, Strict Liability would be applied in this case. (Incidentally, this situation – the riding instructions and the wild animals kept on the property – actually exists in a community in Florida where many circus people winter. The tiger attack is fictional.)

NEGLIGENCE

Negligence is the most important of all of these categories as it is evoked more than the other categories combined and will be discussed in detail.



Note: Liability Insurance concerns itself with *negligent* torts

While there are a multitude of legal definitions, the one that “says it all” is:

“The omission to do something which a reasonable person, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent person would not do.”

Negligence can be broken down into the following types, which do not list all of the newer types, but emphasizes the broad reach of this topic.

- Actionable Negligence
- Collateral Negligence
- Comparative Negligence
- Concurrent Negligence
- Contributory Negligence
- Criminal Negligence
- Culpable Negligence
- Degrees of Negligence
- Gross Negligence
- Hazardous Negligence
- Legal Negligence
- Ordinary Negligence

Slight Negligence
Subsequent Negligence
Wanton Negligence
Willful Negligence (not to be confused with Willful Torts)
(Whew!)
All of this can be simply stated:

 **If there is negligence involved, an individual can be held legally liable for damages.**

In many jurisdictions, by law or court ruling, everyone is expected to act as a *reasonable* person would act under the particular set of circumstances. In those jurisdictions which have laws, statutes or ordinances setting forth what a *reasonable* person actually are, any violation is considered as *negligence per se* and the offense is a statutory violation.

In order to establish negligence, there must be the three elements of Tort Law, plus one:

1. Existence of legal duty from defendant to plaintiff,
2. Breach of duty, and
3. Damage as proximate result, are used, *plus*
There must be evidence that the negligent act is the proximate cause of loss.

The first three elements have been discussed previously, but the additional element, the definition of “proximate cause” is of interest and should be discussed. Proximate Cause is defined as “That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.” “The last negligent act, contributory to an injury, without which such injury would not have resulted.” Also defined as “the dominant cause” the moving or producing cause”, “the efficient cause – one that necessarily sets the other causes in operation.”

Sometimes, situations or circumstances will intervene between the act that caused the loss, and the loss itself, but it will still remain as a proximate cause situation (such as in a chain reaction) as long as there is no “casual element” that would interrupt the sequence. Conversely, when some event occurs, which intervenes in the “chain”, the negligent party is not liable because the proximate cause does not exist. The following Customer Applications illustrate the differences.

CONSUMER APPLICATION

A new computer program installed in Interstate Hydraulics shut down part of a testing program, which created additional pressure at a valve regulating fuel for the testing device. This caused the valve to malfunction, and a pipe burst with the additional pressure, hurling pieces of steel pipe into an adjacent parking lot, creating considerable damage to several expensive automobiles.

In this situation, the malfunctioning computer program would be considered as the proximate cause of the loss to the automobiles.

CONSUMER APPLICATION

Interstate Hydraulics did not immediately repair the adjacent parking lot as a result of the pieces of steel pipe being hurled into the parking lot as their insurance company's claims adjusters needed to send a particular claims adjuster out to test the surface of the parking lot which was roped-off to separate it from the rest of the operating parking lot.

During this interim period, a parking lot customer backed his car into the damaged area, even though traffic cones separated the immediate area. A piece of sharp pipe that was embedded in the macadam of the parking lot as a result of the pipe explosion cut his rear tire so badly that an expensive decorative steel wheel was destroyed.

In this situation, there would be no proximate cause and Interstate Hydraulics could not be held responsible for the damage to the tire and wheel.

VARIOUS FORMS OF NEGLIGENCE

GROSS NEGLIGENCE

The courts have defined Gross Negligence in various ways, depending upon the particular case application. The basic definition of Gross Negligence is the intentional failure to perform as manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want to care and regard for the rights of others as to justify the presumption of willfulness and wantonness.

One court decision defined Gross Negligence as "The want of ordinary diligence and care which a usually prudent man takes of his own property of like description." This relatively simple definition can be simply stated as "take care of another's property as you would your own" – a somewhat variation of the Golden Rule.

Gross Negligence arises when even the slightest care is not used, and may involve the safety of others or other's property, or reckless, irresponsible, wanton and willful misconduct.

CONSUMER APPLICATION

Bill purchases a new SUV with four-wheel drive. He had never driven such a vehicle before and decided to try it out in the nearby mountains. Bill invites his girlfriend Susan along to "get some fresh air" and have a picnic in the mountains.

In an attempt to impress his girlfriend, he takes a lumber road off the main road through Snow Pass. While attempting to climb a very steep grade, he loses control of the SUV, and it turns over, injuring Susan.

Bill is liable for damages to Susan as he showed Gross Negligence in his actions.

CONTRIBUTORY NEGLIGENCE

Contributory Negligence is where both parties to an action which causes damages to one or both parties, “point their fingers at each other.” It is the act or omission amounting to want of ordinary care on part of a complaining party, which, concurring (in agreement) with defendant’s negligence is the proximate cause of injury.

In the determination of negligence, the last consideration is whether the person who was injured or damaged was negligent. The reasoning is that the guilty party must pay, and the injured party, if innocent of the actions, should not pay. Basically, the theory is that if each party is somewhat negligent, each party must bear its own share of the injury. This is determined by law in many jurisdictions.

CONSUMER APPLICATION.

Acme Products created a new computerized self-propelled miniature Jeep. They sold 20 of the Jeeps to the Toys Deluxe Company for the express purpose of their determination as to the marketability of the toy. The boxes in which they were contained stated “Sample Toys Only, Not to Be Sold or Used for Any Purpose Other Than Test Purposes.” The Jeep had a sticker on the windshield when shipped that stated “For Test Purposes Only.” Toys Deluxe gave two of the jeeps to the children of major stockholders. Both Jeeps turned over on the children, badly injuring one, as the length of the vehicle has not been designed properly in relation to the circumference of the wheels. The stockholders, who in turn sued Acme, sued toys Deluxe.

While Acme was responsible for the design flaws, Toys Deluxe could be held liable under the Contributory Negligence rule, as they distributed the toys to children in defiance of its stated purpose – that of testing the vehicle.

CONSUMER APPLICATION

During the evening, Jones is travelling down the Interstate when he remembers that he had forgotten something, so he makes an illegal U-turn across the median. His car was struck by a car driven by Smith who was travelling at 20 miles over the speed limit and didn’t have his lights on.

Neither driver exercised the required standard of care.

COMPARATIVE NEGLIGENCE

The major difficulty in Contributory Negligence is that in many cases the contributions of one party may be small, but the injuries to that party may be large. In some situation, similar to the automobile accident example in the Consumer Application above, it is possible that neither party will pay damages. The Comparative Negligence concept attempts to assess the responsibilities of each party by determining the responsibilities of each. This concept has been adopted in several jurisdictions because of the fairness of the results. However, it creates certain responsibilities on the judge and jury to establish the percentages of negligence.

CONSUMER APPLICATION

Sampson drives his SUV through a stop sign without stopping or slowing-down. He struck a pickup driven by Miller, causing considerable damage to the pickup and injuring Miller. Miller did not have his lights on even though it was dusk.

Obviously both parties were at fault; however Sampson's negligence far exceeded that of Miller. Therefore, awards for liability would heavily favor Miller.

LAST CLEAR CHANCE

"Last Clear Chance" concept is used primarily as a defense against contributory negligence by a plaintiff, if the defendant had an opportunity to avoid an accident but did not do so. By not avoiding the accident, then the defendant's failure to take the proper action supersedes the allegation of contributory negligence.

The doctrine implies thought, appreciation, mental direction, and a lapse of sufficient time to effectively act upon impulse to save another from injury. Some court rules have declared that although the plaintiff's negligence continued until accident, he may recover if the defendant, after knowing of plaintiff's danger or by exercise of ordinary care could have known, could have avoided injury by ordinary care. This doctrine is sometimes referred to as the "humanitarian doctrine."

CONSUMER APPLICATION

An automobile breaks down at night on a heavily traveled highway. The operator puts on the emergency flashing lights, and places an emergency reflector from an emergency kit in the trunk of the car, several feet at the rear of the auto. Another automobile driver ignores all of the warning lights and the reflectors and crashes into the stalled auto. The driver is said to have had the "last clear chance" to avoid the accident and since it was the primary cause of the accident, it overrides the contributory negligent actions of the driver of the stalled auto.

CONSUMER APPLICATION

A 4-lane highway is being repaired and the lanes are marked and traffic cones are so placed that all traffic merges to the right. A driver continues in the right lane and then goes around two of the cones and turns his car into a space between cars in the right lane. While there was adequate room to enter the lane, the driver obviously was negligent in avoiding the traffic signals and cones. The driver of the car that would have been in that space but now is behind the entering car decides that since he is driving a big pickup with a steel pipe front bumper, he is going to "teach that driver a lesson." He speeds up before the entering auto has completely entered the space, causing considerable damage to the auto, but very little to the pickup. The driver of the pickup had the "last clear chance" to avoid the accident, even though the driver of the automobile had negligently entered the space (which the pickup driver felt was his).

RISK ASSUMPTION

The Assumption of Risk exists where none of the fault for an injury rests with the plaintiff, but where the plaintiff assumes consequences of injury occurring through fault of defendant, third party, or fault of no one. This doctrine is usually based upon a master-servant relationship, but courts have held that it can be much more far reaching.

CONSUMER APPLICATION

Wilson is an experienced explosives expert. He signs an employment contract with Benton Mining Company to perform duties in his field of expertise. Standard wording for employment contracts was included in the contract, with no specific reference to the risk of explosives inherent in his job.

Wilson places explosives at a particular location in a mine, sets the timer, and then leaves the area. In his haste he stumbles and falls, spraining his ankle and barely escaping with his life. He suffers serious physical injuries as a result.

By accepting the job Wilson accepted the risks inherent in the position, so he would not be in any position to claim damages for his injury. However, if it can be proven that another employee or the company was negligent in placing an obstacle in his path of which he would not have been aware, and then he possibly could hold the company negligent.

AVOIDABLE CONSEQUENCES

Expanding the negligence factors even more, the law assumes that a person will take every precaution after a loss, to make sure that there is no further damage as a result of the loss. It is assumed that any person that suffers a loss will take every opportunity to make sure that further losses are not suffered because of the original situation. Black's Law Dictionary simply states that the Doctrine of Avoidable Losses is a "Doctrine that imposes duty on a person injured so as to minimize damages."

CONSUMER APPLICATION

While using a cell phone, Bob runs his car into the back of a van carrying the works of art by the van owner, Minnie Adams. The back van doors were hard to open, and the glass had been broken. Minnie makes an appointment for the following day to have her van appraised for damage by the claims adjuster of her insurance company. That night a sudden rainsquall damages several of her most valuable paintings.

Minnie cannot hold Bob responsible for added damage to the paintings as she had the opportunity to move the van into a garage, remove the paintings, or covering the broken glass so that the rain would not damage the contents of the van. The loss to the paintings was an avoidable loss.

INVITATION

In the law of Negligence, and in particular with reference to trespass on real estate, invitation is the act of a person who solicits or incites others to enter upon, remain in, or make use of, his properties or structures thereon, or who so arranges the property or the means of access to it or of transit over it as to induce the reasonable belief that he or she expects and intends that others shall come upon it or pass over it. Therefore, the owner of a store, theatre or amusement park “invites” the public to come upon his premises for such purposes as are connected with its intended use.

CONSUMER APPLICATION

Burt’s Drayage Service’s truck, heavily loaded with produce, approached a railroad intersection that had a heavy growth of trees and bushes on both sides, blinding the drivers from seeing oncoming trains. The gate malfunctioned and the train hit the truck. The courts ruled that the fact that the safety gates at a railroad crossing which should be closed in case of danger, are left standing open, is an “invitation” to the traveler on the highway to cross.

LICENSE

A license is a passive permission on the part of the owner of premises, with references to other persons entering upon or using them, while an invitation implies a request, solicitation, or desire that they should do so. An invitation may be inferred where there is a common interest or mutual advantage; while a license will be inferred where the object is the mere pleasure or benefit of the person using it.

An owner owed to a licensee no duty as to the condition of the premises (unless imposed by statute) save that he should not knowingly let him run upon a hidden peril or willfully cause him harm; while to one invited he is under the obligation to maintain the premises in a reasonably safe and secure condition.

EXPRESS OR IMPLIED

An invitation may be express, such as when the owner or occupier of the land by words invites another to come upon it or make use of it or of something thereon. It may be implied when such owner or occupier by acts or conduct leads another to believe that the land or something thereon was intended to be used as he uses them and that such use is not acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared and allowed to be used.

TRESPASS

The total reverse of an Invitee is a Trespasser. While everyone knows that Trespassing is unlawful entry onto property of another without his or her consent, the historical event of trespass may be interesting.

The original reference to Trespass was the Latin “Trespass quare clausum fregit”, translated: “Trespass wherefore he broke the close.” This was the common-law action for damages for an unlawful entry or trespass upon the plaintiff’s land. In the Latin form of the writ, the defendant was called upon to show why he broke the plaintiff’s *close*; i.e. the real or imaginary structure inclosing the land (whence the name). Even if the real estate upon which one trespassed was an unfenced meadowland, in the eyes of the law, there was an imaginary wall enclosing the property, over, which a person may not enter without permission.

While the owner of the property may not make any attempt to deliberately harm or entrap a trespasser, the owner owes no duty of care to the trespasser in maintenance or inspection of the property.

CONSUMER APPLICATION

Henderson is tired of the neighbors using his property as a shortcut to and from a shopping center every day. He posted the property but they continued. Henderson digs several holes in the path that the neighbors use, covering them with straw and filling them with water. One of the neighbors fell into a hole and broke his leg. Henderson felt that he was not liable as the person was trespassing.

Henderson is wrong and can be held liable as the holes were intentionally placed.

If Henderson had not placed any holes on his property, but a neighbor had fallen over some bushes growing on the property, the neighbor could not hold Henderson liable, as Henderson owes no responsibility for a trespasser.

RES IPSA LOQUITUR

Translated, Res Ipsa Loquitur, means “the thing speaks for itself.” This is a “rule” of law, which is usually not invoked unless necessary evidence is not readily available, or there is no evidence. As an example, an airliner that loses power on takeoff and crashes into a barrier at the end of the runway, injuring passengers. The passengers do not have to prove negligence, as this rule has the effect of justifying an inference of negligence. Some courts and jurisdictions have used this rule to establish a presumption of this nature.

Another way of stating this doctrine is that there is a (rebuttal) presumption that the defendant was negligent, arising upon proof that the cause of the injury was in the defendant’s exclusive control, and further, that the accident was one which ordinarily does not happen in the absence of negligence.

TIME LIMIT ON SUITS

Every state places a time limit on the time when suits for damages must be commenced, ranging from one year to six years. The types of lawsuits can cause this time limit to vary in some states, i.e. the time limit for personal injury may vary from a suit alleging property damage, wrongful death suits, and suits against municipalities. The time limit starts from the date of the injury, not from the time of the negligent act if the dates differ.

SPOUSAL SUITS

A general rule is that a spouse cannot sue a spouse in tort for acts committed by the spouse. Some states make exceptions of this rule for certain situations.

GUEST LAWS

Guest laws pertain to persons who ride in automobiles, airplanes or boats, and severely restrict the ability of the “guest” to sue for injuries sustained while riding in the conveyance. Basically, the operator cannot be found guilty of injuries suffered by a guest unless the operator is found to have been guilty of “gross” or “willful and wanton” negligence.

A guest is usually defined as someone who has not paid for the transportation, but this definition has been very strictly interpreted. If it can be shown that there is any kind of an advantage for the operator to have the “guest” in his conveyance, courts have ruled the Guest Law statutes do not apply.

The recent trend has been toward abolishing Guest Laws as the result of court decision or repeal of the statutes. With the increasing attitude of blaming others for every injury, although slight or imagined, these trends can be expected.

ACTIONS FOR WRONGFUL DEATH

A suit for personal injuries continues even after the injured person has died. Conversely, if the defendant dies, the person’s cause for action will continue against the deceased’s personal representatives, although some states apply some restrictions.

Personal representatives of a person killed by the wrongful act of another may institute and maintain an action against the person who committed the tort (tortfeasor). Some states have established limits recoverable – both maximum &/or minimum limits – and some states have no such limits.

Suits for wrongful death may be maintained independently of personal injury actions. Even in those states where there are restrictions or limitations on the right to sustain an action for personal injuries after one of the parties has died the wrongful death actions still exist and can continue.

NEGLIGENCE OF EMPLOYEES

Every employer is required to protect the public from wrongful acts of their employees and courts will hold an employer liable for torts committed by his employees in the course of their employment. (Insurance policies covering this potential liability will be discussed specifically later in this text).

In order for there to be liability, the employer must have the power to hire and fire the employee, and to control the conditions of employment. Conversely, if the work is performed by one for a fixed amount with no restrictions or conditions surrounding the hours – or conditions – of employment, and if the employer does not directly control the work or employment practices of the person performing the service, usually it will be held that no employer-employee relationship exists.

Further, the employer is not liable for the torts of his employees except when the tort is committed within the scope of his employment. This can create considerable litigation, as the question is not easily determined in many situations. Also, in this situation, both the employer and employee may be held liable, depending upon circumstances.

Note that when an *employee* is injured in the course of employment, the liability of the employer is determined by the applicable Workers Compensation laws.

CONSUMER APPLICATION

Pete works for Acumen, Ltd., as a deliveryman. While making a delivery on a hot day, Pete parked the truck and went into a bar for a beer. Pete got into a fight in the bar, injuring the bartender. The employer would not be liable, as having a beer was not performed as part of his duties.

However, if Pete was making a delivery and got into a fight with a dockworker over the delivery, the employer may or may not be liable, depending upon the details of the case.

VICARIOUS LIABILITY

Vicarious Liability statutes provide that a person may be liable for damages caused by another's negligence in operating a motor vehicle (boats and airplanes also in some states).

In some states, these laws apply to minors who apply for a driver's license and wherein the parents are required to sign for the minor, and therefore, the parents are liable for the negligent torts of the minor. In some jurisdictions, liability is imposed on the parents for any intentional, willful or malicious damage to property done by the minor. Many of these states also provide that the parent can have the minor's license cancelled, and thereby negating any personal liability for the action of the minor.

LIQUOR LIABILITY

In the majority of the jurisdictions, anyone who sells or distributes alcoholic beverages may be held liable for any tort committed by an intoxicated person to whom he has sold intoxicants. This is usually under Common Law, but in many states, under the Dram Shop Act. This has been extended in some cases, to apply to hosts at parties who provide alcoholic drinks to their guests, particularly when the guest leaves and is too intoxicated to be driving.

Note: Liquor Liability Insurance is available and will be discussed later in this text.

CONSUMER APPLICATION

The Women's Junior League of Greater Pompano Beach holds an annual fund-raising auction with all of the proceeds going to local charities. They have been serving hors d'oeuvres and non-alcoholic punch. It has been suggested that if they serve both alcoholic and non-alcoholic punch and several varieties of wine, it might attract more people and those that do attend, might become more "loosened up" and will bid higher on the items. The Chairman of the Junior League is concerned about lawsuits if an attendee should leave intoxicated and injure another party in an accident. She is afraid that the Junior League might be sued.

Even though technically liquor has not been "sold", in some jurisdictions the mere furnishing of alcohol at a fund-raising event has been sufficient to hold the sponsoring party liable for the actions of those who leave their function in an intoxicated state. In some jurisdictions, this has been the case, even for non-profit organizations. The Chairman should have a local attorney research this question carefully, and if there is any chance of liability, to purchase liability coverage if they proceed with their plans to serve alcohol.

THE LAW OF ATTRACTIVE NUISANCE

Continuing the discussion of the antithesis of "invitee", that of Trespasser, the doctrine of Attractive Nuisance must be addressed. This actually expands the provision that a property owner cannot deliberately entrap or create harm to a trespasser. However, in particular with situations involving children, the Doctrine of Attractive Nuisances developed.

The doctrine is that one maintaining on his property a condition, instrumentality, machinery or other agency, which is dangerous to young children because of their inability to appreciate peril and may reasonably be expected to attract them to premises, owes duty to exercise reasonable care to protect them against dangers or such attraction. Interestingly, one of the earliest applications of this doctrine appeared in a suit of *Shrock v. Ringling Brothers and Barnum and Bailey Combined Shows* (5 Was.2d 599, 105 P2d 838, 843). One can immediately envision how this doctrine could apply with children and a circus.

Anyone with such condition as outlined above is under a duty to take such precautions as a reasonably prudent man would take to prevent injury to children of tender years whom he knows to be residing in the vicinity, or who may, by reason of something there which may be expected to attract them, come there to play. It does not apply to natural conditions or common dangers existing in order of nature. It only applies in favor of children of tender years, too young to appreciate danger (usually under age 14). Some court decisions have required that the attraction be visible from a public place or a place where children have a right to be.

CONSUMER APPLICATION

Next to a street that leads to an Elementary school and which is traversed by many students every day, either on foot, in cars, by bicycle or on foot, a new fast-food business is being built. The contractor left open one side of the fence around the construction site that he could get his trucks in and out easier and frequently did not bother to enclose it securely at night. Before the store was open, a playground for children who would be customers of the store was erected. Only part of the slide section of the playground had been completed, leaving an area uncovered, when 4 children who lived nearby and had seen the construction while walking to and from school, walked through the open fence and played on the incomplete slide. One of the children fell through an unfinished and unenclosed area and broke a collarbone.

This situation meets all of the requirements for the Law of Attractive Nuisances. It is seen easily by children, it is not reasonably protected and is very attractive to children – it was designed to be attractive to children, it is an artificial structure, and it was the direct cause of injury to the child.

TORT REFORM

Historically, in the 1980's Auto and Commercial Liability Insurance escalated tremendously, making them nearly unaffordable to the average citizen. Much of this was attributed to the huge increase in lawsuits, both in Federal and State courts. In addition, the size of awards sky-rocketed, for instance in the early 1960's, there was only one civil suit which resulted in an award more than \$1 million. By 1982, there were 251 such jumbo verdicts.

Several solutions to these huge increases were proposed in order to keep the insurance costs under control. Special tort liability laws were enacted in the majority of the states affecting automobile tort liability. There were also many steps taken to modify the tort system for all liability cases. Presently there are several proposed Tort Reform provisions at the federal level, pushed by the Republican Congress, but which the Democratic President has vetoed. The Trial Lawyers organizations have fiercely fought against tort reform for obvious reasons. Many attorneys and others oppose such tort reform as they feel that such legislation violates the concept of equal protection under the law.

Some of the better known tort reform actions are as follows:

Eliminating the Joint and Several Liability provisions. Under previous law, a plaintiff could recover from any one defendant, regardless of the liability of each defendant. Over 20 states are reported to have modified or eliminated this practice.

Punitive Damages. In an area that was crying for limitations, many states now restrict punitive damage awards (where the defendant is found to be guilty of deliberate aggression, malice, fraud or wrongdoing). The Punitive Damage awards have been abused (in the opinion of most) in several jurisdictions (and in particular, Alabama, which has no limits and multi-million dollar awards are frequent) which have led to these caps, frequently a cap of \$250,000 when a business enterprise is held liable for wrongful acts of an employee.

Frivolous Suits. Because there have been many cases whereby the attorney has talked the plaintiff into initiating lawsuits without any merit, on the chance that a sympathetic jury could award damages (shared by the attorney, of course) regardless of the law or of the facts – many states now have laws that provide for the fining of attorneys who bring frivolous actions.

Non-economic Damages. Non-economic damages refer to losses such as pain and suffering &/or emotional distress. In some jurisdictions as part of a wrongful death statute, the non-economic damages are capped.

Medical Malpractice Caps. Several states have ceilings on non-economic losses in medical malpractice. There are other reform statutes regarding medical malpractice.

Medical Expense Rule. In some jurisdictions, defense attorneys were prohibited from revealing collateral sources of payments for their client's medical expenses.

Contingency Fees. Many states have limited, and some states prohibit, attorney contingency fees in liability cases.

Medical Workers. Most states have laws that exempt volunteer medical workers such as doctors, nurses and other health providers, who work at hospitals, public schools or non-profit organizations.

Structured Settlements. These statutes have become so prevalent that large agencies specializing in Structured Settlements have sprung up. They permit settlement of monetary awards above a pre-determined amount (such as \$100,000) to be spread out over several years or over the lifetime of the recipient. Frequently, annuities are used for this purpose, particularly when an award is specifically provided to be so distributed.

Officers and Directors of Non-profit Organizations. Those who serve as Officers and Directors of non-profit organizations in many states are immune from liability.



STUDY QUESTIONS

1. An action taken with the deliberate intent to harm another is
 - A. an example of strict liability.
 - B. a willful tort.
 - C. negligence.
 - D. contributory negligence.
2. Liability Insurance concerns itself with _____ Torts.
 - A. negligent
 - B. willful
 - C. accidental
 - D. absolute liability

3. If wanton and willful misconduct is shown, the type of negligence would probably be
 - A. contributory.
 - B. gross.
 - C. comparative.
 - D. ordinary.

4. Where each party is somewhat negligent, each party must bear its own share of the injury. This describes
 - A. comparative negligence.
 - B. Gross negligence.
 - C. contributory negligence.
 - D. slight negligence.

5. Used primarily as a defense against contributory negligence, if John decides to teach another driver “a lesson” by deliberately crashing into him when he ran through a red light, even though John had not started his car when the light changed and could have avoided the crash. This is the
 - A. the doctrine of Last Clear Chance.
 - B. Aggressive Liability.
 - C. law of Attractive Nuisances.
 - D. Road Rage doctrine.

6. Sue goes to the movie with Bill. A car driven by Oscar hits Bill’s car, injuring Sue. Sue sues Bill as she thinks Bill has more money than Oscar does. Typically
 - A. Sue cannot win the suit because of guest laws.
 - B. Bill will have to pay as he assumed liability for her health when he dated her.
 - C. the laws of Comparative Negligence will now allow Sue to recover damages.
 - D. Sue will win because of subrogation.

7. In some states, a parent can be sued for damages caused by their children. This is
 - A. vicarious liability.
 - B. contributory negligence.
 - C. Res Ipsa Loquitor.
 - D. implicit liability.

8. The intentional failure to perform a manifest duty in reckless disregard of the consequences is
 - A. contributory negligence.
 - B. Gross negligence.
 - C. comparative negligence.
 - D. Res Ipsa Loquitor.

9. One maintaining on his property a condition which is dangerous to young people because of their inability to appreciate peril, and when such condition could cause a young person to enter the property, owes duty to exercise reasonable care to protect them against such condition.

This is known as the

- A. Law of Attractive Nuisances.
- B. Res Ipsa Loquitor.
- C. Law of Last Clear Chance.
- D. Law of Child Endangerment.

10. Among the many Tort Reforms being considered, are statutes that permit settlement of monetary awards above a pre-determined amount, to be spread out over a several years or over the lifetime of the recipient. This area is known as

- A. Medical Malpractice.
- B. Frivolous Suits.
- C. Punitive Damages.
- D. Structured Settlements.

ANSWERS TO STUDY QUESTIONS

1B 2A 3B 4C 5A 6A 7A 8B 9A 10D



CHAPTER FOUR - LIABILITY INSURANCE

Every individual and business entity must exercise reasonable care in inflicting injury on others, damaging their property, or in some other fashion – causing them loss. The amount of care required in any given situation depends upon the circumstances, and any negligence attributed to the individual or business, must be determined after consideration of all pertinent facts and standard of care required.

There are many forms of Public Liability insurance, which are designed specifically to protect an insured business or person from liability in his/her personal, business or professional life. Therefore, it is most important that the legal liability facing the insured be covered under the Liability policy purchased by the insured.

Liability Insurance policies (as are all insurance policies) consist of provisions, conditions and exclusions. While some insurance policies protect against a simple risk (life insurance, for example, protects against the risk of early death), liability policies cover so many situations that they can become complicated and complex.

Those insurance practitioners, who provide policies covering liability exposures, must be familiar with all risks and hazards that could affect the insured. In today's high-tech world, it is quite possible that the insured would be facing liabilities, which are not covered in any of the regular policies. Depending on the particular circumstances, additional coverage must be obtained, either through endorsements, additional policies, or special arrangements with insurers.

Several of the various types of liability policies will be discussed in some detail later in this text

If the Liability policy has performed as expected, as the individual that has been found liable for monetary losses and such losses are paid partially or entirely by the policy, then the Insurer has interposed themselves as a party to the action.

Under an insurance policy, the "First Party" is identified as the one who causes the course of action (causes injury, damages property). The "Third Party" is the one who is injured or wronged. This leaves the "Second Party", or the insurance company, which is "in the middle." In actual practice, the Insured transfers part of their liability exposure to the insurer. Therefore, simply put, a liability policy promises to pay – on behalf of the insured (Party of the First Part) judgements for which they (the insured) are liable.

Before an Insurer will pay under a Liability Policy, the insured must be legally liable. This can be accomplished by the simple fact that a court has determined that the insured has committed a tort and is liable. Or, as an alternative, the facts of the case are such that the insurer feels that if the case went to court, the insurer would – more than likely – be found liable.

If the insurer determines, prior to trial, that the insurer would probably be found liable, the insurer has the right to make a settlement which would (1) eliminate court costs and/or (2) limit the amount of payment to the person who is seeking damages. In the following study of the provisions of the liability policy, this right to settle is an integral part of the policy.

Liability Insurance policies covers the three categories of liability exposures, (1) Personal liability, (2) Professional liability, and (3) Business Liability.

PERSONAL LIABILITY

Personal liability arises from the personal activity of an individual, such as participating in sports, automobile usage, or home ownership. While Personal Liability is not covered in detail in this text, as stated earlier, it is important to be aware of its relationship to general liability exposures.

An individual can be personally liable because of the

- Ownership &/or maintenance of a home.
- Ownership &/or maintenance or use of an automobile, boat or airplane.
- Personal interaction with others, such as participating in sports.
- Responsibility for others, such as for children.

CONSUMER APPLICATION

Ludwig is a Certified Public Accountant (CPA) and has recently established and incorporated his own business, with himself as the sole owner. He purchased a Professional Liability policy to protect against such things as errors and omissions. He has a personal automobile policy with \$500,000 of liability. He also has a personal liability umbrella policy for protection against himself in case of lawsuit for which he would be held personally liable.


Ludwig was driving to court in his personal car and was talking on his cell phone. He dropped some papers that he was referring to in his telephone conversation, reached for the papers on the floor and momentarily took his eyes off the road, striking another car in the rear. The driver and passenger of the other car were seriously injured, and the other car was demolished.

Ludwig's personal automobile policy will cover the liability of the accident. If, however, the other party sues Ludwig's corporation, believing it to have more value than Ludwig personally, his liability company would join in the defense. However (as is discussed later) the typical Professional Liability policy will not cover the auto unless it is specifically covered. The umbrella personal liability policy will cover anything over the \$500,000 limit on the personal auto policy. Ludwig could have purchased a Commercial Automobile Policy if he felt that there was to be a lot of business usage of his car, or if he would have others drive cars that he owned, for business purposes.

PROFESSIONAL LIABILITY

Professional Liability (or Personal Liability) is not covered under the Commercial General Liability policy, and as discussed later, there are a wide variety of Professional Liability insurance forms.

Simply put, Professional Liability covers the exposure of claims arising as the result of a profession. The best known of these policies are Medical Malpractice, but also covers Insurance Agents, Attorneys, Accountants, Architects, Engineers, etc. Liability claims arise because of either (1) rendering services of a professional nature, or (2) failing to render professional services.

 **Before Professional Liability can be determined, it must be established that the individual was acting in a professional capacity, and the actions were of a professional nature.**

CONSUMER APPLICATION

Doug is an architect and operates from his home. He designs office buildings for local businesses. A large law firm from Chicago contracts with him to design a regional office for them, with a stipulation that the building must be only two stories tall and have a lobby that extends the full two stories. After drawing up the plans, Doug discovers that the proposed building goes over the agreed-upon budget, so he changes the plans to allow for a one-story lobby. The building is still built, and Doug is then sued by the firm for malpractice.

While driving to the building under construction, Doug accidentally strikes the rear end of a van that stopped suddenly in front of him because of a truck entering the construction zone. Doug cannot be sued for professional malpractice in this case, as the act of driving was not of a professional nature.

BUSINESS LIABILITY

Business Liability insurance will be covered in detail in this text as it is the type of coverage that is provided under a Commercial General Liability Policy. Business Liability arises from the conduct of business such as:

- ◆ Owning, maintaining or using property for business purposes, such as stores, office buildings, warehouses, factories, etc.
- ◆ Any necessary operation performed away from the business that is incidental to the operation of the business, such as walking to the post office, going to the bank to deposit business funds, etc.
- ◆ Responsibilities resulting from the actions of employees, agents, subcontractors, etc. These responsibilities can be indirect or vicarious.

- ◆ The assumption of liability through a contractual agreement.
- ◆ Manufactured product defects.
- ◆ Completed operations defects.
- ◆ Automobiles used in or for business purposes (covered under Commercial Automobile Policy).

Liability Insurance is the type of insurance that is used to cover the risk of incurring legal liability to pay money damages. Liability Insurance further guarantees financial protection to an insured that may be required to pay damages as the result of a legally negligent conduct. This negligent conduct could be one that causes personal injury, death, or property damage. Liability for negligence may result not only from the conduct of the insured, but can also result from the conduct of his/her agents and/or employees. The Liability Insurance policy, as a rule, provides for investigation, negotiations for private settlement of claims, defense of lawsuits brought against the insured, and the payment of judgements or settlements awarded by the courts (up to the policy limit).

Automobile liability insurance policies assume the risk of financial loss arising from liability for bodily injury or property damage to other parties caused by automobile accidents.

Liability insurance protection is also provided by various policies that assume the risk of legal liability of those who own, operate, or occupy residential or business premises, who manufacture or distribute commodities, or who render services. Special policies are available to manufacturers and merchants to cover possible legal suits arising from defective products that cause injury or death to the purchaser. Professional (malpractice) liability protection is an important kind of insurance, especially for members of the medical profession. Comprehensive personal liability insurance is used widely by tenants and homeowners to protect themselves against legal liability for negligent maintenance and operation of the premises, as well as for personal activities away from the premises. The list goes on and on, and many of these forms will be discussed later in this text.

Commercial General Liability Insurance policies does not provide protection against all liability risks. For example, Workers Compensation provides coverage to injured employees, regardless of liability, and also provides death benefits and disability benefits.

Employers Liability is another type of Liability insurance not covered in the General Liability policy. This will be discussed later in the text.

Commercial General Liability policies also do not cover Auto, Aviation, or Boiler & Machinery policies. These policies can be purchased separately which are designed for these purposes.

CONSUMER APPLICATION

Bernard is the Executor of his late-father's estate and inherits an apartment building, which contains 15 tenants, but it is over 30 years old and is obviously in need of repair. After receiving this inheritance, Bernard feels that he can afford to get married, so he and his girlfriend marry and purchase a home in a nice suburban area. Bernard is an architect by profession, so he puts the operation of the apartment house in the hands of a building manager and starts his own architectural firm, hiring 2 architects and several office employees.

Bernard contacts his late-father's insurance agent, Scruggs, for advice on insurance. Scruggs suggests that Bernard protect himself against liability claims as he has several exposures that need to be covered. Besides, being wealthy now, he is a natural target for many "con-men" and other unscrupulous individuals who will try to share in his good fortune.

At Scrugg's suggestion, Bernard purchases a Homeowners policy with high liability limits to protect his residence. He purchases a liability policy to protect against claims from tenants or others that may file claims against the owner of the building. When he started his architectural firm he obtained Professional Liability Errors & Omissions Insurance with his Commercial General Liability policy. Bernard felt that all of the liability insurance policies were perhaps "overkill." However, during the first five years the following suits were filed:

1. Pipes in the walls of the apartment building broke due to faulty plumbing, destroying a tenant's property,
2. When remodeling the apartments, a contractor left material in the stairwell and a person looking for an apartment fell over the material and broke an arm.
3. He interviewed a secretary but did not hire her. She is claiming racial discrimination as she is of a minority race.
4. A customer files suit because of what they considered a design flaw, even though it was the customer's idea and the firm simply followed the customer's desires.
5. An elderly neighbor slipped on the ice in front of their home early one morning, and is suing Bernard for injuries sustained in the fall.
6. His wife drove their new car into the trunk of a late-model Buick.
7. His brother believes that the estate was not divided evenly and since Bernard is the Executor of the estate, he is suing Bernard as he believed Bernard did not exercise proper fiduciary responsibilities in settling the estate.



STUDY QUESTIONS

1. Liability is a form of
 - A. Casualty Insurance.
 - B. Property Insurance.
 - C. Marine Insurance.
 - D. Inland Marine Insurance.

2. Before Professional Liability can be determined it must be determined that the individual was acting in a
- A. Normal manner.
 - B. Manner consistent with nonprofessionals in that geographic area.
 - C. Professional manner.
 - D. Obstructive manner.
3. Under a Commercial General Liability policy, what type of liability is covered?
- A. Professional
 - B. Business
 - C. Individual
 - D. Automobile.
4. Which of the following would be covered under a Commercial General Liability policy?
- A. Workers Compensation
 - B. Group Health insurance.
 - C. Manufactured Products Defects.
 - D. Boiler and Machinery coverage.
5. Professional liability claims can arise because of
- A. The failure of the professional to render professional services.
 - B. Chronic illness of a foreman.
 - C. an automobile accident in the doctor's parking lot (no doctor involved).
 - D. children drowning in a motel pool next door to the doctor's office.
6. Business liability arises from the
- A. negligence of others.
 - B. laws of trespass,
 - C. conduct of business.
 - D. personal acts at home.
7. An individual can be personally liable because of
- A. ownership and/or maintenance of a home.
 - B. professional acts committed during course of employment.
 - C. the negligence of a professional.
 - D. performing corporate duties.
8. Insurance agents can be liable for misrepresenting a policy to an applicant.
- A. They should carry Commercial Liability policies.
 - B. They should carry Errors and Omissions insurance.
 - C. Their homeowners insurance will normally cover them.
 - D. There is no insurance they can buy to protect themselves from misrepresentation.

9. A liability insurer discovers that they (the company) can settle a lawsuit and they feel that they would probably lose in court anyway.
- A. They have the right to settle out of court.
 - B. The insurer can only settle a lawsuit if the insured agrees to the settlement.
 - C. The insurer has no legal right to settle a lawsuit regardless of the circumstances.
 - D. If the settlement would limit the amount to go to the person seeking damages, they cannot legally make a settlement.
10. If the liability policy performs as expected, and the insured has been found liable for monetary losses, and such losses are paid entirely or partially by the policy, then the insurer is said to have
- A. interposed themselves as a party to the action.
 - B. cancelled the policy ab initio.
 - C. subrogated them.
 - D. been fortunate to not have been sued by the policyholder.

ANSWERS TO STUDY QUESTIONS

1A 2C 3B 4C 5A 6C 7A 8B 9A 10A



CHAPTER FIVE - COMMERCIAL PACKAGE POLICY & CPP PROVISIONS

HISTORY

During the period of time when civilization moved from an agrarian society to an industrial society, goods and methods of production of the population became more concentrated. With this concentration, the possibilities of losses increased due to situations beyond the control of the owners; primarily by fire, wind and water. While farmers have always suffered such losses, they compensated for part of the cost by helping each other in time of need. The “barn - rising” of rural America was well documented as part of history, particularly in situations where property was destroyed because of fire.

As the industrial society expanded, protection against losses was very conservative, originally covering only losses by fire. Policies were written by hand covering each situation differently. As more and more businesses required this protection, more standardized wording became available, and with financial institutions investing in commercial ventures, insurance had to be provided to protect the investor’s interests. This further pushed the burgeoning insurance industry to standardize coverages and policy provisions.

Marine Insurance is considered as one of the oldest (if not the oldest) types of insurance, as ships and their cargoes were protected against losses at sea by consortiums of wealthy persons who “underwrote” the protection by signing “under” the contract and noting their share of the risk. Throughout the years certain words used in the contracts became standardized and recognized by law as having specific meanings. To this day, many marine policies contain language that may seem archaic, such as referring to risks as “perils”, but are used because of the legal interpretations that have evolved.

Other forms of insurance have changed so that it is easier to understand by the consumer, and most of the antiquated language is no longer present.

As soon as protection from fire perils was available, protection against windstorm, hail, water damage, and other such risks was created. These coverages became known as “property insurance.”

Soon legal recourse against someone wronged by another was considered an insurable situation, and the idea of protection against liability grew into what is now called “casualty” or “liability” insurance. Many insurers became “Property and Casualty Insurers.” Others preferred to continue to cover only one type of peril, such as fire insurance, and these companies became known as “monoline” companies, and policies that cover only one type of peril, became known as monoline policies.

MONOLINE INSURANCE POLICIES

With the complexities of modern life and modern commerce, many commercial enterprises were faced with an increasing number of situations that were determined to be insurable. Also,

the number of types of commercial businesses also increased each type with its own peculiarities and situations that are unique to their business. With the increase in insurance situations, the number of insurance policies needed to cover each contingency increased dramatically, to the point where many customers had many policies. The problems with this approach soon became apparent.

The sheer number of such policies became overwhelming, with a variety of coverage's provided by a variety of insurers, frequently represented by a variety of insurance brokers.

With so many policies, it was inevitable that there would be duplication of some coverage's, and with no coverage provided for other risks.

Legally, it became reminiscent of the biblical scholars who debated for years as to how many angels can dance on the head of a pin, i.e. since there was little standardization of wording, legal interpretations were abundant. Many consumers paid for years to protect themselves and their businesses against certain risks of doing business, only to find that the wording of the policy did not provide the coverage they thought they had purchased.

MULTILINE POLICIES

It soon became apparent that the only solution was to "package" policies. Therefore, the "multiline" policy was born, which is several of the risks previously insured under separate policies, now packaged into one policy. This has several advantages:

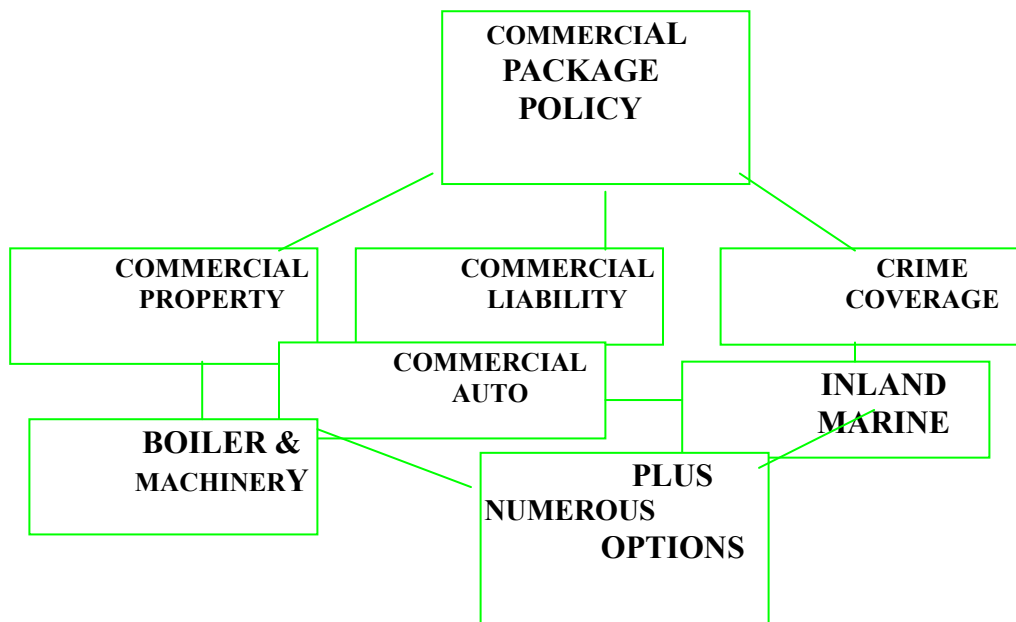
To the Insured:

- There are fewer policies to purchase and maintain.
- The chance of delay in loss settlement due to disputes of different insurers is substantially reduced.
- The insured benefits from reduced administrative expense.

To the insurance company:

- The administrative expense is lessened because it costs less to underwrite and issue one policy instead of several.
- Package policies help insurers avoid adverse selection by spreading the risk among various insureds and among the various risks covered under the package policy.

Packaging is also advantageous for the **insurance agent** as it facilitates selling a policy to cover the insured's entire account, and many packages are more easily sold and rated, so the agent can quickly and efficiently provide quotes.



THE ROLE OF THE INSURANCE SERVICES OFFICE

Insurance is a statistic-driven business. The premiums to be charged for any insurance coverage must be based upon statistics derived from actual experience, either of the insurance company itself, or from an industry average. And statistics can only be meaningful if there is enough experience to provide a broad base upon which to forecast future losses and expenses.

If each insurer attempted to collect sufficient statistics to provide adequate premiums, the expenses would be excessively high, and the reliability of the statistics could be questioned, as it would probably not be based upon an adequate base. However, if companies banded together and shared their experience, the expenses would be drastically reduced for each company.

Therefore, most companies use the services of the Insurance Services Office (ISO) which is a statistic - gathering organization located in New York. While it initially was involved in providing advisory rates to its subscriber members, it has since withdrawn from providing rates, and now provides policy forms and endorsements and manual rules for its members. It should be noted that subscriber members are free to use whatever policy forms and rates they choose, but the information provided by the ISO is considered as “Standard” wording for the purposes of this text.

The American Association of Insurance Services, a competing firm, provides similar services to approximately 400 regional insurers.

The ISO developed special “Special Multi - Peril Policies (SMP)” which always included Property Coverage and Liability. They were designed to be used only by a “Preferred” class of policyholder. When the SMP policies were introduced, this added a new class of policy

available to the monoline policies in use, adding to the number of forms available to the consumer.

In addition, because of the different needs and desires of the smaller and medium sized businesses, such as grocery stores, garages, bakeries, etc., a new classification of policies was developed, appropriately called the “Businessowners Policies.” These policies also covered both property and liability risks, but because of the wide variety of risks peculiar to each type of business, many insurers offered a variety of coverages. This class of policy will be discussed later in this text.

As the SMP policy evolved throughout the years, the ISO offered many revisions, and eventually replaced the SMP policy with the “Commercial Package Policy” (CPP) that had several new features:

- The ISO rewrote all of the standardized commercial forms into more easily understood language
- The differences between the monoline and the multiline policy forms were eliminated, with the welcome result that one set of forms can be used for single coverage or many.
- Much more flexibility was obtained as the customer no longer had to accept the standard coverages, but could construct a policy using the forms that they specifically needed.

While the Commercial Package Policy has replaced the older SMP policies in most areas, there still are some SMP policies used in a few areas that have not adopted the ISO Commercial Package Policy.

COMMERCIAL PROPERTY INSURANCE

The ISO introduced a series of forms to protect commercial property and to insure buildings, personal property, and business income and builders risks. The coverage parts of this policy are:

- Commercial Property Policy
 - 1) Basic Form
 - 2) Broad Form
 - 3) Special Form
- Commercial Crime
- Commercial Inland Marine
- Commercial General Liability (Principal subject of this text)
- Commercial Auto
- Commercial Boiler and Machinery

The policy is available to almost any type of risk and it is not necessary to buy coverage on all the coverage parts - any two parts may be used to comprise the policy. Also, the policy does not have to incorporate liability coverage. Two classes of property are ineligible for this coverage: Homeowners Policies and Farming Policies.

All three forms of the Commercial Property Policy and the other Commercial insurance forms mentioned above have a uniform format and include Common Policy Declarations and Conditions:

C. P. P. UNIFORM PROVISIONS

There are several parts to the Commercial Package Policy (CPP) that are common to all such policies and parts of policies, but for purposes of this discussion, the Common Policy Conditions and related sections as above constitute most of the parts that will pertain to the CPP and to the Liability Coverages discussed in this text.

Common Policy Declarations are very important as they list who is covered and the outlines of the limit amounts, premiums, how the insurance applies, time of insurance, where the property is located, etc. The agent must check the Declaration Page very carefully before delivering it to the customer as items on the Declaration page are items that have been discussed and agreed-upon with the customer. They may be changed if there are any errors by so notifying the insurer, however other provisions of the policy have been filed and approved by the Insurance Department and changes cannot be made, or can be extremely difficult to change. (An example of a Declaration Page follows this section).

TYPICAL COMMON POLICY CONDITIONS

CANCELLATION

Cancellation may be effected by either party, subject to conditions:

- 1) **Cancellation by Insured:** The first - named insured in the policy declarations may cancel at any time by written advance notice, and will receive refund of premium, generally on a pro - rata basis.
- 2) **Cancellation by Company:** Company must give notice as required by state law, after which time the policy may be canceled after 30 days, unless the cancellation is a result of non - payment of premium, in which case only 10 days notice is allowed.

CONSUMER APPLICATION

Ludwig decided to cancel his Professional Liability Policy as he can get better coverage for less money through the CPA national organization. He had paid for an annual premium and had the policy for six months.

Most insurers will make some premium refund, either for goodwill or because of specific Insurance Department regulations, however under the typical liability policy; the insurer would not have to refund the pro-rata or unearned premiums.

CHANGES

The policy contains all the agreements between the insured and the insurer concerning the insurance afforded. The first Insured named in the policy Declarations is authorized to make changes in the terms of the policy, however, the insurer must agree to any changes. The policy terms can be amended or waived only by Endorsement issued by the company and therefore be made a part of the policy. Endorsements are discussed in a separate chapter of this text.

CONSUMER APPLICATION

Michael and his wife opened an Antique store in Jackson Hole. They purchased a Commercial Liability policy for the store through a local agent. Michael's brother is a well-known attorney in Wyoming and Michael informed the agent that in case of a liability claim, his brother must be used. When the policy was issued, it stated that the company retained the right to pick an attorney, but would, in effect, take the "recommendations" of the insured into consideration. This did not satisfy Michael. In order to appease Michael, the agent wrote a letter on his agency stationery stating that Michel reserved the right to appoint the attorney.

Michael was sued over an antique desk that he represented as being worth more than what an appraiser decided it was worth. He asked his brother to represent him, but discovered that the insurer did not want a close relative as an attorney in such a suit. Michael's brother would not be accepted by the insurance company.

EXAMINATION OF BOOKS & RECORDS

The insurance company may examine and audit the insured's books and records as they relate to the policy at any time during the policy period and up to three years afterward. The reason for the three year period is because some property &/or liability claims can have a long "tail" and the insurer may be liable for claims that occurred during the policy period but not reported until up to three years later.

INSPECTONS AND SURVEYS

The insurance company has the right to inspect the insured's premises and operations at any reasonable time during the period of the policy. The company may use its own personnel, or may employ others such as rating or service bureaus acting on behalf of the insurer.

While the insurer can inform the insured of the results of the inspections and can recommend changes, there is no duty or legal obligation for the insurer to do so.

The provisions states that the insurer:

- ◆ Is not obligated to make safety inspections (they actually state they do not make safety inspections).
- ◆ Does not guarantee that conditions are safe or healthful.
- ◆ Does not guarantee that the insured is in compliance with safety or health regulations.

The purpose of these disclaimers is to protect the insurer against lawsuits.

The insurer reserves the right to recommend changes to areas of insurability and the premium to be charged.

This provision applies not only to the insurer, but also to any rating, advisory, rate service or similar organization, which makes insurance inspections, surveys, reports or recommendations.

PREMIUMS

The named Insured (first-named insured) shown in the Declarations page is responsible for the payment of all premiums and will be the payee for any premiums returned to the insured by the insurance company.

TRANSFER OF RIGHTS & DUTIES

The rights and duties of the insured may not be transferred without the written consent of the insurance company, except in case of death of an individually named insured. If the insured dies, the rights and duties will be transferred to their legal representative, but only while acting within the scope of duties as legal representative. Until such time that the legal representative is named, anyone having temporary custody of the property will have the rights of the insured and duties, but only in respect to that property.

Endorsements are the mechanism whereby a standardized form can be tailored to fit the needs of a variety of situations. Endorsements “modify” the policy in some fashion. In these contracts they are used to add additional lines of coverage, to change coverage or the terms of the policy, or restrict the terms. Some Endorsements are required by regulatory bodies, others are required by insurers. If two or more lines of insurance are to be “endorsed”, this is called “Interline Endorsements.” If changes are to be made within a single line of insurance, this is called the “Line of Insurance” Endorsements.” (See later chapter on “Endorsements”).

Please note that the same forms may be used to write either a monoline policy or a Commercial Package Policy. If the package policy format is used, as explained earlier, many common items only need to be included only once.

CONSUMER APPLICATION

Harold decided that it was time for him to retire, so he turned his business over to his daughter, Tammy. He notified his Liability Insurer (and all other insurers) that this was the situation.

His insurer does not have to accept this notification as binding. For instance, they could have determined through investigation that Tammy had a criminal past and would not be eligible under the company’s normal underwriting rules.

STUDY QUESTIONS

1. The chance of claim settlement delays is reduced when the policy is
 - A. a Multiline policy.
 - B. a Monoline policy.
 - C. an Inland Marine policy,
 - D. an Automobile Liability policy.
2. Which of the following is NOT an advantage of a Multiline policy?
 - A. There is fewer policies to purchase and maintain.
 - B. The chance of delay in loss settlement due to disputes of different insurers is reduced.
 - C. The insured benefits from reduced administrative expenses.
 - D. The commissions are higher.
3. The oldest form of insurance is
 - A. Life insurance.
 - B. Health insurance.
 - C. Liability insurance.
 - D. Marine insurance.
4. The Insurance Services Office (ISO) is
 - A. a credit-reporting agency.
 - B. a statistic gathering organization
 - C. an agency of the Federal government.
 - D. an insurance company rating bureau,
5. Commercial Liability policies may be cancelled
 - A. by either party, subject to conditions.
 - B. only by the insurance company.
 - C. only by the insured.
 - D. by the insurance agent only.
6. The DeBrey Mercantile company has a Commercial Package Policy. After suffering two losses, the insurance company notified DeBrey that they will be inspecting their operation within 30 days, using an outside firm to do the actual inspecting.
 - A. The insurance company cannot inspect once the policy is issued.
 - B. If the insurer is going to inspect, they must use only their own employees.
 - C. This is reasonable within the policy conditions and provisions.
 - D. DeBrey can take the insurer to court and make them leave the company alone.

7. The partnership of Brown and White has a professional liability policy. Who is responsible for payment of premiums?
 - A. Both Brown and White equally.
 - B. The one that is named first on the policy.
 - C. The one that is named secondly on the policy.
 - D. The insurance agent.

8. The approved method of adapting a standardized liability to fit a particular situation is by
 - A. Endorsement.
 - B. Rewriting.
 - C. Amendment.
 - D. Subrogation.

9. Cecil Standard, President of Standard Drilling Co., dies suddenly at the office. According to the by-laws, the temporary acting President is their legal counsel Jim who takes office days later. An emergency board meeting is called and Henry is elected president one week later. During the interim when Jim was acting as President, he obligated the company to a contract with Seamless Properties as Cecil had instructed him to start the paperwork just before he died. When Henry becomes President, he revokes the agreement, stating that Jim did not have the authority to enter into any such agreement.
 - A. During the interim, Jim could do anything including selling the company.
 - B. Since Jim was acting within the authority of the legal representative, the agreement stands.
 - C. Nobody had any authority to do anything until the new President was elected.
 - D. Jim and Henry must agree on the commitment with Seamless, or either could be sued.

10. In the situation above, Sam considered purchasing a drilling rig from standard drilling, and was trying it out on his property when Cecil died. Sam sent in a check for the rig, but Henry considered the agreement null and void.
 - A. Sam had no right to sell the rig, and must return it to the company.
 - B. Sam had temporary custody and so was within his right to buy the rig.
 - C. Jim had to approve the sale or the rig had to be returned.
 - D. Henry had the last word; Sam is out of luck.

ANSWERS TO STUDY QUESTIONS

1A 2D 3D 4B 5A 6C 7B 8A 9B 10B




CHAPTER SIX - COMMERCIAL GENERAL LIABILITY FORM

VERSIONS

The Commercial General Liability Form is offered in two versions:

1. Occurrence version.
2. Claims Made version.

 **The two forms are identical in all respects except at the point when the coverage is applicable (activated or “triggered”). The Occurrence Version covers defined occurrences taking place while the policy is in force (policy term). The Claims Made Version provides that the policy, which applies for any particular claim, is the one that is in effect when the claim is made.**

The difference between the two may offer widely different exposures, particularly in risks that have exposures accumulating over several years. One oft-quoted example that best describes the practical difference regards the asbestos exposures. A California court held that all policies which were in effect from first exposure until death, or the date of the failing of a claim, are triggered for such claims for bodily injury. Therefore, under “claims-made policies” there would be coverage for claims actually made within the term of the policy. The “occurrence policy” in force in any year in which a claimant was first exposed or a claim filed or the affected individual dies, all could be used to provide coverage.

OCCURRENCE FORM

The Commercial General Liability Policy includes the separate coverages, which were available under the older forms, the risks covered by the older policy, and all appropriate endorsements, are all built into the new policy.

Actually, the Occurrence Form incorporates what was previously called the Broad Form Property Damage, Contractual Liability, Fire Legal Liability, Broad Form Property Damage, Host Liquor Liability, Incidental Medical Malpractice Liability, Non-owned Watercraft Liability, Products Liability and Extended Bodily Injury Liability, Personal and Advertising Liability and Medical Payments.

The Commercial General Liability Form can be purchased monoline (single policy) or as part of the Commercial Package Policy. The provisions stated below would be that of a Liability part of the CPP.

Each provision of the ISO form will be quoted and discussed in detail when necessary. Some of the wording is obvious and does not require any further explanations, but other sections

may require explanations and illustrations (Consumer Applications). The Occurrence form will be discussed first, followed by the Claims-made Form. Also note that the actual Coverage Form or policy may be referred to a “Coverage Part” which refers to the coverage that may (or may not) be part of a Commercial Package Policy; or may be a Monoline policy. However for simplicity purposes, the “Coverage Part” will be referred to as “policy.” In other words, the Commercial General Liability Coverage is treated as a separate Commercial General Liability Insurance *policy*, and not as *part* of a Commercial Package Policy.

Various provisions in this policy restrict coverage. The insured is cautioned to read the entire policy carefully to determine rights, duties and what is and is not covered.

(Note: In keeping with “readability” regulations, policies typically refer to the insured as “you”, and “your”, and will refer to the insurer as “we”, “us” and “our.” For educational and illustrative purposes, the first party (I, me, we, us, our) and second party (you, your) is usually not used, but third-party terminology (the insurer, the insured) is used.

Please refer to the Declaration Page illustration on the next page. As indicated above, this page shows *that* is the insured, *when* they are insured, *how* they are insured, and *where* the property insured is located.

The name and address of the insured, and name and address (where) of the business must be stated correctly. The “Type of Business” is also needed to be accurate because if the insurer is given misleading or false information as to what the business is and what it does, the insured may find themselves without insurance when the need arises. As an example, the enclosed Declarations page shows the business to be “Wood Products”. The policy would probably not be issued without more information. For instance, if the “wood products” were creosoted posts, creating an environmental hazard, or if the products were wooden playground equipment, which could lead to children being injured with the products, the insurer would need to know more to properly rate the policy.

The policy period – when the coverage starts and when it ends – must be most precise. In many situations, the old song, “Oh, what a difference a day makes” would be most applicable.

Exactly how the insured is covered is shown in the Declarations page by listing the coverage parts that are purchased and the premiums pertaining to the particular coverage. In the following Declaration example, the Burton’s Woodworking is covered as shown under “LIMITS OF INSURANCE”

DECLARATIONS FOR COMMERCIAL GENERAL LIABILITY COVERAGE

(Next Page)

**COMMERCIAL GENERAL LIABILITY
DECLARATIONS**

POLICY NO. XXXX12345

COMPANY NAME AREA

PRODUCER NAME AREA

NAMED INSURED Burton's Woodworking & Development Inc.

MAILING ADDRESS 7445 Sunlight Boulevard
Sunset, FL 344567

POLICY PERIOD: From January 16, 1999 to January 2, 2000 at
12:01 A.M. Standard Time at your mailing address shown above.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

LIMITS OF INSURANCE

GENERAL AGGREGATE LIMIT (Other than Products -Completed Operations)	\$ 500,000	
PRODUCTS-COMPLETED OPERATIONS AGGREGATE LIMIT	\$500,000	
PERSONAL & ADVERTISING INJURY LIMIT	\$100,000	
EACH OCCURRENCE LIMIT	\$100,000	
FIRE DAMAGE LIMIT	\$ 50,000	ANY ONE FIRE
MEDICAL EXPENSE LIMIT	\$ 10,000	ANY ONE PERSON
RETROACTIVE DATE (CG 00 02 only)		

Coverage A of this Insurance does not apply to "bodily injury" or "property damage" which occurs Before the Retroactive Date, if any, shown below

Retroactive Date: _____ None
(Enter Date or "None" if no Retroactive Date applies.)

Form of Business:

- | | |
|--|---|
| <input type="checkbox"/> Individual | <input type="checkbox"/> Partnership |
| <input type="checkbox"/> Joint Venture | <input type="checkbox"/> Organization (Other than Partnership or Joint Venture) |

Business Description: Manufacturing of wood-based products

Location of All Premises You Own, Rent or Occupy:
Above address only

CLASSIFICATION PREMIUM	CODE NO.	PREMIUM BASIS	RATE	ADVANCE
-Wood Products Manufacturing	55802		Prem/ OP: .20 Products: 1:15 PR/CO \$ 3,100	ALL OTHER: \$7,000 TOTAL \$ 10,100

Premium shown is payable: \$ 10,100 - at inception.
ENDORSEMENTS ATTACHED TO THIS POLICY: IL 00 211185 - Broad Form Nuclear Exclusion

COUNTERSIGNED
(Date)

By
(Authorized Representative)

NOTE: OFFICERS' FACSIMILE SIGNATURES MAY BE INSERTED HERE, ON THE POLICY COVER OR ELSEWHERE AT THE COMPANY'S OPTION

COVERAGES

“COVERAGES” section is normally the first section of the policy (after the DECLARATIONS page), which outline the coverages provided by the insurer, and is divided into three types:

- Coverage A. Bodily Injury and Property Damage
- Coverage B. Personal and Advertising Injury Liability
- Coverage C. Medical Payments


Note: In later discussions of coverages, the titles “Coverage A”, “Coverage B”, and “Coverage C” is not used per se. Instead the coverages will be referred to as to their coverages; i.e. “Coverage A” will be referred to as “Bodily Injury and Property Damage” coverage, etc. Even though policy wording will refer to these types as “Coverages”, the functional description is used so that the student will become familiar with the provisions – instead of having to stop and think “Is Personal Liability part of Coverage A or Coverage B?”

An example of actual policy wording will be provided in detail later in this text. At this point, it is important to recognize the provisions as to coverage and exclusions, etc., so that they can be recognized and understood in any liability policy.

BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement:

The insurer will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which the insurance applies. The insurer will have the right and duty to defend any "suit" seeking those damages. The insurer may at the insurer's discretion investigate any "occurrence" and settle any claim or "suit" that may result.

 **The important part of this agreement is that the insured must be legally obligated to pay.**

However, the amount that the insurer will pay for damages is limited by the policy, and further, the insurer's right and duty to defend stop when the insurer has used up the applicable limit of insurance in the payment of judgments or settlements under Bodily Injury or Property Damage Liability Coverage or medical expenses (under Coverage C). Otherwise, the policy will pay only for those obligations or liability that are specifically listed as Supplementary Payments (Coverages A and B).

Insured "bodily injury" and "property damage"(BI & PD) must be caused by an "occurrence" that takes place in the "coverage territory"; and such injury/damage must occur during the policy period.

Under the policy, "Damages because of 'bodily injury' includes damages claimed by any person or organization for care, loss of services or death resulting *at any time* from the "bodily injury."

CONSUMER APPLICATION

The Brokaw Luggage Shop in the Square Mall has a local reputation for customer appreciation. Their motto is "The Customer is King." Herbert, a local real estate broker, is looking at luggage when he drops a carry-on on his foot, breaking his toe. The store manager offers to pay for his doctor's bill for the broken toe as a measure of good will. Brokaw applies for reimbursement from his Liability insurer.

The insurer will not reimburse for these medical costs, as there was no legal obligation for Brokaw to pay for the medical costs.

2. Exclusions.

This insurance does not apply to "Expected or Intended Injury" which is defined as "bodily injury" or "property damage" expected or intended from the standpoint of the insured. In other words, the insured cannot purchase liability insurance with the intention of committing a punishable act upon another and expect that the insurance will pay for his actions. However, if one exercises reasonable force to keep from being injured, or to protect his/her property, this exclusion does not apply.

The policy will not pay for any bodily injury or property damage if the liability for such damages has been assumed by the insured by contract or agreement. This exclusion does not apply to liability for damages if the liability is specifically accepted by the insurer and if the act itself occurs after the effective date of the contract.

CONSUMER APPLICATION

Nelly's Deli is a food processing and distributing company specializing in delicatessen type foods. In order to get more local recognition; they contract to provide several items for the big Labor Day celebration, including potato salad. The celebration sponsors were concerned that the potato salad might spoil as the food would all be outside, picnic style. The Sales Manager for Nelly's convinced the sponsors that was unlikely, and as a matter-of-fact, gave them a written agreement that stated if any person became ill as a result of eating the potato salad on Labor Day, with an established time limit, Nelly's would be liable for any medical expenses.

Unfortunately, Labor Day was unusually hot, and the time frame for the usage of the potato salad was too broad, with the result that several people became quite ill. Nelly's filed a claim with the Commercial Liability carrier, but since the liability had been assumed by Nelly's, these claims were excluded from coverage.

Liquor Liability is specifically excluded. The policy will not cover BI & PD if the claims arise because of causing or contributing to the intoxication of any person, furnishing alcoholic drinks to a minor or an intoxicated person, or if the insured was held liable because of any ordinance, regulation or statute relating to the sale, gift, distribution, or use of alcoholic

beverages. The exclusion only applies if a person is in the business of manufacturing, distributing, serving, or furnishing alcoholic beverages and would not cover casual use, such as company cocktail parties if incidental to the business. However, courts have changed this concept considerably and further discussion will be found later in this text.

Obligations of the insured under a Workers Compensation, disability benefits or unemployment compensation law are excluded.

Excluded are bodily injury to an employee of the insured arising out of and in the course of employment by the insured; or performing duties related to the conduct of the insured's business; or the spouse, child, parent, brother or sister of that "employee" as a consequence of the employees employment as so stated. This exclusion applies whether the insured may be liable as an employer or in any other capacity; and to any obligation to share damages with or repay someone else who must pay damages because of the injury. This exclusion does not apply to liability assumed by the insured under an "insured contract." An Insured Contract is defined as a lease of premises, a sidetrack agreement, an easement or license agreement in connection with vehicle or pedestrian or private railroad crossings, except in connection with construction of demolition operations on or within 50 feet of a railroad. It also means an elevator maintenance agreement or any agreement which the insured assumes the tort liability of another person (see discussion previously) to pay damages because of BI or PD damage to a third party if the agreement is made prior to any such BI or PD damage.

CONSUMER APPLICATION


Bruce owns a Cheese Distributor business and Christmastime is his busiest time of the year. He often brings his family members in to help keep his warehouses and coolers clean. During the cleaning of a cooler, his oldest son, Robert, slips on ice and falls, breaking a leg. Robert is 22, and is financially independent, having his own apartment. Bruce treats him as any other employee, paying him the same wages as others performing the same duties. Since the ice had been left in a place it should not have been, by another employer, Robert gets a personal injury attorney and sues Bruce.

Regardless of his apparent employee status, the liability insurance policy would have excluded Robert from coverage, as he is a member of Bruce's family.

The pollution exclusion is rather lengthy and detailed and quite broad. There is no coverage for BI or PD arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, and release of escape of any pollutants:

- (a) At or from any premises, site or location, which is or was at any time owned or occupied by, or rented or loaned to, any insured;
- (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
- (c) Which are or the insurer at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

- (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
- (i) If the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or
 - (ii) If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

 **Note: A “waste” is considered as a pollutant, which is defined as certain materials that will be treated and converted into fuel. It does not include gases that escape during a chemical manufacturing process.**

Subparagraphs (a) and (d) (i) do not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire. A “hostile fire” is considered to be any fire which occurs in a location other than where it was meant to be, or a fire which while friendly in the inception, becomes out of control and burns in another area or destroys material that it was not intended to destroy.

Specifically excluded is any loss, cost or expense arising out of any request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants. Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

CONSUMER APPLICATION

The Brady Leather Products Co. has operated for 50 years on the bank of the Pohawtee River. The chemicals used in tanning and other leather preparation processes has been stored in large stainless steel containers, then they are put into 55 gallon drums and carried to an approved chemical dump site.

Residents in the area have recently complained of chemicals in their water. The Government inspectors inspected the chemical tanks and the disposal procedures and containers. They detected leaks in the containers and instituted a suit against Brady. Residents of the area obtained their own attorneys and also have filed suit.

Brady insists that they have always complied with all regulations, and have always taken more protective steps against pollution and waste disposal, than that required by regulation. The leakage discovered was the result of age of the container, which was due to be replaced in 2 years anyway. They filed a claim with their Commercial Liability insurer.

Their insurer refused to furnish legal counsel or pay any claims against them in this matter as situations as this are explicitly excluded. They could purchase an Endorsement to cover this exposure, however since the damage has already been done, there is no way that it could be covered now.

Bodily Injury or property damage arising out of the ownership, maintenance, use or entrusting to others, of any aircraft, automobile or watercraft owned or operated by or rented to or loaned to any insured, is excluded. "Use" includes operation and loading or unloading such vehicle or craft. The exclusion does not apply to a watercraft while ashore on premises owned or rented by the insured, watercraft that is less than 26 feet long or watercraft used to carry persons for a charge. In respect to an automobile, it does not apply if the auto is parked next to or on premises owned or leased by the insured (not the auto owned by or rented/loaned to the insured) and subject to the equipment listed as "Mobile Equipment" in this policy.

CONSUMER APPLICATION

Sizemore Country Store serves a community of summer lake homes in the area. The 4th of July celebration is the high point of the community and of the Store. Sizemore purchases 2 "Wave-runners" to rent. On the holiday, the lake is full of water-skiing boats, fishing boats, jet-skis and Wave-runners. Sizemore lets 2 men take the Wave-runners out on the lake. One of the drivers loses control of his watercraft and strikes a boat pulling water skiers, and then, losing control, ends up on the beach where it struck a young couple who were watching the activity on the lake. Several persons were injured. Suit was brought against Sizemore as the watercraft was theirs and had the company name on it.

Under the Commercial Liability protection, the exclusion of owned watercraft would not apply as the Wave-runner was several feet shorter than 26 feet (Insurer will pay).

Excluded is any BI or PD arising out of transporting mobile equipment by an auto that is owned or operated by, or rented or loaned to the insured. Excluded is BI or PD as the result of the use of mobile equipment in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition or stunting activity.

Property damage is excluded if the property is owned, rented or occupied by the insured, property loaned to the insured or in the care of custody of the insured. Also, property damage will be excluded if property damage occurs because of business operations on real property used or being worked on by the insured. Subject to the "products completed operations hazard" portion of the policy, excluded is that part of any property that must be replaced or repaired because the work was incorrectly performed on the property.

CONSUMER APPLICATION

McBride Machinery Co. occupies rented space in a one-story building. It is a typical machine shop, making made-to-order parts for several small manufacturers in the area. One of the employees overheated a cutting tool, with the result that the machine hurled a hot piece of the cutting tool into a barrel of inflammable liquid stored against the outer wall of the building. The barrel exploded which created structural damage to the building. The building owner sued McBride as McBride refused to repair the building as McBride considered the building construction as inadequate. The Liability coverage of the Commercial policy held by McBride would not provide McBride with legal representation, as property damage as the result of an operation of the insured, is specifically excluded.

There is a rather typical “War Exclusion”, that excludes BI or PD due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution. This exclusion applies only to liability assumed under a contract or agreement.

Property damage to the insured’s product is excluded. Property damage to the work of the insured arising out of it or any part of it and included in the “products completed operations hazard” section of the policy is excluded, unless a subcontractor performed the work

There is no coverage for property damage to “impaired property” (defined in “Definitions Section below) or property that has not been physically injured arising out of a defect, deficiency, inadequacy or dangerous condition in the insured’s product or work, or a delay or failure by the insured, or anyone acting on his behalf, to perform a contract or agreement in accordance of the contract in question. The exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to the insured’s product or his work after it has been put to its intended use.

Specifically excluded are any damages claimed for any loss, cost or expense incurred by the insured or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of the insured’s product, work or impaired property, if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it. This is a long statement, which follows the wording in the policy, but basically it states that any claims that arise because a product is deficient, etc., will not be covered if the defect was known.

CONSUMER APPLICATION

Penelope Dolls manufacture expensive children’s dolls and similar specialty products. One of their recent products was “Penelope Feel Good”, which had a texture that felt remarkably like human skin. The patented process as applied over a more rigid material so that it would hold its shape. After the introduction of the doll just before Christmas, several small children were injured because if an extremity was stricken, the outer texture would tear and the interior material would shatter and in these cases, sharp edges protruded through the “skin” which caused cuts to the children. After Consumer Reports asked for its recall, it was taken from the market.

Penelope was sued. Investigation showed that the engineer who had devised the “skin” process had objected to the interior material, asking for a more flexible, but much more expensive, material to be used under the “skin.” Under these conditions, the liability insurer would probably deny coverage as Penelope knew, or should have known, that there was a danger inherent in the product.

PERSONAL AND ADVERTISING INJURY LIABILITY

The insurer will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which the insurance applies. The insurer will have the right and duty to defend any "suit" seeking those damages. The insurer may at the insurer's discretion investigate any "occurrence" or offense and settle any claim or "suit" that may result.

The amount that the insurer will pay is limited to the "Limits of Insurance" as stated in the policy, and the insurer's right and duty to defend end when the limits have been met. The coverage applies to "Personal injury" caused by an offense arising out of the insured's business, excluding advertising, publishing, broadcasting or telecasting done by or for the insured, and "Advertising injury" caused by an offense committed in the course of advertising the insured's goods, products or services; but only if the offense was committed in the "coverage territory" during the policy period.

This coverage does not apply to "Personal injury" or "advertising injury" arising out of oral or written publication of material, if

- done by or at the direction of the insured with knowledge of its falsity;
- arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;
- arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured; or
- For which the insured has assumed liability in a contract or agreement.

This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

Further, this coverage does not apply to "Advertising injury" arising out of breach of contract, other than misappropriation of advertising ideas under an implied contract; the failure of goods, products or services to conform with advertised quality or performance; the wrong description of the price of goods, products or services; or an offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting.

CONSUMER APPLICATION

Greasy Jim's Auto Shop advertised "lifetime" brake lining for \$59.95. Alice had her Toyota serviced with brake linings and did not receive a written warranty. Five years later she took her car back for new linings. Jim refused to furnish linings free, stating that the "lifetime" that he had advertised pertained only to the linings, and not the labor costs, which now \$79.99 were. Alice sued.

Jim's liability coverage would not apply, as he was aware of the "falsity" of his original advertisement.

MEDICAL PAYMENTS

The insurers will pay medical expenses "bodily injury" caused by an accident on the insured's owned or rented premises, on ways next to premises owned or rented by the insured, or because of the operations of the insured. These medical expenses will be paid (1) if the accident takes place in the "coverage territory" and during the policy period, (2) are incurred and reported to the insurer within one year of the date of the accident; and (3) the injured person submits to examination, at the insurer's expense, by physicians of the insurer's choice as often as the insurer reasonably requires.

The medical payments will be made regardless of who is at fault and within the limits of the policy. The insurer will pay reasonable expenses for first aid administered at the time of an accident, for necessary medical, surgical, x-ray and dental services, including prosthetic devices; and for necessary ambulance, hospital, professional nursing and funeral services.

Excluded are expenses paid for "bodily injury" to any insured or any person hired to work for or on behalf of any insured or a tenant of any insured, to a person injured on that part of premises owned or rented by the insured that the person normally occupies. Benefits will not be paid to a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers compensation or disability benefits law or a similar law. Excluded are payments to a person injured while taking part in athletics, those claims excluded under the BI and PD Coverage section of the policy, or due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

CONSUMER APPLICATION

Bert's Bakery is located in Minnesota. He hires a local snow removal company to keep his driveway; parking lot and sidewalk clear in the winter. After one blizzard, the snow removal company neglected to keep the sidewalk clear. Mable fell on the sidewalk when entering the Bakery, sustaining hip and knee injury. She sues for medical costs.

Bert's policy would cover the medical payments. The snow removal company may be liable, or subrogated for the claim, but that is another matter.

SUPPLEMENTARY PAYMENTS

In addition to the coverages as described above, the policy will pay, with respect to any claim or "suit" the insurer defends, and all expenses the insurer incur, up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. The insurer does not have to furnish these bonds.

The coverage will apply to the cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. The insurer does not have to furnish these bonds.

The policy will also pay all reasonable expenses incurred by the insured at the insurer's request to assist in the investigation or defense of the claim or "suit", including actual loss of earnings up to a printed amount, (such as \$100 a day) because of time off from work.

Further, the policy will pay all costs taxed against the insured in the "suit" and prejudgment interest awarded against the insured on that part of the judgment the insurer pays. If the insurer makes an offer to pay the applicable limit of insurance, the insurer will not pay any prejudgment interest based on that period of time after the offer.

The policy will pay all interest on the full amount of any judgment that accrues after entry of the judgment and before the insurer has paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

Under this part of the policy, these payments will not reduce the limits of insurance.

CONSUMER APPLICATION

Steve Owens is being sued for a covered event under his liability coverage. During the investigation of the claim, the insurer needs a copy of the title to certain property located in an adjoining state. They request that Steve obtain the title copy. Steve flies to the county seat in the adjoining state to get a copy of the title, necessarily spends the night and flies back. They would also pay Steve for loss of wages, up to maximum of \$100 a day (\$200 maximum in this case).

Later the court awards the plaintiff \$250,000 against Steve, the defendant. Further, the court assesses 10% of the award as prejudgment interest for the 6 months period from the date of the injury to date of adjudication.

The aggregate limit on Steve's policy is \$250,000.

Under the Supplementary Payments section of his policy, even though his aggregate limit was reached by the judgment, the insurer would pay Steve's airline fare, hotel bill and meals and any other cost involved in acquiring the title copy. They would also pay the approximately \$12,500 prejudgment interest assessment.

DEFINITION OF INSURED

Since this type of policy is designed for business purposes, the definition of Insured is not as simple as for individual policies. The definitions pertain to individuals, partnership/joint ventures, or other organizations – such as corporations.

In respect to an individual, the named insured and spouse are insured's, but only in regards to the conduct of a business of which the insured is the sole owner.

If the business is a partnership or joint venture, they (one or the other) are the insured. The executive officers and directors are insureds but only in regards to their duties as officers or directors.

If the organization is other than the categories above, the company is the insured and officers and directors are insureds while performing duties related to the business. In addition, stockholders are insureds but only with respect to their liabilities as stockholders.

Employees are also insureds, but only for acts within the scope of their employment by the insured or while performing duties while performing duties related to the conduct of the business. There are several specific situations wherein employees (other than executive officers) are not considered as insureds.

No employee is an insured for PD or BI to the insured (employer), partners, or partner/joint venture members, or to another employee while in course of performing duties related to the conduct to the business – or spouse, child, parent, brother or sister or the other employee. No employee is an insured for BI or PD arising out of his/her providing or failing to provide professional health care services.

An insured may be any organization while acting as a real estate manager for property damage liability only.

If the insured dies, an insured may be a person or organization having property temporary custody in regards to liability arising out of the maintenance or use of the property and until a legal representative has been appointed. The legal representative will then assume the role as insured in respect to duties as such.

Mobile Equipment is treated different, as any person driving such equipment along a public highway with the permission of the employer/insured may be considered an employee. Any other person or organization responsible for the conduct of such person (equipment operator) is also an insured, but only with respect to liability arising out of the operation of the equipment, and only if no other insurance of any kind is available to that person or organization for this liability.

This classification of insured is restricted as no person or organization is an insured with respect to bodily injury to a co-employee of the person driving the equipment; or "Property damage" to property owned by, rented to, in the charge of or occupied by the insured or the employer of any person who is an insured under this provision.

Businesses have a tendency to purchase other businesses or to merge or to form new organizations, and any such newly merged, acquired or started business over which the insured business maintains ownership or majority interest, will qualify as a Named Insured provided there is no other similar insurance available to that organization. This coverage is provided only for a period, usually 90 days, after the new venture has been acquired, merged or started. Coverage will not be provided for any bodily injury or property damage occurring before the

new venture is acquired or formed. All insureds must be shown as a Named Insured in the Declarations in respect to the conduct of any current or past partnership or joint venture.

CONSUMER APPLICATION

Soledad Concrete Company manufactures concrete products and have a Commercial Liability policy covering their operations. The owners of Soledad want to expand and to be able to transport their products instead of contracting with a trucking company, so they purchase the Donaldson's Trucking Co. Donaldson's has a Commercial Package Policy, which includes coverage for the vehicles and their usage. Soledad's policy does not cover the transportation hazard. The Comptroller of Soledad feels that there is no big hurry for Soledad to obtain coverage for the newly acquired trucks as they have 90 days of coverage before they have to do anything.

The Comptroller would be well advised to immediately add coverage for liability for the trucks, autos and other mobile equipment acquired from Donaldson's. At the time of the purchase, Donaldson's will cease to exist and therefore there would be no "insured" under the Donaldson's policy. In actual practice, the Comptroller would probably have already obtained Endorsements for the Soledad Company that would cover this new exposure(s) and they would become effective the date of the acquisition.

LIMITS OF INSURANCE

The source of the limits of insurance information will be found on the Declarations Page. From the previous example of a Declarations Page, the following limits were shown:

GENERAL AGGREGATE LIMIT (Other than Products -Completed Operations)	\$500,000
PRODUCTS-COMPLETED OPERATIONS AGGREGATE LIMIT	\$500,000
PERSONAL & ADVERTISING INJURY LIMIT	\$100,000
EACH OCCURRENCE LIMIT	\$100,000
FIRE DAMAGE LIMIT	\$ 50,000
	ANY ONE FIRE
MEDICAL EXPENSE LIMIT	\$ 10,000
	ANY ONE PERSON

The Limits of Insurance shown in the Declarations are subject to certain specified rules regarding the limits, and regardless of the number of Insureds, Claims made or "suits" brought; or persons or organizations making claims or bringing "suits".

The General Aggregate Limit is the most the insurer will pay for the sum of Medical expenses under Bodily Injury and Property Damage Liability coverages, and Personal and Advertising Injury Liability coverages, and damages under the Medical expense coverage section.

The Products- Completed Operations Aggregate Limit is the most the insurer will pay under BI and PD coverage for damages because of "bodily injury" and "property damage" included in the "products completed operations hazard".

Subject to the General Aggregate Limit above, the Personal and Advertising Injury Limit is the most the insurer will pay under Personal and Advertising Injury Liability Coverage for the sum of all damages because of all "personal injury" and all "advertising injury" sustained by any one person or organization.

Subject to the Aggregate Limit or the Products-Completed Operations Aggregate Limit, whichever applies, the Each Occurrence Limit is the most the insurer will pay for the sum of damages under the BI and PD coverage and Medical Expense coverage.

Subject to the immediate preceding paragraph, the Fire Damage Limit is the most the insurer will pay for damages because of "property damage" to premises, while rented to the insured or temporarily occupied by the insured with permission of the owner, arising out of any one fire.

The Medical Expense Limit is the most the insurer will pay under the Medical Expense Coverage for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

CONSUMER APPLICATION

The Antiobe Manufacturing Company's policy has products-completed operations aggregate limit of \$100,000. Antiobe is sued by three individuals under this provision, and each plaintiff is awarded \$75,000. The most that this policy will pay is \$100,000 total. The distribution of funds from the policy would usually be to pay the first to file \$75,000, \$25,000 to go to the next to file. Other settlement arrangements can be made – for instance the insurer could possibly pay \$33,333 to each plaintiff, or some other award distribution.

COMMERCIAL GENERAL LIABILITY CONDITIONS

Conditions under this policy consist of specific provisions under which the insurance company will or will not pay. The policy will list the coverages available, and to whom the coverages apply. The limits of the coverage amounts have been covered in previous sections. Remaining are the conditions under which payments will or will not be made, and definitions of terms used in the policy.

The First condition pertains to bankruptcy or insolvency of the insured. If this should happen, the insurer still must pay any obligations under the policy.

DUTIES OF THE INSURED in the Event of Occurrence, Offense, Claim or Suit - In case claims to be made under the policy occur, by occurrence, offense, claim or suit, there are certain specific duties that the insured(s) must take. This "Occurrence" type of policy form is brought to the forefront in this section.

The insured(s) has a duty to notify the insurer as soon as practicable of an "occurrence" or an offense, which may result in a claim. To the extent possible, notice should include the following items:

- (1) How, when and where the "occurrence" or offense took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

If a claim is made or "suit" is brought against any insured, the insured must immediately record the specifics of the claim or "suit" and the date received; and notify the insurer as soon as practicable. Further, the insured(s) must (1) immediately furnish to the insurance company copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit", (2) authorize the insurance company to obtain records and other information; (3) cooperate with the insurance company in the investigation, settlement or defense of the claim or "suit"; and (4) assist the insurer, upon the insurer's request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage which is or may be covered under the policy.

An important provision is that no insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without the insurer's consent. It continues to amaze liability claims personnel as to how many insureds will assume obligations, although most often quite innocently. Some people seem to feel, particularly if it is a business situation, that if they have done wrong, they should "belly up to the bar" and admit it in order to maintain good customer relations.

CONSUMER APPLICATION

Benjamin's Discount Auto Parts store is being sued and they have a Commercial General Liability policy. The basis of the suit is selling to the plaintiff an auto part that failed within a very short period of time, causing the auto to malfunction and caused an accident in which the plaintiff and his children were injured.

Upon receiving notification of the suit, the owner (Ben) contacted his wholesaler who contacted the manufacturer, who verbally stated that they would "make it right" with Benjamin. Ben then paid for the medical bills for his customer and children that they suffered as the result of the accident. The customer refused to withdraw the suit, however, as one of the children was injured so that he would be suffering long term damage from the accident.

Ben contacted the manufacturer again and discovered that the company had been sold and the new owners were disallowing any liability in the situation. Ben then notified his agent who instructed him to immediately contact the insurance company with all of the details, etc.

Under these circumstances, Ben could be in trouble. The insurance company not only was not notified immediately as required by the policy, but he had already assumed some liability without the approval of the insurer. The insurer may, or may not, work with Ben in fighting the lawsuit, at their option, as Ben had not abided by the provisions of the policy. It would be very doubtful that the company would reimburse Ben for any of the medical expenses he has already paid.

LEGAL ACTIONS AGAINST THE INSURER - In respects to legal actions against the insured, no person or organization has a right to join the insurer to bring suit against an insured. Also, the insured may not sue the insurer unless all of the insurer's terms as stated in the policy have been fully complied with.

A person or organization may sue the insurer to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial but the insurer will not be liable for damages that are not payable under the terms of the policy that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by the insurer, the insured and the claimant or the claimant's legal representative.

OTHER INSURANCE - Provisions are made for those situations where there is (are) other insurance coverage(s). If other valid and collectible insurance is available to the insured for a loss, the insurer covers the insurer's obligations are limited as primary insurance, excess insurance, and the methods of sharing with other insurers.

PRIMARY INSURANCE - This insurance is primary except when if it considered as excess insurance (as discussed below). If this insurance is primary, the insurer's obligations are not affected unless any of the other insurance is also primary. Then, the insurer will share with all that other insurance by the method described below.

EXCESS INSURANCE - This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis, (1) that is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for the insured's "work"; (2) that is Fire insurance for premises rented to the insured; or (3) if the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusions in the policy.

When this insurance is excess, the insurer will have no duty under Coverages BI & PD or Individual or Advertising Liability to defend any claim or "suit" that any other insurer has a duty to defend. If no other insurer defends, the insurer will undertake to do so, but the insurer will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, the insurer will pay only the insurer's share of the amount of the loss, if any, that exceeds the sum of the total amount that all such other insurance would pay for the loss in the absence of this insurance; and the total of all deductible and self-insured amounts under all that other insurance.

METHOD OF SHARING - The insurer will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and *was not bought specifically to apply in excess of the Limits of Insurance* shown in the Declarations. If all of the other insurance permits *contribution by equal shares*, the insurer 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, the insurer 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.

PREMIUM AUDIT – The insurer will use their usual rules and rates in computing the premium. The premium that is shown, as “advance premium” is a deposit premium only and at the end of each audit period, the insurer will determine the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium; the insurer will return the excess to the first Named Insured.

The first Named Insured must keep records of the information the insurer will need for premium computation, and send copies to the insurer at such times as the insurer may request.

REPRESENTATIONS – By the fact that the insured accepts the policy is proof that the insured agrees that the statements in the Declarations are accurate and complete and based upon representations made by the insured to the insurer. The insurer issued the policy in reliance upon the representations of the insured.

SEPARATION OF INSUREDS – Since there may be multiple “insureds” under this policy, as defined in the policy, there is a provision that except with respect to the Limits of Insurance, and any rights or duties specifically assigned in the policy to the first Named Insured, the insurance would apply as if each Named Insured were the only Named Insured; and separately to each insured against whom claim is made or "suit" is brought.

TRANSFER OF RIGHTS OF RECOVERY against Others to the Insurer - If the insured has rights to recover all or part of any payment the insurer has made under this policy, those rights are transferred to the insurer. The insured must do nothing after loss to impair them. At the insurer's request, the insured will bring "suit" or transfer those rights to the insurer and will help the insurer to enforce them.

WHEN THE INSURER DOES NOT RENEW - If the insurer decides not to renew this policy, the insurer will mail or deliver to the first Named Insured shown in the Declarations written notice of the non-renewal not less than 30 days before the expiration date. If notice is mailed, proof of mailing will be sufficient proof of notice.

CONSUMER APPLICATION

RX Preferred is a specialty pharmacy housed in rented space in a shopping mall. They carry Commercial General Liability insurance and a Commercial Fire policy for the contents. The building is protected against fire loss by a policy owned by the Mall owners. Because of mishandling of some chemicals in the pharmacy, a fire erupts, injuring a customer and two mall shoppers outside of the store. The fire caused damage to the adjacent stores so that they had to close temporarily. Prescriptions of customers were destroyed, causing some customers to have to contact doctors in various states and to have considerable concern and injury, real and imagined.

The damage to the building because of fire would be primarily covered under the Fire Contents policy and the Mall's Fire policy, and the CGL policy would be excess. For the bodily injury to the customers, the CGL would be primary. If any other lawsuits arise, such as the adjacent store owners suing RX, if the fire insurance companies refuse to protect RX – which would probably be the case, then RX's CGL would be primary. In any event, there would be plenty of work for adjusters and Personal Injury attorneys.

DEFINITIONS

It can be properly asked as to why the Definitions appear as the last Section of the policy. For one not familiar with Liability Insurance, reading a policy for the first time might entail continually referring to the "Definitions" section in order to understand the policy. Regardless, the format was established by the ISO who evidently feels differently. The definitions are numbered in a policy, which is necessary as some definitions refer to other definitions, which can then be recalled, by number (or letter). Therefore, this same type of format is used here. Also, in this discussion of Definitions, the first party format ("you", "your" and "we", "our", and "us") may be used as it is used in most policies.

1. "Advertising injury" means injury arising out of one or more of the following offenses:
 - a. Oral or written publication of material that slanders or libels a person or organization or disparages a people or organization's goods, products or services;
 - b. Oral or written publication of material that violates a person's right of privacy;
 - c. Misappropriation of advertising ideas or style of doing business; or
 - d. Infringement of copyright, title or slogan,

CONSUMER APPLICATION

The Medallion Steak House opened two blocks from the Golden Fence Steak house. They had a notice in their menu that stated, "As opposed to steaks from other local restaurants, our steaks are fresh, never frozen, and no one has ever become ill from enjoying our home-style food." To add "insult to injury", they placed a sign in their window that stated, "Unlike nearby "Steak Houses" No one has ever gotten ill from eating OUR food." The only other "Steak House" was the Golden Fence, who initiated a lawsuit, claiming advertising injury. The CGL policy would provide coverage under this provision.

2. "Auto" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment".
3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
 - a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
 - b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or
 - c. All parts of the world if:
 - (1) The injury or damage arises out of:
 - (a) Goods or products made or sold by you in the territory described in a. above or
 - (b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
 - (2) The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement the insurer agrees to.
5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
7. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
 - a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;If such property can be restored to use by:
 - a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
 - b. Your fulfilling the terms of the contract or agreement.

8. "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;
- An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
 - f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
- Paragraph f. does not include that part of any contract or agreement:
- (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
 - (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, drawings, opinions, reports, surveys, change orders, designs or 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 or engineering services.
9. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
10. "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".

11. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
 - b. Vehicles maintained for use solely on or next to premises you own or rent;
 - c. Vehicles that travel on crawler treads;
 - d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mount:
 - (1) Power cranes, shovels, loaders, diggers or drills; or
 - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
 - e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - (2) Cherry pickers and similar devices used to raise or lower workers;
 - f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

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

- (1) Equipment designed primarily for:
 - (a) Snow removal;
 - (b) Road maintenance, but not construction or resurfacing; or
 - (c) Street cleaning;
- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

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

13. "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
- e. Oral or written publication of material that violates a person's right of privacy.

- 14.a. "Products - completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
- (1) Products that are still in your physical possession; or

- (2) Work that has not yet been completed or abandoned.
- b. "Your work" will be deemed completed at the earliest of the following times:
 - (1) When all of the work called for in your contract has been completed.
 - (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
 - (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

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

- c. This hazard does not include "bodily injury" or "property damage" arising out of:
 - (1) The transportation of property unless the injury or damage arises out of a condition in or on a vehicle created by the "loading or unloading" of it;
 - (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
 - (3) Products or operations for which the classification in this Coverage Part or in the insurer's manual of rules include products or completed operations.

15. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured, if such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

16. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which you must submit or do submit with the insurer's consent; or
- b. Any other alternative dispute resolution proceeding in which such damages is claimed and to which you submit with the insurer's consent.

17. "Your product" means:

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

18. "Your product" includes:

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

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

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

20. "Your work" means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

21. "Your work" includes:

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

COMMERCIAL GENERAL LIABILITY CLAIMS MADE FORM

As described earlier in this text, there are two versions of the Commercial General Liability policy. The "Occurrence" version has been discussed in the preceding pages and covers bodily injury and property damage, which *occurs during the policy period*.

The "Claims-Made" version covers claims *that are made during the term of the policy*, i.e. while the policy was in force. However, there are several other qualifying dates that must be considered in determining the liability of the insurance company.

Otherwise, in most respects the two policies are alike and in most areas, are identical. The principal difference is what situations or circumstances that will "trigger" the coverage.

COVERAGES

Coverage under this form applies to claims that are made when a notice of claim is received and recorded by the insured or the insurance company. The policy wording that further illustrates this would be under Bodily Injury and Property Damage Liability coverage:

The Bodily Injury or Property Damage did not occur before the Retroactive Date, if any, as shown in the Declarations, and a claim for damages because of the "bodily injury or property damage is first made against any insured during the policy period or any Extended Reporting Period afforded under the policy.

A claim by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:

1. When notice of such claim is received and recorded by any insured or by the insurer, whichever comes first; or

2. When the insurer makes a settlement.

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

It is interesting that the notice does not have to be in writing, although is difficult to imagine a claim of any size not being in writing.

CONSUMER APPLICATION

Kirby the Jeweler has a claims-made CGL policy with an effective date of January 1, 1997. He cancels the policy on January 1, 1998, and purchases another claims-made policy. On December 15, 1997, Margaret leaned on a glass counter in order to get a better look at a piece of jewelry and the glass broke, cutting Margaret. Margaret received first aid and left the store. In January she discovered that she was going to have to have plastic surgery, so she made a claim against Kirby.

The claim will be filed against the policy that was in effect January 1, 1998 (the “new” policy) as the claim was filed when that policy was in effect.

RETROACTIVITY

The policy provides for a Retroactive Date to be inserted in the policy. If there is no Retroactive Date requested, the policy will show “none.” If a date is entered, it creates a specific time on occurrences, which took place before the Retroactive Date. Any occurrence predating the Retroactive Date is not covered under the policy, even if the claim is made during the period of the policy.

The policy applies to personal injury and advertising injury caused by an offense arising out of normal business functions, or advertising normal business functions, but only if the offense was not committed before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period, and a claim for damages because of the personal injury or advertising injury is first made against any insured during the policy period or extended period.

A claim made by a person or organization seeking damages will be deemed to have been made at the earlier of the time when notice of the claim is received and recorded by any insured or by the insurer – whichever comes first – or when settlement is made.

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

Excluded is any personal or advertising injury arising out of oral or written publication of material whose first publication took place before the Retroactive Date, if any, shown in the Declarations.

- A Retroactive Date may be advanced only if the insured approves of the new date, and
1. The new insurance policy is being issued by another (different) insurance company, or
 2. There has been an essential and substantial change in the insured's business operation, which has resulted in a greater loss exposure.

CONSUMER APPLICATION

Barney purchased claims made liability policy on June 1, 1995, with a Retroactive Date of June 1, 1993. On September 1, 1995, a claim is made against Barney for bodily injury sustained by Sophia on October 5, 1994. The claims-made policy would provide coverage for Barney against the claim by Sophia.

It should be noted that if an insured has been continuously insured under "occurrence" policies, and now elects to be insured under a claims-made policy, the Retroactive Date under the new policy can be the same as the effective date and should therefore not provide for any lapse in coverage.

CONSUMER APPLICATION

Cecil purchased a claims-made liability policy (#1) effective 1/1/98, and cancelled the policy on 1/1/99. He replaced it with a claims-made policy (#2) effective 1/1/99 and it provided coverage until 1/1/2000, when it was terminated. The new carrier (#2) provided a Retroactive Date of 1/1/99.

A claim was reported to the insured on 3/1/99 for an incident causing bodily injury that occurred on 3/15/98. Neither policy would pay in this situation as for policy #1; claim was not made during the policy period. For policy #2, the loss occurred before the Retroactive Date.

If the Retroactive Date is the same as the effective date of the policy, it will provide coverage for Bodily Injury and Property Damage only if both the occurrence and the claim occur during the policy period.

In this case, the second (new) insurer had advanced the Retroactive Date that had applied to the first policy, leaving the insured without insurance. That is the reason that a company advancing the Retroactive Date must do so **WITH THE PERMISSION OF THE INSURED.**

DUTIES OF INSURED

In respects to the duties of the insured and insurer in the even of occurrence, offense, claim or suit, with the claims-made policy, notice of an occurrence or offense is not notice of a claim. If a claim is received, the insured must immediately record the specifics of the claim and the dates received, and notify the insurer as soon as practicable.

CONSUMER APPLICATION

Seth joined the local Silver's Gym. While exercising with one of the machines in May 1997, the seat on the machine broke while Seth was working with weights, causing Seth to injure his back. The gym manager sent him to a doctor who gave him muscle relaxants. The gym manager notified his insurer at that time, even though Seth did not file a claim against the gym as Seth used his personal health insurance to pay the doctor. However, his back continued to hurt, and in August he underwent back surgery and Seth filed a claim against the gym. The gym manager did not file a claim with the CGL carrier as they had been notified when the injury occurred.

It is the responsibility of the gym manager (or owner) to file a claim with their CGL carrier, outlining all of the specifics, dates, etc., immediately upon receiving the claims notice. It would be in violation of the policy provisions if this were not done, risking losing coverage for the claim.

EXCESS INSURANCE

The "Excess insurance" provision under the Claims-Made form varies because of the Retroactive provision. This form is excess over any other insurance, whether primary, excess, contingent or on any other basis that is effective prior to the beginning of the policy period shown in the Declarations. It applies to bodily injury or property damage on other than a claims-made basis, if no Retroactive Date is shown in the Declarations or the other insurance has a policy period which continues after the Retroactive Date shown in the Declarations.

RIGHT TO CLAIM AND OCCURRENCE INFORMATION

The insurance company will provide to the "first Named Insured" as listed on the Declarations page, certain information relating to any current liability claims and any preceding general liability claims-made that was issued to the insured during the previous three years. This information will include a list or record of each occurrence not previously reported to any other insurer, of which the insurance company had been notified in compliance with other provisions in the policy, plus a summary by policy year of payments made and amounts reserved under any applicable policy limits. Not only is the information required by the Insurance Departments, it would be required if or when the insured replaces the existing policy.

The amounts provided are based on the judgement of the insurer and the insured is cautioned about disclosing this information to any claimant without the insurer's consent. The insurer will provide this information to the insured only on the written request from the insured, or 30 days prior to non-renewal by the insurer. The "30-day prior to non-renewal" provision is obviously for the benefit of acquiring new liability insurance. There is a reason for the "secrecy" in respect to revealing any of this information regarding claims and pending claims. For example, an existing claimant whose claim has not as yet been adjudicated discovers the amount that was "reserved" by the insurer for settlement of a particular claim, and that amount was higher than what was expected by the claimant. The claimant (or probably, the claimant's attorney) would then "raise the ante" and claim for more money on the basis that the insurer was prepared to pay more.

CONSUMER APPLICATION

Capital Bakeries has a claims-made CGL with Correct Casualty but since Correct Casualty is merging with another company and will no longer provide such coverages, Capital goes to Consolidated Casualty for a new policy. Correct Casualty provides Capital Bakeries with a report listing the claims that it has paid, and also lists a claim reported but not settled with a Mrs. Upright who had sued Capital for \$5,000. This claim had not gone to court as yet, so Correct Casualty had established a claims reserve of \$25,000 for three reasons: (1) the attorneys and actuaries of Correct Casualty honestly felt that a claim of the type filed by Mrs. Upright could be resolved by paying up to \$15-20,000; (2) since Correct Casualty was in a merger situation, it was taking every advantage of tax laws to make it show more profit (claims reserves can be used to offset profits), and (3) Corrects new owners are exceedingly conservative, so they insisted that all reserves be maintained as high as financially practical so there would be no "surprises." In addition, if the new owners were to sell the block of liability business to another carrier, tax-losses (including the claims reserves) have a monetary value.

Since the Correct Casualty's Claims Manager was going to be out of work, he spitefully provided Mrs. Upright's attorney with the claims reserve amount. The attorney immediately refiled the claim, asking for \$50,000 in damages.

EXTENDED REPORTING PERIODS

The policy provides for a basic extended reporting period without extra charge, for a period of five years, which arise out of claims because of BI and PD or for personal injury and advertising injury arising out of an occurrence reported not later than 60 days after the end of the policy period, and 60 days for claims arising from occurrences or offenses not previously reported to the insurer.



Note: This Extended Reporting Provision does not extend the policy period, but does extend the period during which reporting may occur.

Claims must be made during the 60 days immediately following the expiration of the policy. Occurrence or offenses of the claim must occur between the Retroactive Date and the expiration date of the policy. To reiterate, a claim must be reported within 60 days of the policy's termination date. After that time, claims for damages arising from a reported occurrence can be brought at any time for a period of 5 years.

A Supplemental Extended Reporting Period of unlimited duration is available for an extra charge. The policy spells out the provisions if this added period is selected but importantly, separate insurance limits are provided if this supplemental provision is chosen.

The remainder of the Claims-Made Form is the same as for the Occurrence Form. There will be differences in some of the Endorsements that reflect the difference in the two forms.

CONSUMER APPLICATION

Glenn's Inc. has a CGL claims-made policy with a retroactive date, which is the same as the effective date, January 1, 1998. It is later cancelled on December 31, 1998. There is an accident for which Glenn could be liable for the property damage that occurred on Nov. 4, 1998. It was not reported to Glenn until December 1, 1998. This situation would be covered by an Extended Reporting Provision. Glenn's CGL has a General Aggregate Limit of \$100,000, and the insurer has already paid out the \$100,000 in claims during 1998. Therefore, even though the situation would be covered by an Extended Reporting Provision, it would not pay because of the Aggregate Limit. However, if Glenn's had purchased a Supplemental Extended Reporting Period coverage, the General Aggregate Limit does not apply to damages for claims first received and recorded during the Supplemental Reporting Period.



STUDY QUESTIONS

1. What information is not contained on the Declarations Page of a Commercial General Liability (CGL) Policy?
 - A. Company Name
 - B. Exclusions
 - C. Premiums
 - D. Limits of insurance.
2. Under the Insuring Agreement provision of a CGL policy, the insurer will pay
 - A. those sums that the insured is legally obligated to pay as damages.
 - B. whatever loss the insured determines is fair.
 - C. the amount specified by the loss adjuster.
 - D. the loss amount as determined by the insurance agent.

3. Bob's Tannery has been constructed on the Little Big River. The owners are aware that some new chemicals that they will be using for some specialized leather treatments will probably pollute the stream. Therefore, they buy a CGL policy to avoid paying expensive lawsuits. Will the policy pay?
 - A. Sure. That is the purpose of a liability policy.
 - B. No. They will need a Professional Liability policy to pay for that.
 - C. No. Not only could the insurer say the loss was "expected", but the pollution exclusion would apply also.
 - D. The policy will pay for cleaning up the material, but not for any lawsuits that may occur as a result.

4. Brighton's Sports has a CGL policy. They decide they want to sponsor a racecar so that their logo can become better known. While trying out the car in the parking lot at their plant, the car strikes a gas main that is being worked on, releasing gas, with resulting damage to the car and the property.
 - A. The insurer will pay. This is a good example of why this type of insurance is bought.
 - B. The insurance will not pay as damage was to an auto owned by Brighton's and the property was owned by Brighton's, both exclusions.
 - C. The insurance will only pay for the damage to the car.
 - D. The insurance will only pay for property damage.

5. Liability assumed by the insured under an insured contract is
 - A. covered under the liability policy.
 - B. not covered under the liability policy.
 - C. covered for 50% of the loss.
 - D. covered but only for the amount that the insurer would have paid if the liability was not assumed, less the amount that the insured assumed.

6. Under the Medical Expenses provision of the liability policy, the insurer will pay _____ expenses for first aid.
 - A. all
 - B. any
 - C. reasonable
 - D. none

7. Under the products-completed operations area, a policy has aggregate limits of \$50,000. If bodily injury limits is \$50,000 and property damage is \$25,000, what is the maximum the insurer will pay for a products-completed operations claim?
 - A. \$75,000
 - B. \$50,000
 - C. \$25,000
 - D. 100,000

8. The insured must notify the insurer immediately if a claim is made. The information that must be filed does not include
- A. how, when and where the occurrence or offense took place.
 - B. the names and addresses of any injured persons and witnesses.
 - C. the name and address of the insurance agent.
 - D. the nature and location of any injury or damage arising out of the occurrence.
9. Under the Commercial General Liability policy, “Covered Territory” means
- A. the contiguous 48 states.
 - B. all U.S. 50 states.
 - C. the U.S., its possessions and territories, Puerto Rico and Canada.
 - D. the U.S., its possession, territories, Puerto Rico and Mexico.
10. For Bodily Injury and Property Damage claims under a CGL policy, the Extended Reporting Period provides for an extended reporting period of
- A. 60 days.
 - B. 5 years.
 - C. 1 year.
 - D. any reasonable time, not to exceed 3 years.

ANSWERS TO STUDY QUESTIONS

1B 2A 3C 4B 5B 6C 7B 8C 9C 10B



CHAPTER SEVEN - ENDORSEMENTS

An Endorsement changes the base policy. With some policies and contracts, “Addendum” is used when additional coverages or provisions apply. “Exclusions” will apply if certain exclusions are added to the policy (in addition to those listed within the documents). “Amendment” is an addition to a contract or policy that changes the wording of the agreement. The definition of Endorsement is act of giving sanction or support to the document – confirmation – approval.

Endorsements are necessary in insurance contracts as insurance is regulated by 50 states and (now) the Federal Government. While the Insurance Service Office has presented standardized wording which most of the States have accepted, because of local situations or politics, there will be certain changes, additions or changes to the contract, either by adding some coverage or changing coverage – seldom is a coverage removed unless it is replaced by coverage equal or more liberal than the original coverage.

The following Endorsements are those most prevalent in the industry and some will pertain to Claims-Made forms only and others to Occurrence Forms. This will be so indicated on the Endorsement. All Endorsements contain a statement similar to the following, at the beginning of each Endorsement: “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.” The Policy Number to which the Endorsement applies appears at the very top of the Endorsement and the type of policy and policy form number also appears at the top.

Certain important and specific parts of the Endorsement will be written in *Italics* for emphasis.



SUPPLEMENTAL EXTENDED REPORTING PERIOD ENDORSEMENT

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE FORM
(CLAIMS-MADE VERSION)

Premium (The premium applicable to this supplemental form is given)

The Supplemental Extended Reporting Period Endorsement has been discussed earlier under the Claims-Made Form. The Endorsement provides for such extended reporting period and the Limits of Insurance are placed to apply to claims first received and recorded during the Supplemental period. Definitions of the Supplemental General Aggregate Limits and Products-Completed Operations Aggregate Limit are defined. Also, the Excess Insurance provisions are changed by this Endorsement to reflect the additional coverage-reporting period. The Endorsement would appear similar to the following:

A. A Supplemental Extended Reporting Period Endorsement is provided, as described in EXTENDED REPORTING PERIODS (Section V).

B. A Supplemental General Aggregate Limit and a Supplemental Products- Completed Operations Aggregate Limit apply, as set forth in paragraphs C. and D. below, to claims first received and recorded during the Supplemental Extended Reporting Period. These limits are equal, respectively, to the General Aggregate Limit and the Products- Completed Operations Aggregate Limit, if any, entered on the Declarations in effect at the end of the policy period.

C. Paragraph 2. Of LIMITS OF INSURANCE (Section III) is replaced by the following:

2. The General Aggregate Limit is the most the insurer will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard"; and
 - c. Damages under Coverage B.

However, the General Aggregate Limit does not apply to damages for claims first received and recorded during the Supplemental Extended Reporting Period.

The Supplemental General Aggregate Limit is the most the insurer will pay for the sum of damages under:

- a. Coverage A, except damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard"; and
- b. Coverage B, for claims first received and recorded during the Supplemental Extended Reporting Period.

D. Paragraph 3. Of LIMITS OF INSURANCE (Section III) is replaced by the following:

3. The Products- Completed Operations Aggregate Limit is the most the insurer will pay under Coverage A for damages because of "bodily injury" or "property damage"

included in the "products-completed operations hazard", except damages for claims first received and recorded during the Supplemental Extended Reporting Period. The Supplemental Products- Completed Operations Aggregate Limit is the most the insurer will pay under Coverage A for damages because of "bodily injury" or "property damage" included in the "products -completed operations hazard" for claims first received and recorded during the Supplemental Extended Reporting Period.

E. LIMITS OF INSURANCE (Section III), as amended by paragraphs C. and D. above, is otherwise unchanged and applies in its entirety.

F. The first paragraph of paragraph 4.b. of COMMERCIAL GENERAL LIABILITY CONDITIONS (Section IV) is replaced by the following:

4. Other insurance.

b. Excess insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

- (1) that is effective prior to the beginning of the policy period shown in the Declarations of this insurance and applies to "bodily injury" or "property damage" on other than a claims-made basis, if:
 - (a) No Retroactive Date is shown in the Declarations of this insurance; or
 - (b) The other insurance has a policy period, which continues after the Retroactive Date shown in the Declarations of this insurance;
- (2) That is Fire, Extended Coverage, Builders' Risk, Installation Risk or similar coverage for "your work";
- (3) that is Fire Insurance for premises rented to you;
- (4) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to exclusion g. of Coverage A (Section 1);
or
- (5) Whose policy period begins or continues after the Supplemental Extended Reporting Period begins.

G. This endorsement will not take effect unless the additional premium for it, as set forth in Section V, is paid when due. If that premium is paid when due, this endorsement may not be cancelled.

CONSUMER APPLICATION

Sam owned a 'Petting Zoo', and was insured with a claims-made Commercial General Liability policy. Because of high claims, his insurance company refused to renew the liability policy on expiry date of 1/1/98.

On November 1, 1998, a zebra in the petting zoo causes bodily harm to three children. The parents of one child filed a claim during the 60 day extended reporting period. Sam is very concerned that other claims may arise because of this incident. Sam should immediately request a Supplemental Extended Reporting Period Endorsement, and he would be advised to be sure that the request for the Endorsement arrives at the Home Office of the insurance company within 60 days of the expiration of the policy, i.e. prior to 3/1/1998.

EXCLUSION OF SPECIFIC ACCIDENTS, PRODUCTS, WORK OR LOCATION

This Endorsement excludes certain specified accident, products, work or location from coverage under the base policy to which the Endorsement is attached. It will also identify the specific accidents, etc. that will be covered under the Extended Reporting Periods.

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE FORM
(CLAIMS-MADE VERSION)

SCHEDULE		
Date of Accident	Location of Accident	Description of Accident
"Location"	Address	Description of "Location"
"Your Product" (Or "Your Work" Description)		Date of (Manufacture, Sale, Distribution, Disposal, or Completion) (Specify Date and one of above acts)

A. COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY
(Section I - Coverages) does not apply to "bodily injury" or "property damage" arising out of:

1. The accidents or "locations", if any, described above; or
2. The products or work, if any, described above, if the "bodily injury" or "property damage" is included in the "products-completed operations hazard"; even if other causes contribute to or aggravate the "bodily injury" or "property damage".

B. Extended Reporting Periods

The following applies when this Endorsement takes effect, but only if:

1. This insurance is a renewal of an immediately preceding policy issued by us providing claims-made coverage for Bodily Injury and Property Damage Liability; and
2. That coverage applies to "bodily injury" and "property damage" arising out of any of the accident(s), products, work or "location(s)" described above.

In this case, the insurer will provide an Extended Reporting Period under that preceding policy, but only for such "bodily injury" and "property damage" that occurred before the end of the policy period of that preceding policy (but not before any applicable Retroactive Date).

The insurer will issue the Amendment of Section V - Extended Reporting Periods for Specific Accidents, Products, Work or Locations endorsement on that preceding policy,

amending paragraphs 1 and 2 of EXTENDED REPORTING PERIODS (Section V) accordingly. The Extended Reporting Period will then be as set forth in that Section.

C. For the purposes of this endorsement, the following definition is added to DEFINITIONS (Section VI):

"Location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.



AMENDMENT OF SECTION V - EXTENDED REPORTING PERIODS FOR SPECIFIC ACCIDENTS, PRODUCTS, WORK OR LOCATION

When a policy has been renewed, certain specific accidents, products, work or location are excluded from future coverage and are "moved" to the Extended Reporting Period. In order to determine which of the accidents, etc., are "moved" they are listed on this Endorsement and treated accordingly.

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE FORM
(CLAIMS-MADE VERSION)
PRODUCTS- COMPLETED OPERATIONS LIABILITY COVERAGE FORM
(CLAIMS-MADE VERSION)

SCHEDULE

Date of Accident	Location of Accident	Description of Accident
"Location"	Address	Description of "Location"
"Your Product" (or "Your Work" Description)		Date of (Manufacture, Sale, Distribution, Disposal, or Completion) (Specify Date and one of above acts)

The insurer has issued a renewal of this insurance excluding "bodily injury" and "property damage" arising out of the accident(s), products, work or "location(s)" described above. When that renewal takes effect, this insurance is amended as follows:

A. Paragraph 1. Of EXTENDED REPORTING PERIODS (Section V) is replaced by the following:

1. One or more Extended Reporting Periods are provided as set forth below.

B. Paragraph 2. Of EXTENDED REPORTING PERIODS (Section V) is replaced by the following:

2. Extended Reporting Periods do not extend the policy period or change the scope of coverage provided. They apply only to claims for "bodily injury" or "property damage" that occurred before the end of the policy period (but not before the Retroactive Date, if any, shown in the Declarations), and only if such "bodily injury" or "property damage":

a. Arose out of the accident(s) or "location (s)", if any, described above; or

b. Arose out of the products or work, if any described above and is included in the products - completed operations hazard".

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

C. Paragraphs 3, 4, 5, and 6. Of EXTENDED REPORTING PERIODS (Section V) remain unchanged. But the Supplemental Extended Reporting Period endorsement referred to in paragraphs 5 and 6 will be the Supplemental Extended Reporting Period Endorsement for Specific Accidents, Products, Work or Locations.

D. For the purposes of this endorsement, the following definition is added to DEFINITIONS (SECTION VI):

"Location" means premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.



SUPPLEMENTAL EXTENDED REPORTING PERIOD ENDORSEMENT FOR
SPECIFIC ACCIDENTS, PRODUCTS, WORK OR LOCATIONS

This Endorsement provides the Supplemental Extended Reporting Period Endorsement to the Claims-Made Form. This form is similar to the previous Supplemental Reporting Period Endorsements, but is for Specific Accidents, Products, Work or Location. If the general format is to be used, the previously Endorsement is used, but if there are specific accidents, etc., involved, then this format is used.

**COMMERCIAL GENERAL LIABILITY COVERAGE FORM
(CLAIMS-MADE VERSION)**

SCHEDULE

- A. The Supplemental Extended Reporting Period Endorsement described in EXTENDED REPORTING PERIODS (Section V), as amended by the Amendment of Section V - Extended Reporting Periods for Specific Accidents, Products, Work or Locations endorsement, is provided.
- B. A Supplemental General Aggregate Limit and a Supplemental Products- Completed Operations Aggregate Limit apply, as set forth in paragraphs C. and D. below, to claims first received and recorded during the Supplemental Extended Reporting Period. These limits are equal, respectively, to the General Aggregate Limit and the Products- Completed Operations Aggregate Limit, if any, entered on the Declarations in effect at the end of the policy period.
- C. Paragraph 2. Of LIMITS OF INSURANCE (Section III) is replaced by the following:
2. The General Aggregate Limit is the most the insurer will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of "bodily injury" and "property damage" included in the products -completed operations hazard"; and
 - c. Damages under Coverage B.

However, the General Aggregate Limit does not apply to damages for claims first received and recorded during the Supplemental Extended Reporting Period.

The Supplemental General Aggregate Limit is the most the insurer will pay for the sum of damages under:

- a. Coverage A, except damages because of "bodily injury" or "property damage" included in the "products- completed operations hazard"; and
- b. Coverage B,

For claims first received and recorded during the Supplemental Extended Reporting Period.

- D. Paragraph 3. Of LIMITS OF INSURANCE (Section III) is replaced by the following:

3. The Products- Completed Operations Aggregate Limit is the most the insurer will pay under Coverage A for damages because of "bodily injury" or "property damage" included in the "products - completed operations hazard", except damages for claims first received and recorded during the Supplemental Extended Reporting Period.

The Supplemental Products- Completed Operations Aggregate Limit is the most the insurer will pay under Coverage A for damages because of "bodily injury" or "property damage" included in the "products- completed operations hazard" and for claims first received and recorded during the Supplemental Extended Reporting Period.

E. LIMITS OF INSURANCE (Section III) as amended by paragraphs C. and D. above is otherwise unchanged and applies in its entirety.

F. The first paragraph of paragraph 4.b. of COMMERCIAL GENERAL LIABILITY CONDITIONS (Section IV) is replaced by the following:

4. Other Insurance

b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

- (1) that is effective prior to the beginning of the policy period shown in the Declarations of this insurance and applies to "bodily injury" or "property damage" on other than a claims-made basis, if:
 - (a) No Retroactive Date is shown in the Declarations of this insurance; or
 - (b) The other insurance has a policy period, which continues after the Retroactive Date shown in the Declarations of this insurance;
- (2) That is Fire, Extended Coverage, Builders' Risk, Installation Risk or similar coverage for "your work";
- (3) that is Fire Insurance for premises rented to you;
- (4) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to exclusion g. of Coverage A (Section 1); or
- (5) Whose policy period begins or continues after the Supplemental Extended Reporting Period begins.

G. This endorsement will not take effect unless the additional premium for it, as set forth in Section V, is paid when due. If that premium is paid when due, this endorsement may not be cancelled.



EMPLOYMENT- RELATED PRACTICES EXCLUSION

This Endorsement applies to both the Claims-Made and Occurrence forms and is designed to exclude employment-related practices from the Liability Policy. This can be used to reduce premiums, or if the business carries a separate liability policy covering employment related practices; this coverage could be eliminated from the commercial general policy.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART A.

A. 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" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment- related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment- related practices described in paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

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

B. The following exclusion is added to paragraph 2, Exclusions of COVERAGE B - PERSONAL AND ADVERTISING INJURY LIABILITY (Section I - Coverages):

This insurance does not apply to:

"Personal injury" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment- related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "personal injury" to that person at whom any of the employment- related practices described in paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

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

AMENDMENT OF LIQUOR LIABILITY EXCLUSION

This Amendment is provided because of recent court decisions, which have ruled that the liquor liability exclusion in the Commercial General Liability policy does not apply to nonprofit organizations that furnish alcoholic beverages. Frequently quoted is the situation where a nonprofit organization provides drinks at a fund-raising affair. The fact that they are not in the practice of providing liquor seems to make no difference to the courts. Therefore, the Amendment excludes the liquor liability if the insured serves or furnish alcoholic beverages for a charge even if the purpose of livelihood is not involved. This applies to either Claims-Made or Occurrence Forms.

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion c. of COVERAGE A (Section I) is replaced by the following:

- c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
- (1) Causing or contributing to the intoxication of any person;
 - (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
 - (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you:

- (1) Manufacture, sell or distribute alcoholic beverages;
- (2) Serve or furnish alcoholic beverages for a charge whether or not such activity:
 - (a) Requires a license;
 - (b) Is for the purpose of financial gain or livelihood; or
- (3) Serve or furnish alcoholic beverages without a charge, if a license is required for such activity.



AMENDMENT OF LIQUOR LIABILITY EXCLUSION EXCEPTION FOR
SCHEDULED ACTIVITIES

This Amendment is provided to except specific scheduled activities, which are either listed at the top of the Endorsement, or shown in the Declarations.

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
Description of Activity (is):

SCHEDULE

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

Exclusion c. of COVERAGE A (Section 1) is replaced by the following:

c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you:

- (1) Manufacture, sell or distribute alcoholic beverages;
- (2) Serve or furnish alcoholic beverages for a charge whether or not such activity:
 - (a) Requires a license;
 - (b) Is for the purpose of financial gain or livelihood; or
- (3) Serve or furnish alcoholic beverages without a charge, if a license is required for such activity.

However, this exclusion does not apply to "bodily injury" or "property damage" arising out of the selling, serving or furnishing of alcoholic beverages at the specific activity (ies) described above.



TOTAL POLLUTION EXCLUSION ENDORSEMENT

Within the Commercial General Liability policy there is extremely limited pollution coverage. On occasion, the insured or the insurer may want to eliminate even this small exclusion, which they can do with this Endorsement. Note: this Endorsement eliminates coverage, and the following Limited Pollution Liability Extension Endorsement provides limited coverage.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion f. under paragraph 2, Exclusions of COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I - Coverages) is replaced by the following:

This insurance does not apply to:

- f. (1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.
- (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
 - (b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

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



LIMITED POLLUTION LIABILITY EXTENSION ENDORSEMENT

As stated earlier, this Endorsement adds a limited amount of pollution liability. It has a separate Aggregate Limit, stated on the Endorsement (along with the premium for such coverage).

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Limited Pollution Liability Extension Aggregate Limit: _____
Premium \$ _____

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

1. Exclusion f. under COVERAGE A (Section 1) is replaced by the following:
 - f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
 - (a) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
 - (b) Which are or were at any time transported, handled, stored, treated, disposed of or processed as waste by or for any insured or any person or organization for whom you may be legally responsible;
 - (c) At or from any premises, site or location, on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants;
 - (d) At or from a storage tank or other container, ducts or piping which is below or partially below the surface of the ground or water or which, at any time, has been buried under the surface of the ground or water and then subsequently exposed by erosion, excavation or any other means if the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants arises at or from any premises, site or location:
 - (i) Which is or was at any time owned or occupied by, or rented or loaned to, any insured; or
 - (ii) Which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor.
 - (2) Any loss, cost or expense arising out of any:

(a) Request, demand or order issued or made pursuant to any environmental protection or environmental liability statutes or regulations that any insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

Loss, cost or expense arising out of

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing or in any way responding to or assessing the effects of pollutants.

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

II. With respect to "bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

A. The "Each Occurrence Limit" shown in the Declarations does not apply.

B. Paragraph 7. Of LIMITS OF INSURANCE (Section III) does not apply.

C. Paragraph 1. Of LIMITS OF INSURANCE (Section III) is replaced by the following:

1. The Limits of Insurance shown in the Declarations or in the Schedule of this endorsement, and the rules below fix the most the insurer will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits."

D. The following are added to LIMITS OF INSURANCE (Section III):

8. Subject to 2 or 3 above, whichever applies, the Limited Pollution Liability Extension Aggregate Limit shown in the Schedule is the most the insurer will pay for the sum of:

a. Damages under Coverage A; and

b. Medical expenses under Coverage C

Because of "bodily injury" or "property damage" arising out of the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.

Subject to 8 above, the Medical Expense Limit is the most the insurer will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.



CHANGES IN COMMERCIAL GENERAL LIABILITY COVERAGE FORM -
INSURING AGREEMENT –COVERAGE A (CLAIMS-MADE VERSION)

This Endorsement changes the form to comply with the Claims-Made version, and the last paragraph is the one that modifies the policy.

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
(CLAIMS-MADE VERSION)

Paragraph l-c. of COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE
LIABILITY (Section I -Coverages) is replaced by the following:

1. Insuring Agreement

c. A claim by a person or organization seeking damages will be deemed to have been made at the earlier of the following times:

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

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



ENDORSEMENTS TO RESTRICT COVERAGE

The Commercial General Liability Policy covers a broad range of liability coverages. In some situations, the insured may want to restrict the coverages because they feel there is no exposure, or the exposure is very slight, for possible liability claims; they have additional coverage specifically covering those exposures; or they may simply want to lower their premiums.

Products Completed Operations Hazard – This particular Endorsement eliminates all Bodily Injury or Property Damage coverage for the Products Completed Operations Hazards.

Medical Payments – Medical Payments (Coverage C) is eliminated by this Endorsement.

Personal Injury and Advertising Injury – This Endorsement will eliminate this coverage (Coverage B).

Advertising injury – Advertising injury only is eliminated from the coverage.

Contractual Liability Limit – This Endorsement actually replaces coverage – it replaces broad form coverage with a limited contractual coverage that applies only to leasing of premises, “sidetrack” and easement agreements, and other contracts that may be so specified.

Fire Damage Legal Liability – This Endorsement eliminates fire damage legal liability coverage.



ENDORSEMENTS TO BROADEN COVERAGE

Pollution Liability Coverage Extension – This Endorsement will eliminate the bodily injury and property damage portions of the pollution exclusion, but will retain the exclusion for clean-up costs.

Injury for Leased Workers – This Endorsement provides employers' liability coverage for leased and temporary workers. This is accomplished by changing the definition of "employee" used in the exclusion.

Definition of Products-Completed Operations Hazard – This Endorsement eliminates the need for bodily injury or property damage to occur away from the insured's premises. This is accomplished by changing the definition.

Liquor Liability – This Endorsement provides liquor liability coverage by eliminating the exclusion for liquor liability.

Watercraft – This provides coverage for watercraft (boats) which are excluded in the Aircraft, Auto and Watercraft exclusion.

PROFESSIONAL LIABILITY ENDORSEMENTS

Various Professional and Business liability coverages are discussed in the next chapter. Because of the wide variety of coverages available, there are numerous Endorsements that are necessary to exclude professional liability exposures from the Commercial General Liability policy. Even though these exposures are generally excluded, these endorsements provide specific exposures.

Designated Professional Services

Inspection, Appraisal and Survey Companies

Products and Professional Services

Druggists

Optical and Hearing Aid Businesses

Blood Banks


Engineers, Architects or Surveyors Professional Liabilities

Health or Cosmetic Services

Specified Health or Cosmetic Services

Professional Liability Exclusion

Computer Software
Electronic Data Processing
Health or Exercise Clubs



STUDY QUESTIONS

1. An _____ changes the base insurance policy.
 - A. Amendment
 - B. Addition
 - C. Endorsement
 - D. Exclusion
2. An Endorsement to the CGL policy, which provides for an additional reporting period is
 - A. Supplemental Extended Reporting Period Endorsement.
 - B. Claims Made Form.
 - C. Changes in Commercial General Liability Coverage Form insuring Agreement
 - D. Supplemental Time Extension Endorsement.
3. Blair Mfg. has three locations. For financial reasons they decide that they do not need to continue their CGL at the location in Phoenix. Therefore, the CGL policy would contain
 - A. a Supplemental Extended Reporting Period Endorsement.
 - B. Extended Reporting Form for Specific Accidents, Work or Location Endorsement.
 - C. Exclusion of Specific Accidents, Products, Work or Location Endorsement.
 - D. Two-thirds Coverage Endorsement.
4. Berlin Produce Co. hires many newly arrived immigrants and also a large number of disabled persons. Because of the increased possibilities of lawsuits for harassment, discrimination, demotion, etc., the Human Resources Manager convinced the company that they needed to carry a separate policy covering employment practices. Berlin also carries a CGL insurance policy and other commercial coverages. The management agreed that they should purchase this employment practices insurance, but the budget was tight. What could they do?
 - A. They should carry both anyway as the cost of one lawsuit could pay for all the insurance.
 - B. They should hire a new Human Resources Manager, one who will make sure that no lawsuit arises out of employment practices.
 - C. They could hire the best employment attorneys in the area, just in case.
 - D. They could have their CGL changed with the Employment Related Practices Exclusion Endorsement. This would reduce the premium on the CGL and they could put the savings towards the new special policy.

5. Creative Artists is a non-profit organization that works with down-and-out artists and artist's families. They have been threatened a couple of times with lawsuits, so they purchase a CGL policy. Twice a year, their principal fundraising activity is an art exhibit where alcoholic drinks are served. Which of the following is true?
 - A. Since it is a non-profit, there are no liquor liability hazards with non-profits.
 - B. The CGL will exclude all liquor liability.
 - C. They would probably get an Amendment of Liquor Liability, which excludes liquor liability because of the fundraising activity.
 - D. The CGL would not be issued, or would be cancelled if they were not aware of the type of fundraising used by the nonprofit organization.

6. Beams Leather Co. purchases a CGL policy. They are concerned about the pollution they might generate in some of their processing, even though they have a good record and keep tight control on any possible pollutants. They find that the limits in the CGL policy for pollution are very small. What can they do?
 - A. There is not much they can do. Companies are not crying for pollution policies.
 - B. They can increase the amount by using a Limited Pollution Liability Extension Endorsement.
 - C. They can use a Total Pollution Exclusion Endorsement to increase pollution coverage.
 - D. They can have the CGL policy endorsed to include whatever amount Beams wants for pollution damage liability.

7. CGL policies can have endorsements to restrict coverage. Which Endorsement does this?
 - A. Contractual Liability Limit.
 - B. Pollution Liability Coverage Extension.
 - C. Liquor Liability.
 - D. Watercraft.

8. In order to exclude certain professional liability coverages, certain endorsements provide specific exposure to be excluded. Which of the following is NOT such an Endorsement?
 - A. Engineers, Architects or Surveyors Professional Liabilities.
 - B. Computer Software.
 - C. Health Clubs.
 - D. Manufacturing concerns

9. When a policy is renewed, certain specified accidents are excluded from further coverage, and are moved to the Extended Reporting Period. This Endorsement would be
- A. Changes in Commercial General Liability Coverage Form Insuring Agreement.
 - B. Renewal Restrictions for Extended Reporting Endorsement.
 - C. Extended Reporting Periods for Specific Accidents, Products, Works or Location.
 - D. Exclusion of Specific Accidents, Products, etc.
10. The Supplemental Extended Reporting Period Endorsement is used with
- A. the Claims-Made CGL policy.
 - B. the Claims-Reported CGL policy.
 - C. any version of the CGL policy.
 - D. only Commercial Property Policy.



CHAPTER EIGHT - VARIOUS BUSINESS AND PROFESSIONAL LIABILITY COVERAGES

Business and Professional Liability coverages were briefly discussed earlier in this text. This chapter will be concerned with listing various types of professional liability policies - such list being far from complete – with a discussion of coverages afforded.

It will be noted that the Errors and Omissions Policy is discussed in some detail. The following chapter “dissects” and Errors and Omissions (E&O) policy.

ADVERTISING INJURY LIABILITY

The Advertising Injury Liability policy provides coverage for liability claims as a result of injury arising out of an offense committed in the course of the insured’s advertising activities. However, the injury must rise out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition or infringement of copyright, title or slogan.



BROADCASTER’S LIABILITY COVERAGE

Broadcasters’ Liability Coverages are necessarily broad and numerous. The policy covers liabilities arising from the use of incorrect news stories, libel and slander, invasion of privacy, copyright infringement, and unauthorized use of plot, characters, or music.

This policy not only covers those exposures, but it also covers defense costs in contesting suits of claims. Employees are covered as insureds while acting within the scope of their duties.

The News Media has been quite successful in using the First Amendment to protect their broadcasting errors; however some “mistakes” have been so flamboyant that the Constitutional protection has failed.



BEAUTY SHOP AND BARBER SHOP LIABILITY COVERAGE

The liability insurance policies covering beauty shops (parlors) and barbershops are some of the most interesting because of their coverages. There are no standardized forms, however most policies follow a particular format.

One of the differences between these policies and other Professional Liability policies is that many companies prefer to write the Premises, Products and Malpractice coverage in one

policy. Where most Professional Liability policies do not cover property damage, this policy does offer property damage liability to cover claims for damage to the clothing of the customer and other property from spilled dyes or other coloring preparations.

Most of these policies cover any professional service while within the premises resulting from any work, treatment or operation, or the use of any preparation or appliance used in the operation of a beauty parlor or barber shop. Some of these policies define covered professional services specifically. Some of the areas covered in these policies are:

Hair cutting	bleaching
Styling	dyeing
Singeing	coloring by liquid dyes
Trimming	henna treatments
Conditioning	eyelash-eyebrow tinting
Dressing	eyebrow arching
Shampooing	tweezing or plucking
Shampoo-tinting	shaving or using wax for hair removal
Hair & scalp treatments	face & neck massaging
Manicuring or pedicuring	marcel, finger and water waving
Etc., etc.	

Some of the unique specific exclusions are:

- Face lifting, plastic surgery, removing warts
- X-ray usage for removing hair
- Flammable dry shampoo
- Chiropody
- Exercising or slenderizing services
- Any operator of a permanent waving machine without specific experience & education



COMPLETED OPERATIONS LIABILITY COVERAGE

This form of liability insurance provides coverage for bodily injury and property damage arising from operations that have been completed, or abandoned. The incident causing the bodily injury &/or property damage must have occurred away from the any premises that is owned or rented by the insured.

The question as to when an operation is deemed to be “completed” arises frequently. The policy defines operations as being completed when:

- All operations to be performed by (or on behalf of) the insured, under contract, have been completed.
- All operations to be performed by (or on behalf of) the insured *at the site of the operations* have been completed.
- The portion of the work out of which the particular injury or damage, arises, has been put to its intended use by a party other than the contractor or the subcontractor.



CONTRACTORS LIABILITY COVERAGE

The Contractor's Liability Policy is usually composed of two parts: (1) Premises &/or Operations and (2) Completed Operations, as described immediately above. It is possible for some contractors to immediately leave a work site and transfer the completed project to the owner, thereby negating the need for Completed Operations insurance.

The Premises/Operations portion of the liability insurance provides for payment on the behalf of the insured, all sums that the insured becomes legally obligated to pay as damages resulting from bodily injury and/or property damage, caused by an insured peril, and arising out of the ownership, maintenance, or use of premises and the contractor's operations in progress.

As with other liability policies, this particular policy only pays those sums that the contractor is *legally obligated to pay*. In most cases, this would not allow for pre-trial settlement, but if the insurer feels that the insured is legally obligated to pay, then the insurer always has the right to make such payment.



CONTRACTUAL LIABILITY COVERAGE

In many contractual agreements, particularly in the construction industry, a separate agreement allows one party to assume the liability of another. These "hold harmless" agreements may either be written or oral. The extent of the agreement as to which and how much, etc., holding a party harmless, will vary significantly from contract to contract.

Assuming the liability of other increases the person assuming the liability to greater exposure and it would not be covered under a typical Commercial General Liability policy.



CROSS LIABILITY COVERAGE

If two (or more) individuals are covered by the same policy, and a claim is made against one of the insureds for which another insured under the policy may be held liable, this coverage (by endorsement) will operate as if separate policies had been issued. Note, however, it does not increase the insurance company's overall limit of liability.



DATA PROCESSORS ERRORS AND OMISSIONS INSURANCE

Details of the Errors & Omissions insurance policy are outlined in detail elsewhere in this text, the fact that Data Processors E&O insurance is growing in popularity due to the advancement of technology leads to some discussions of the peculiarities of this policy.

Many firms perform data processing for others either on fee or contract basis. Frequently companies with their own data processing department may offer their services on fee or contract basis, to other companies. These firms will be facing the same liabilities as those who are exclusively in the data processing business.

Basically, the policy is like the usual Professional Liability policy and it provides coverage for all claims, which the insured shall become legally obligated to pay because of any negligent act, error or omission of the insured in the performance of data processing services to others. The policy usually has a deductible – generally \$1,000 for each claim.

It excludes losses arising out of advice on methods, practices or procedures, or opinions on financial statements, the preparing of income tax forms, and liability for damage to the property of others, or for loss to the property of others while in the care, custody or control of the insured.

Policy forms used are not standardized and some are written on the Claims-Made basis and others Occurrence basis.



DIRECTORS AND OFFICERS LIABILITY COVERAGE FOR NON-PROFIT ORGANIZATIONS

Directors and Officers (D&O) liability coverage has become very important for those who serve on the board or in an official capacity of non-profit organizations. Note that in some states some of the liability has been eliminated by various tort reform measures.

The reasons for this coverage are many, principally because nonprofit organizations are not immune from costly litigation in most jurisdictions, with the result that they are being sued more often and from more sources, despite the tort reform laws limiting the liability of nonprofit Directors and Officers. Directors and Officers are subject to the duties of diligence, obedience and loyalty and can be sued for negligence in the performance of these duties, and a liability claim could threaten the personal assets of Directors, Officers and Trustees. If the organization defends a D&O suit, it could drain the resources of the organization that is designated for its stated purpose.

Since the Civil Rights Act of 1991, and the Americans with Disabilities Act of 1992, suits related to employment for such things as harassment and wrongful termination, have increased substantially, and continue to rise.

Of all of the lawsuits against nonprofit organizations, more than half involve employees. Even with sophisticated efforts to avoid employment disputes, many claims can and are often alleged against such nonprofit organizations. Some of the claims that arise include:

- Discrimination (race, sex, age, national origin, religion, disability, sexual orientation)
- Wrongful Termination
- Promotions and compensation
- Hiring (and firing) decisions
- Conflicts of interest
- Libel, slander, defamation of character
- Failure to provide adequate supervision of employees
- Invasion of privacy
- Copyright infringement, misrepresentation of ideas, unauthorized use of official correspondence and logos
- Sexual harassment

This form of D&O coverage provides defense for the above, and more, and brought by a variety of individuals, such as:

- Donors who feel that their contributions have not been properly used to further the stated goals of the organization.
- Members of the Board of Directors who disagree with the majority on decisions, usually involving the use of the organization's funds.
- Beneficiaries of the largess of the organization who feel that they did not receive enough.
- State officials, particularly Attorney Generals, who may move against the board for mismanagement of funds, etc.

CONSUMER APPLICATION

A wealthy widow passes away, leaving the bulk of her large estate to a Trustee with instructions to form a non-profit organization to provide assistance to families of those with Alzheimer's disease. The Trustee approached several individuals of national and international fame, to serve on the Board of Directors. One physician who practiced exclusively in the field of Alzheimer's disease was recruited but was apprehensive as his Medical Malpractice premiums might increase if he were sued as a result of a Board action.

Any organization of this type must, in order to attract well-known persons, provide the liability protection of a Directors and Officers Liability Coverage for Non-Profit Organizations. Usually the organization will pay the premiums for the coverage, which will be arranged so that as one Director replaces another, the new Director will immediately be covered.



EMPLOYEE BENEFITS PLAN LIABILITY COVERAGE

This type of liability coverage protects the employer against any liability claims by employees or former employees, resulting from negligent acts or omissions in the administration of the insured's employee benefits programs. Obviously, this plan is sought by large employers who provide considerable benefits to their employees.

For the purposes of this coverage "employee benefits programs" is defined to include group life and health insurance, profit-sharing plans, employee stock subscription plans, workers compensation, unemployment insurance, social security benefits, disability benefits, etc.

Coverage pertains to the "administration" of these plans, which may include counseling of employees, interpreting employee benefit program, and enrolling/terminating/canceling employee's in particular plans, etc.



EMPLOYMENT PRACTICES LIABILITY COVERAGE

Basically this coverage protects the Corporation, directors and Officers and employees for claims resulting from wrongful termination, discrimination, sexual harassment, wrongful discipline and failure to employ or promote. Recently, the nationally televised hearings on the Clarence Thomas confirmation hearings brought this type of coverage into the headlights. And more recently, President Clinton's workplace misconduct landed him in court with Paula Jones. Texaco, Denny's, Baker & McKenzie, Montel Williams, Microsoft, and a host of other well-known names have made the big-city news recently. Unfortunately, there have been a plethora of small and medium size businesses that have also been hauled into court.

For example, between 1991 and 1995, the number of sexual harassment cases alone increased by 125%, amounting to \$91 million paid to claimants. And this is a small portion of employment practice cases resulting in monetary awards. The median award for compensatory damages in employment-related discrimination cases in 1995 was \$204, 310, an increase of 56% over the previous year. Plus punitive damages in 30% of those cases, with an additional median award of \$160,000.

Because of the difference in types of businesses, products, number of employees, geographical location, etc., etc., there are many policies that can cover whatever hazards are present for a particular business. Several insurers offer their policyholders loss control programs, which helps the business to recognize, identify and correct issues which might lead to a claim. These valuable services are offered at greatly reduced rates, or in some cases, at no cost to the client.



ERRORS AND OMISSIONS

Errors and omissions are (or definitely should be) well known to those who represent insurance companies. In fact, most General Agencies &/or carriers require that all of their representatives carry E&O insurance.

An E&O policy provides coverage for liability from errors or omissions in the performance of professional duties. Some of those who need Errors and Omissions Malpractice (also known as Professional Liability E&O Malpractice Insurance) are (but certainly not limited to):

- Abstractors
- Accountants
- Architects and Engineers
- Attorneys
- Chiropractors
- Computer Consultants
- Dentists
- Financial Planners
- Medical Professionals
- Human Resources & Personnel Consultants
- Insurance Agents and Brokers
- Internet Service Providers
- Management Consultants
- Marketing Consultants
- Medical Doctors
- Nurses Registries
- Ophthalmologists
- Optometrists and Opticians
- Patent Agents
- Podiatrists
- Psychologists
- Public Relations Consultants
- Real Estate Professionals
- Software Designers & Engineers
- Surgeons
- Tax Preparers
- Temporary Agencies
- Title Agents

Simply put, anyone or any organization that holds itself out as an expert in a particular field or discipline, and receives compensation in some form for this service or expertise, is subject to potential claims based upon professional liability, errors and omissions, or malpractice.

One of the principal protections that an E&O policy provides, is that of *defense*. Regardless if any firm takes every precaution possible to avoid liability claims, with today's litigious society, anyone can – and often does – sue anyone for anything. Even if a firm or

person is not specifically involved, they can be brought into court because of a cross-complaint against anyone and everyone who was even remotely involved in the work. Good lawyers are expensive and many require substantial retainers and deposits before they will do anything. And anticipation of a winning verdict which would include attorney's costs may be worthless, as judgements still have to be collected even though the "winner" has already paid the retainer and other ongoing expenses. As the saying goes, "you cannot make a purse from a sow's ear, or blood from a turnip," etc.

Most professional liability policies are written on a "claims-made" basis, but sometimes coverage is available on an "occurrence" basis (these terms are discussed earlier in the text). Any prospective purchaser of professional liability insurance must know what they have and what they need to avoid gaps in coverage.

CONSUMERS APPLICATION

Morton's Market is a large corporation of supermarkets operating in several states. Because of the cost of health insurance and the difference in benefits dictated by various states, employees who transfer from one state to another may find themselves with better or worse employee benefits after the transfer. Therefore, they elected to self-insure and administer their own employee benefits under the ERISA regulations.

One of the hazards that they would encounter, according to the insurance administrator that they hired for this situation, was that if an employee felt that they did not get the type or amount of medical care that they felt they should have, they could sue the employer. ERISA give the employer some protection, but recent legislation has diminished the protection, so additional protection is needed.

The Employees Benefits Plan Liability Coverage is perfect for this situation, as it pertains specifically to the administration of the programs.



ATTORNEY'S ERRORS AND OMISSIONS PROFESSIONAL LIABILITY INSURANCE

To further illustrate this particular type of coverage, an Attorney's Errors and Omissions Professional Liability is presented for educational purposes. It is important to remember that not all policies are the same, and even though the coverage may be the same, the policy format can change.

The Attorney's Professional Liability Policy is very similar to the Physicians, Surgeons and Dentists Liability policy (described below). It provides coverage against liability for acts of omissions arising out of professional services performed for others, by lawyers or by persons for whom the insured is legally liable. For an additional premium, it is possible to cover the personal liability of the employees of the insured.

There are two coverage forms: Coverage A applies to individual lawyers, Coverage B applies to partnerships. The policy provides coverage for acts or omissions of the insured, which

occur during the period of the policy regardless of when the claim is made. It also covers claims made during the period of the policy for any acts which occurred prior to the effective date of the policy (provided the insured did not know or could not reasonably have been expected to know, that such act or omission had occurred and which could then have created a claim).

The policy does not cover losses arising because of fraud or omission, caused by the insured or an employee. Further, since attorneys become involved with estates, trusts, etc., in a fiduciary capacity, there is no coverage for loss, which is sustained by the Insured as the *beneficiary, or distributee* of any trust or estate. However, there is a special clause relating to the duties of the insured as *executor, administrator, guardian, trustee or similar fiduciary*. The insured's acts or omissions during the time that he is performing these duties are covered, but only to the extent that such acts or omissions are those for which he would be legally responsible as an attorney for a fiduciary.

More specific coverages under one typical policy would be similar to the following:

Attorney Specialization- Lawyers who specialize in a particular branch of the law are held to a higher standard of conduct than a general practitioner.

California Policy Cancellation and Non-Renewal - The Cancellation and Non-Renewal Condition found in the insured's policy form states the circumstances under which a policy may be terminated. The reasons for cancellation, the time notices required, the procedures to be followed, and the computation of return premium will all be outlined for the insured's use. California has a special Amendatory Endorsement regarding policy termination which may delete or expand typical policy terminology that must be carefully considered in order to understand the rights and obligations of the policyholders.

Claim - A representative policy definition of Claim is a demand for money upon the insured, including service of suit, or institution of arbitration proceedings against any insured. However, depending on the policy the "Demand" may be defined as written or verbal or may simply be the insured's knowledge of an incident or circumstance that may lead to a claim. In the latter case insureds may be reluctant to report an incident to their carrier fearing a increase in premium or a non-renewal of their policy. (It is advised that the client should always make the claim with the insurer, and in any event, if another claim is ever entered, the insured must make the present situation known to the insurer.)

Claims Made Policy - The "claims made" policy is the vehicle by which nearly all professional liability insurance is made available. Coverage must be in force not only when the claim is made but also when the alleged act, error or omission that results in a claim occurred, or there is no coverage.

Covered Damages – Covered Damages is defined as a monetary judgment, award or settlement for which the insured is legally liable resulting from the rendering of professional services. However, punitive or exemplary damages, multiplied portion of multiplied damage award, fines, penalties, sanctions, and return of insured's fees are excluded from coverage.

Covered Defense Costs - Fees charged by any lawyer designated by the insurance carrier, and other authorized fees, costs and expenses to investigate, adjust, defend or appeal of the claim against the insured. Claim expenses do not include salary charges or benefits of regular employees of the insurer or supervisory counsel designated by the insurer.

Coverage for Past Partners or Employees- If an attorney leaves an ongoing firm that maintains its professional liability insurance, he or she will still have coverage for his professional services performed on behalf of his old firm. If however, the old firm dissolves or fails to maintain a current policy or obtain tail coverage (specific coverage for existing claims) there is no longer any coverage for a subsequent claim.

Deductibles - Deductibles generally apply to both claim expenses and indemnity payments made by the insurance company on behalf of the insured. The insurer anticipates that by the presence of a deductible will induce a positive effect on the loss prevention activities of the firm, as it would have to share in any loss with the carrier. Conversely, the insurer would not want to impose so large a deductible that the insured would find it difficult to pay. Also, a higher deductible has the effect of reducing the premium to the benefit of the insured. Some carriers offer Aggregate Deductibles where there is a maximum amount per policy year that the insured will have to pay - regardless of the number of claims. Certain insurers have offered a "First Dollar Defense" whereby the deductible applies only to covered damages but not to the costs of defense.

Defense and Settlement Procedures - Within policy limits the insurer has a duty to defend claims even if they are "false, groundless or fraudulent." Any settlement or compromise negotiated by the insurer and acceptable to the claimant requires the consent of the insured. However, if the insured refuses to accept the settlement recommended by the insurance carrier, he is then responsible for any additional damages and claim expenses in excess of the amount the insurer and claimant had previously agreed upon (this provision is sometimes referred to as the "arm-twisting" provision). The selection of defense counsel is made by the insurance carrier. However as a practical matter, most carriers will consider the views of the insured regarding choice of counsel.

Exclusions - Exclusions are an important part of any insurance policy and often determine the choice of one policy over another. Even when exclusions deal with the same subject matter, the treatment may differ significantly from one policy to the next. The exclusions commonly found in attorney's professional liability insurance policies where coverage shall not apply are:

1. Intentional Dishonest, Fraudulent, Criminal or Malicious acts. It is important to determine if the policy will provide defense if such a claim is made against the policyholder, and it must also be determined if coverage for "Innocent Insureds" remains in force.
2. A claim by any insured person or entity against any other insured person or entity. Professional Liability Insurance was never intended to become involved in conflicts within a law firm. If it is believed that there could be problems with employment

practices, for instance, wrongful termination or sexual harassment problems, the firm may wish to consider Employment Practices Liability Insurance.

3. A claim against any insured as the beneficiary or distributee of a trust or estate.
4. A claim for bodily injury or injury to or destruction of tangible property or resulting loss of use. - However, this exclusion does not apply to personal injury or bodily injury arising from personal injury in the rendering of professional services. Coverage for claims of bodily injury or property damage more properly falls under the Commercial General Liability policy.
5. Claims arising out of any insured's services or capacity as:
 - a. an officer, director, shareholder, partner, manager, trustee, owner or employee of a business enterprise, nonprofit organization, charitable organization or pension, welfare, profit-sharing, mutual or investment fund or trust. (These firms or entities should maintain their own professional liability policies or be named on the insured's policy).
 - b. Public officials, employee of a governmental body, or subdivision or agency. These organizations should obtain their own Professional liability insurance, except where a policy exclusion allows a lawyer to provide legal services to public service organization on a fee basis.
 - c. A fiduciary under ERISA of 1974 and its amendments or any regulation or order issued pursuant thereto, except if an insured is deemed to be a fiduciary solely by reason of legal advice rendered with respect to an employee benefit plan. Attorneys who are involved in the investment of funds however require separate fiduciary liability coverage.
6. Various forms of discrimination as defined in the policy. Depending on the form, this exclusion may be broadly applied or limited to employment situations. Claims involving discrimination in employment would properly be covered under Employment Practices Liability Insurance. Some policies do not contain this exclusion but would deny a discrimination claim contending that discrimination has nothing to do with the rendering of professional legal services.
7. Other Exclusions - A number of other exclusions on a broad range of topics will be found in professional liability policies dealing with everything from investment advice to nuclear energy (see discussion above).

Extended Reporting Option - the extended reporting option, also known, as tail coverage is available for the attorney who retires from the practice of law. This allows attorney coverage for claims that are made after the policy has expired. However the claim resulting incident must have occurred before policy the policy expired. The policy limit available for claims is not reinstated and is limited to the available remaining limit. The premium for the E&O is based on the premium for the last policy year. It is a sliding scale based on the number of year's tail coverage the attorney thinks is necessary.

Insured Individuals and Entities – In most policies, the Named Insured and any Predecessor Firm are defined as the “insured.” Note that this definition is extended to include any lawyer or professional corporation who is or was an owner, partner, officer, director, stockholder or employee, but *only* for professional services rendered on behalf of the Named Insured or Predecessor Firm. Any lawyer or professional corporation designated as "Of Counsel" or independent contractor while acting solely on behalf of the named insured may be covered *with the permission of the insurance carrier*. Further, coverage is provided for the estate, heirs, executors, administrator’s legal representatives of each Insured in the event of death, incapacity, or bankruptcy, but only to the extent that the Insured would have been provided coverage by the policy.

Lapsed Coverage- When a policy has lapsed (for any reason, non-payment of premium or whatever), all policy coverage ends regardless of whether or not coverage was in force at the time a claim triggering incident occurred. Even if a new policy is purchased later, it would be nearly impossible to regain prior acts coverage that has terminated when the policy had lapsed.

Lawyers Professional Liability Insurance Form - Insurance is provided in the form of a Claims-Made Policy that covers monetary loss and expense of an attorney or law firm for legal activity in the rendering of professional services as defined by the policy. The policy also includes coverage for claims of unintended personal injury.

Policy Limits – It is obviously important that policy limits are adequate to cover both the cost of Defense and Damages. In order to determine a proper limit, the policyholder must take into consideration a wide variety of factors including the size of firm, areas of practice, claims history, case size, and any other circumstance that will help to determine the maximum loss the firm may suffer in a worse case scenario. It must be understood that higher limits naturally increase the premium, but since there are very few claims that rise to the level of maximum loss, the extra charge for higher limits is on a sliding scale and therefore can be quite affordable. Policy limits are available on both a Single Limit and on a Per Claim and Aggregate basis. The latter allows for multiple claims up to a per claim limit that the insured has determined adequate for any one claim, and is less expensive than choosing a single limit to cover multiple claims, where no one claim exceeds the per claim limit. For example, a single limit of \$3,000,000 would cost more than a per claim and aggregate limit of \$1,000,000/\$3,000,000 and would serve no better in the described example. In addition, it must be considered that multiple claims that result from a single or related group of incidents will be considered as one claim under the policy.

Prior Acts Date - Policies either contain a Prior Acts Date or are designated as having Full Prior Acts. The “prior acts date” is normally defined the same date from which continuous coverage was first obtained by the current or predecessor firm. Claims triggered by events occurring before this date is not insured. If a firm changes insurance carriers, it is important that the same prior acts date appears on the new policy. The Prior Acts date is also referred to as Retroactive Date.

CONSUMER APPLICATION

Shak, Ratl & Wroll, is a partnership of Attorney's. They carry an Attorney's E&O policy. They represent the estate of Simon West. The firm is named as Executors of the estate, and in this capacity he searches for and finds Simon's brother, who had been at odds with Simon and had not been mentioned in the Will. The brother is struggling financially, so Shak give him \$100,000 from the estate, and loans him an additional no-interest loan of \$500,000.

The Will of Simon instructed the estate Executors to provide funds for local educational purposes. Ratl purchases personal computers for the local elementary school.

Shak and Ratl are sued by the nephew of Simon who had considered himself as the sole heir to the estate and was contesting the Will. The nephew sued as illegal distribution of estate assets.

The gift and no-interest loan would not be protected under their E&O policy as the giving and loaning of funds was not something for which he was legally responsible as an attorney for a fiduciary.

The Ratl action falls within the duties of the attorney for the Executor and would be covered under the policy.



FIDUCIARY LIABILITY COVERAGE

Fiduciary liability provides coverage for a loss that the insurance becomes legally liable to pay because of a claim made against the insured for alleged wrongful act by such insured (or by any other person for whom the insured is legally responsible. This coverage is also known as "pension trust liability" as it relates exclusively to pension trust situations. Under this plan, the term "wrongful act" includes violations of the responsibilities, obligations, or duties that are imposed on fiduciaries by the Employee Retirement Income Security Act (ERISA) as well as any act or error &/or omission in the performance of the duties of the plan administrator.

The ERISA definition of a fiduciary is any person who is named in the plan, or any person who has any discretionary authority or control with respect to the administration or management of the plan or assets of the plan. ERISA sets form strict guidelines for fiduciaries, and violations can result in lawsuits from employees, former employees, beneficiaries, the Secretary of Labor, Treasury Department, and Pension Benefit Guarantee Corporation. In addition to the fiduciaries at risk, is the Sponsor Corporation as well.

According to ERISA, an employee benefit plan includes any plan, fund, or program established or maintained for the purpose of providing employee benefits to its participants or beneficiaries. Under a fiduciary liability policy, the insured is defined as (1) the sponsor organization, (2) the plan(s), and (3) any natural person in their capacity as fiduciary or administrator of the plan(s).

CONSUMER APPLICATION

The Nevada General Corporation, a large, worldwide company with 150,000 employees, has emerged after several smaller companies have been merged into Nevada General. The various companies all had some sort of retirement plans and other employee benefits. Smith, a Human Resource specialist, has been hired to create an employee benefit package for all of the employees. Since the company is growing rapidly, they do not wish to be burdened with a variety of benefits that they would have to administer, particularly in health insurance. Smith is able to find and negotiate with a large international insurer to create health insurance plans that are acceptable and will cover all of the employees. However, the retirement plans are so different among the employees that Smith decided that the only way to proceed was to consolidate the retirement income plans into one plan under government (ERISA) guidelines.

The corporate attorney nearly panics when he discovers the tight regulations that govern any ERISA retirement plans. However, Smith proves that there is only one option, and that is for the company to administer their own plan.

To protect the company against lawsuits by employees or former employees, and even from government agencies, it is necessary that insurance for any wrongful act by Smith, or his superiors that create a claim, must be obtained. The Fiduciary Liability Coverage would be the most appropriate special coverage for this situation.



FIRE LEGAL LIABILITY COVERAGE

Fire Legal Liability Coverage provides coverage if the insured leased or rented property for which they could be held legally liable for damage to the property due to fire or explosion.



GENERAL PARTNERS' LIABILITY COVERAGE

This type of plan maybe referred to as the General Partner's Liability and Limited Partnership Reimbursement coverage. The responsibilities of a General Partner in the area of management and fiduciary responsibility, is very similar to that of a Director or Officer in a corporation. The exposure arises when general partners become the financial managers of a limited partnership.

Claims can arise for a variety of reasons, such as false statement (written or oral) by the general partner, any breach of fiduciary duties, not fully disclosing pertinent facts regarding the business, conflict of interest, failure to devote proper time to the partnership, appointment of contracts without proper "due diligence" actions, etc.



HOSPITAL PROFESSIONAL LIABILITY INSURANCE

Hospitals, like Doctors and other medical professionals, need liability insurance to protect against claims arising out of rendering, or failure to render professional services. This policy also covers claims arising out of medicine, drugs, food, medical appliances, and other products distributed, administered or provided to their patients.

Anyone who has eaten in a hospital cafeteria may wonder if the hospital had insurance on the “quality” of the food. While the policy does not cover “quality”, it does cover food served to patients. However, food provided in a hospital cafeteria or provided to guests, are not covered under this form. Coverage would be available under the Hospital’s General Liability policy – and most hospitals have General Liability to cover such exposures, as well as other exposures acquired in the conduct of general business.

One difference from other liability policies is that the Hospital Liability policy does not exclude liability for damage to the property of others in the care, custody or control of the hospital. However it will not cover the loss of personal effects of a patient unless the loss arose out of professional services administered by the hospital. In addition, most liability policies exclude exposures relating to motor vehicle use, ownership, maintenance, or loading/unloading of motor vehicles, but the Hospital policy does not exclude liability arising out of treatment of an individual in an ambulance.

Interestingly, since a large number of hospitals are operated by churches, asylums, schools and other nonprofit organizations, they are not necessarily immune from liability exposure. At least 25 states have legislation that charitable institutions are no longer protected from liability for their acts. Most of the other states allow charitable institutions immunity from liability but only under very specific conditions.



INSURANCE AGENTS AND BROKERS

Insurance Agents and brokers are responsible for protecting the interests of their clients and the companies that they represent. Any acts or omissions rendered by them or by those that they employ, can make them liable for damages. The Insurance Agents and Brokers policy is actually an “Errors and Omission” coverage and is very similar to other professional liability policies. These policies are available through companies, organizations, or agencies, or on an individual basis.

As other Professional Liability policies, it provides coverage against any claims by individuals or insurance companies represented by the insured. As other similar plans, the policy will pay any awards assessed against the insured, but also will provide defense against suits alleging negligence covered by the policy, court costs, and other legal expenses.

The policy excludes dishonest, fraudulent or any criminal acts by the insured (or employees) and also excludes libel and slander.

Most of these policies have a substantial deductible, and has an aggregate limit applicable to all claims during the policy period.

Some policies are “Claims-Made” and others are “Occurrence” types of plan.

CONSUMER APPLICATION

Bill Bates is an insurance agent specializing in life and health insurance. He has never had any problems with marketing of life insurance as he has meticulously followed company guidelines. He now has an opportunity to work for Senior Citizens Agency, which markets life and health products to Senior Citizens, such as Medicare Supplements and Long Term Care.

Bill meets with Elsie, age 70, and sells her a Medicare Supplement policy, a small life insurance for funeral expenses, and then convinces her that most of her savings that are now in CD's should be in an annuity. When he mentions Long Term Care insurance, Elsie becomes rather agitated, as she does not want to “end up in a nursing home.” Rather than upset his client and possibly lose all of the policies that he has sold her, Bill drops the subject without further discussion.

Six months later, Elsie has a stroke and finds herself in the nursing home, unable to take care of herself. Medicare paid for some of the Skilled Nursing care that she needed, but when she needed only custodial care, she had to pay for it herself. Elsie's children would have to pay for the nursing home, as the payments from annuities were not sufficient to pay all of the nursing home costs. They met with Bill to see what resources Elsie had. A son-in-law who was an attorney became very upset when he asked if Bill had discussed Long Term Care with Elsie, and Bill was unable to show that he had even mentioned it.

The heirs sued Bill for not discussing Long Term Care insurance with Elsie, as Bill had been the only agent with whom Elsie had any discussions with regarding insurance, prior to her stroke. If he had done his job properly, he would have discussed Long Term Care insurance with Elsie, and if she rejected it, there would have been a notation to that effect signed by Elsie. Now the heirs will not receive all, if any, of there anticipated inheritance.

Suits of this type are not unique and most Long Term Care insurance companies and agencies specializing in the Senior Market officially notify their agents of the necessity of offering Long Term Care insurance or documenting the refusal to purchase. The Agent's Error's and Omissions policy will cover situations such as this, as Bill did not perform any dishonest, fraudulent or criminal act. However, Bill will have to pay a substantial deductible.



MEDICAL PAYMENTS GENERAL LIABILITY

This is a general liability coverage whereby the insurer reimburses an insured & others so specified in the policy for medical and funeral expenses incurred by such persons, as a result of bodily injury or death sustained by accident. This coverage reimburses without regard to the liability of the insured or others provided for in the policy.

OWNERS' OR CONTRACTORS' PROTECTIVE LIABILITY

This plan provides coverage for any payment for which the insured becomes legally obligated to pay, due to bodily injury or property damage caused by operations performed for the named insured by independent contractors, and/or actions or omissions of the insured in connection with their general supervision of such operation.

Notable exclusions are maintenance and repair at the premises owned by or rented to the insured, or any such structural alterations at these premises that don't involve changing the size of a building, or moving a building.

This policy is a "Protective" policy, which can be considered as a different and separate type of liability coverage. A "Protective" type of policy must be purchased by someone other than the insured, and it must protect the insured from liability because of the actions of other persons that are made on behalf of the insured – hence the name "protective" as it specifically protects the insured against others actions.

CONSUMER APPLICATION

Ann is the owner of an apartment building, which has been rented to others for years and is starting to appear rather run-down. She decides that she will remodel the apartments so that she can get higher rent, but in order to do so, she must wait until the apartment is vacant before she remodels. She uses the Remodel Inc. Construction Company to do the remodeling to her specifications. Remodel purchases an Owners' or Contractors' Protective Liability policy and pays for the premiums, to cover any liability that may arise involving Ann during the period of reconstruction and because of the remodeling.

Jim was visiting his sister who lived on the same floor as the apartment being remodeled. As he passed the doorway of the apartment being remodeled, some debris from the apartment fell into the hallway, hitting Jim and breaking his leg. This policy is designed to provide liability coverage for situations such as this.

During the time of remodeling, the building elevator accidentally fell two floors, injuring 2 passengers. The passengers normally walked up and down the stairs (2 floors) for exercise, but took the elevator because of their concern after what had happened to Jim. The policy would not cover the passenger's injuries, as the injuries did not arise from the contractor's operation.

Later, but still during the remodeling period, the contractor removed the top cover of the elevator so that they could bring long pieces of lumber and sheet rock up to the remodeling site. There was no service elevator in this building. The Contractor also propped the elevator doors leading to the elevator shaft open, so as to facilitate loading and unloading while they were bringing material to the job site. During this time, some tenants were riding in the elevator to reach their apartments while the contractor was not using the elevator. A piece of two-by-four from the remodeling process fell through the elevator doors that were kept open by the Contractor, and entered the top of the elevator cage, striking a passenger and breaking his collar bone. In this case, there is a direct relationship between the acts of the Contractor and the bodily injury to the tenant. The policy should cover this situation.



PERSONAL INJURY LIABILITY

Personal Injury Liability Coverage pays for any claims of the insured or other designated covered persons, from lawful claims arising from false arrest, detention or imprisonment, malicious prosecution, libel, slander, defamation, violation of privacy rights, wrongful entry, eviction or other invasions of right of private occupancy.



PESTICIDE OR HERBICIDE APPLICATOR COVERAGE

Pesticide or herbicide applicator insurance provides coverage to the named insured in those cases where discharge of pollutants (see below) or the release or escape of these pollutants is accidental and sudden, or if the insured's operations are being performed away from premises owned by or rented to the named insured, while the injury/damage occurs away from such premises. All such operations in the latter case must meet all government regulations.

This policy is needed because a normal exclusion in a liability insurance policy are bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, liquids of gasses, waste materials, or other irritants, contaminants, or pollutants into or on land, the atmosphere, or any watercourse or body of water.



PHYSICIANS, SURGEONS AND DENTISTS PROFESSIONAL LIABILITY INSURANCE POLICIES

The Physicians, Surgeons and Dentists Professional Liability Insurance policies are frequently referred to as "Medical Malpractice" policies and have been available for years from a limited number of specialty insurers on an individual basis, but many of these policies have been obtained under group policies issued to members of professional societies. In recent years, the number of suits and the amount of the awards has increased substantially. Those few companies who have remained in the Medical Malpractice field have increased their premiums for 300-400%, and are still concerned about staying in practice.

In some states, doctors have organized mutual companies to provide malpractice insurance and state regulators have attempted to consider ways of solving this problem. In some states, insurance pools have been started or are being contemplated.

Many Medical Malpractice insurance policies are on a claims-made basis, which will apply only to claims actually made during the term of the policy, even though the "error" may have occurred years previously. By doing this, this helps to eliminate the long "tail" of these

policies, and allow the insurer to underwrite the exposure at a premium justified by the claims actually presented in one policy year. (See discussion **Claims-Made Form**)

It is very difficult to keep up with changes in medical malpractice legislation, however for illustrative purpose; the following states have made changes in recent years. For those who would like more up-to-date changes, membership in the Professional Liability Underwriting Society (PLUS) would provide information on the most recent changes and trends in Liability insurance.

- California requires doctors to carry a minimum of \$1 million of malpractice before they can practice in all hospitals. California formed a company to furnish medical malpractice insurance over 20 years ago, but problems continued. The state passed a law authorizing the Joint Underwriting Associate to provide this coverage. Pain & Suffering claims have capped at \$250,000 and limits lawyer fees to 10% of awards over \$200,000.
- Florida has also formed a Joint Underwriting Association (JUA) to provide Medical Malpractice insurance.
- Hawaii requires all liability insurance written in the state must be written by the JUA.
- Idaho has previously tried the JUA approach, but now permits doctors and hospitals to setup a reciprocal exchange for this purpose. They have also capped the limits per claimant and per occurrence.
- Indiana limits the liability of malpractice insurers, with excess paid out of a fund from surcharging doctors on their malpractice insurance. They limited the amount of malpractice claims, and prescribed that all-medical malpractice suits must be submitted to a medical review panel.
- Maryland also set up a JUA made up of all insurers writing public liability insurance in the state. They have also established a physician's mutual to write medical malpractice.
- Massachusetts has set up a JUA. The City of Boston now self-insures medical malpractice.
- New Jersey provides that all medical malpractice policies must be written on a claims-made basis. A state Malpractice Reinsurance Association has been established with all companies writing Public Liability sharing in the pool.
- New York has the Medical Malpractice Insurance Association which provides malpractice insurance to physicians. The JUA –Medical Malpractice Insurance Association – provides coverage for hospitals.
- Pennsylvania requires doctors and hospitals to have malpractice insurance. There is a fund that pays claims over \$1 million, funded by doctors, hospitals and others in the medical field.
- Rhode Island, South Carolina and Tennessee have all set up JUA's.

Coverage can be provided to a doctor practicing as an individual, medical partnership, or medical professional corporation. In each instance, the policy pays all sums which the insured becomes obligated to pay as damages because of injury arising out of the rendering or the failure to render of professional service which falls within the scope of the insured's profession.

Anyone who watches television is aware that there is a huge potential liability for failure to provide professional service. Many are not aware that a physician that does not visit a patient, with whom he has previously had as a patient and has previously undertaken to treat, may be held liable. It is also noted that a physician has certain limitations on his right to terminate his treating the sick person.

Nurses, Assistants, technicians, etc., when operating under the control of the physician, are covered under the policy. The insurer is obligated to defend any suit brought against the physician, even if it is false, groundless or even fraudulent. The policy covers only such sums as the insured is obligated to pay which arises out of injury that was sustained during the policy period.

As are many of these types of policies, it has two limits. It has a maximum amount that it will pay for damages arising out of any claims covered under the policy. It also has an aggregate limit, which is the maximum the insurer will pay for all claims under the policy.

Claims-Made Form – The form of liability insurance discussed above covers any claims occurring during the policy period (Occurrence Form). Lloyd's (of London) policy form attempts to avoid being faced with the long tail of developing claims out of occurrences that occurred years previously by requiring that the claim be made during the policy period. When the coverage is first placed with Lloyd's the "Retroactive Date" is the effective (inception) date of the policy. This date is used for all renewals thereafter and any policy thereafter (renewal) uses the one Retroactive Date. This "Claims-Made" form is used by many, if not most, professional liability insurers.

Lloyd's policy also has the feature that if a Professional Liability policy is cancelled or is not renewed, there is a 36 months (Discovery) period that covers any claims against the insured, but for only those claims that arising because of injuries which occurred during the policy term (between the Retroactive Date and the termination date of the policy).

The Lloyd's form takes more of a scheduled approach, as contrasted with the broad coverage afforded under other professional liability policies. The specific procedures are listed, with premiums shown for each insured procedure. For instance, more than a dozen forms of surgery, fitting contact lenses, certain X-ray procedures, etc. are all listed. However, an exception to the schedule approach is compliance with the "Good Samaritan" regulations, which provide that emergency medical care at the scene of an accident or other medical emergency care will be covered even though the treatment or procedures are not listed on the schedule.

CONSUMER APPLICATION

Dr. Samuel has been the family doctor for Bert and his family for many years. Bert has a history of high blood pressure, treated by Dr. Samuel with medication. Recently Bert developed heart problems and had several mild infarctions. Dr. Samuel treated Bert, provided him with prescriptions for medication, and recently, after meeting with a cardiologist, he suggested a by-pass operation. Bert went to another cardiologist, who told him that he did not need the operation, so Bert elected not to have the by-pass over the pleading of Dr. Samuel.

Three weeks later, Bert had chest pains and called Dr. Samuel, who refused to see Bert, but he told Bert that if he did not trust his medical judgement, then he could get another doctor. Bert's wife found him on the floor, called 911 and an emergency by-pass operation was performed. Dr. Samuel refused to visit him in the hospital, so Bert had to get another doctor.

Dr. Samuel is susceptible to a suit for malpractice, as he can be held liable if he refuses to treat a patient with whom he had a doctor-patient relationship. The Medical Malpractice policy would be called into play in this situation.




POLLUTION LEGAL LIABILITY COVERAGE

This liability coverage closely resembles that of the Pesticide or Applicator coverage shown above, however it is much broader. It will pay all sums the insured is legally obligated to pay as a result of emission, discharge, release or escape of any contaminants, irritants, or pollutants into or on land, the atmosphere, or any water course or body of water *provided this results in "environment damage."*

Further, it will pay reimbursement of expenses for reasonable and necessary cleanup costs which incurred in the discharge of a legal obligation validly imposed through governmental action, (again) provided such expense is incurred because of "*environmental damage.*" It will also pay for defense of any claim or suit covered by this policy.

The policy is written on a Claims Made basis.

"Environmental damage" is defined in one policy as "the injurious presence in or on land, the atmosphere, or any water course or body of water, of solid, liquid gaseous or thermal contaminants, irritants, or pollutants."



PRODUCTS LIABILITY

Products Liability is defined as the liability for any bodily injury or property damage that is incurred by a business because of some defect in the product sold or manufactured; it may also include the liability incurred by a contractor after he has completed his contract, as the result of work that was improperly performed. (This latter portion is called “Completed Operations”).



PROPERTY MANAGEMENT ERRORS AND OMISSIONS LIABILITY

The Property Management E&O policy pays on the behalf of the insured, all sums for which they become legally obligated to pay because of any act, error, or omission rising out of services rendered (or failed to render) by the insured. It also pays for any defense of any claim or suit arising out of such coverage.

Services can include property maintenance (performed or contracted for) renting or leasing, construction, alteration, land development, etc.

Claims may arise because of mishandling of accounting and financial matters mismanagement, exceeding authority under the contract, failure to perform, failure to maintain an adequate amount of insurance, etc.

Interestingly, this policy also covers the intentional acts of current &/or terminated employees.

CONSUMER APPLICATION

Windsor Trailer Park has been so successful in maintaining an excellent image in the community, that Mobile Home Estates contracted with Windsor to manage their mobile home park also. Windsor soon discovered that new employees that were hired to run Mobile Home Estates were incompetent so they were all fired and Windsor replaced them with new employees. The new employees were worse than the previous employees, and soon the Mobile Home Estates became “run-down” to the point to where they could not attract new residents and the present residents were complaining loudly.

When some of the present residents attempted to sell their mobile homes and were unsuccessful because of the reputation and the condition of the grounds and landscaping. They instituted a lawsuit against Windsor, its employees, and the previous (fired) employees.

A Property Management Errors and Omissions Liability policy would cover the lawsuit, including paying for any defense of such suit. It would also cover the suits against the former employees even though they no longer are employed by Windsor.



UMBRELLA LIABILITY COVERAGE

This policy provides coverage over the Liability insurance owned by the insured. It is also popular because it is very broad in its coverages and will cover many more exposures than the typical underlying liability insurance. There are exceptions, but they are specifically excluded and are few. The policy is subject to a deductible, usually such as \$10,000.

This policy provides automatic replacement coverage for underlying policies that have been reduced or exhausted by loss.

The Umbrella Liability policy may be “extended” by the following (unless excluded)

Personal Injury Coverage – broader coverage than in the underlying policy and includes coverage for mental injury, mental anguish, shock, disability humiliation, discrimination, etc.

Advertising Liability Coverage – included in the definition of “personal injury.”

Blanket Contractual Coverage – included for both oral and written contracts.

Employers Liability Coverage – claims made by employees are not excluded.

Worldwide Coverage

Liquor Law Liability Coverage

Non-owned Watercraft Liability Coverage – can also cover owned watercraft if the owned watercraft is included in the primary insurance schedule

Drop-down Coverage – This is a unique coverage and provides coverage for occurrences within the scope of the policy *but in the absence of primary coverage*. It will be subject to a high deductible (for example: \$10,000).

Additional Insured Coverage – This plan can be expanded to include Officers, Directors, stockholders of the named insured, and employees, while acting within their scope of duties. It will not cover liability of employee-owned autos. It will also add any additional insured named in the underlying insurance (for the same coverage), and any other person or organization to whom the insured is obligated under contract, with certain restrictions.

Care, Custody or Control Coverage – Accepting only liability assumed under contract

Occurrence Coverage – Matches the new standard primary policy definition.

Products and Completed Operations Coverage – Using the new standard policy provisions.



STUDY QUESTIONS

1. Bristol Levine Advertising has an Advertising Injury Liability policy. They devised an advertising program for Butte Electronics where a Sony TV was advertised for \$299. After the ad hit the papers, it was discovered that Bristol misunderstood and the ad was for a Sharp TV, a much lower quality TV. John drove his pickup for 45 miles so that he could purchase the SONY. He is suing Bristol and Butte for his inconvenience.
 - A. The policy will pay for any awards against Bristol.
 - B. The policy will only pay if the suit against Butte is success.
 - C. The policy will not pay because the policy does not cover losses due to inconvenience.
 - D. The policy will cover both Bristol and Butte.

2. Broadcaster's Liability Coverage is
 - A. very precise and limited in scope.
 - B. limited inasmuch as it does not cover defense costs in contesting suits.
 - C. very broad and covers many situations.
 - D. not available in most states as the radio/TV station covers the broadcasters.

3. A Liability policy that covers errors made in entering data into a computer is
 - A. Cross Liability Coverage.
 - B. Computer Data Entry Coverage.
 - C. Data Processors Errors and Omissions Insurance.
 - D. Data Entry Liability insurance.

4. C. Emmett Jackson III is a wealthy retired industrialist who has been asked to sit on the Board of Directors of Mammoth Services, Inc., a non-profit company; Jackson is concerned about lawsuits that could affect his personal fortune.
 - A. That is why he is being paid to serve on the Board.
 - B. Mammoth could (and should) purchase Directors and Officers Liability Coverage for Non-Profit Organizations.
 - C. Jackson should increase the limits on his homeowner's policy.
 - D. Jackson could deposit a bond with the Secretary of State and would not otherwise be liable.

5. The type of liability insurance that covers a person who holds himself out to be an expert in a particular field and receives compensation therefrom, from claims of malpractice, would be
 - A. a Commercial General Liability insurance policy.
 - B. Personal and Homeowners Insurance.
 - C. Mistakes and Malpractice insurance.
 - D. Errors and Omissions insurance.

6. One of the principal advantages of an Errors and Omissions policy is
 - A. very inexpensive premiums.
 - B. it provides legal defense,
 - C. it is very easy to read and understand.
 - D. there is no agents commissions paid.

7. Herman and Lector are members of a large law firm. Herman reports to the partners of the firm that Lector made a billing mistake that cost the firm \$100,000. Although Lector denied the charge, he was fired anyway. He thereupon sued the firm.
 - A. The Errors and Omissions policy will pay as it the suit was based upon an error of Lector.
 - B. The Errors & Omissions policy will not pay but the firm should file a claim with their Employment Practices Liability insurer.
 - C. There is no insurance that will pay for a squabble in a law firm.
 - D. The suit will be thrown out as lawyers cannot sue other lawyers.

8. In order to have liability protection against property damage to rented property in case of explosion because the annual check of the furnace was omitted, the owners may purchase
 - A. Errors and Omission insurance.
 - B. Fire Legal Liability Coverage.
 - C. Fire and Extended Coverage.
 - D. Fire and Boiler insurance.

9. Medical Malpractice insurance policy limit(s) is (are)
 - A. only the aggregate limit that it will pay for all claims.
 - B. only the limit that it will pay in respect to any one claim.
 - C. the aggregate limit that it will pay for all claims, and a maximum limit that it will pay for any one covered claim.
 - D. that established by the court, with maximum exposure of (usually) \$1 million.

10. Drop-Down Coverage provides
 - A. coverage for occurrences within the scope of the policy but in the absence of primary coverage and is subject to a high deductible.
 - B. that only liability that is assumed is insured under the contract.
 - C. broader coverage than in the underlying policy and includes coverage for mental injury, mental anguish, shock, disability, humiliation, etc.
 - D. using the new standard policy provisions.

ANSWERS TO STUDY QUESTIONS

1C 2C 3C 4B 5D 6B 7B 8B 9C 10A



CHAPTER NINE - DISSECTING AN E&O POLICY

In order to better understand the very important Errors & Omissions field of Liability insurance, an Architects' and Engineers Professional Liability Policy is discussed in detail. The policy language varies by occupation or specialty of the insured, but much of the wording and provisions of this policy will closely follow that of other professional E&O policies.

Similar to the discussion of the Commercial General Liability policy, each provision will be discussed and typical wording will be reviewed. The wording of the policy is a combination of policy forms offered by companies offering this type of coverage. It is not within the purpose of this text to determine if the policy form used is the "best" type available, but an attempt has been made to include some of the more appealing provisions in this discussion.



ARCHITECTS' AND ENGINEERS PROFESSIONAL LIABILITY INSURANCE

To further illustrate a Professional Liability Insurance Policy, the following format is used with a typical Architects' and Engineers Professional Liability Insurance Policy. Under this particular policy form liability limits usually range from \$100,000 to \$5 million, and with deductibles range from \$5,000 upwards, depending upon the size of the firm.

This particular policy, and others like it, in almost all cases, will be on a "Claims-Made" format. A statement so acknowledging this would appear at the beginning of the policy (in capital letters &/or in bold print):

"THIS IS A CLAIMS-MADE AND REPORTED POLICY. CLAIMS MUST FIRST BE MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD UNLESS AN EXTENDED REPORTING PERIOD APPLIES."

One can easily see why this is a Claims-Made type of policy, i.e. claims are first made against the insured and reported to the insurance company while the policy is in effect.

"Within the body of the policy, any claim expenses paid to the insured will reduce the insurance limits." For instance, if the policy had limits of \$500,000, and claim expenses (defined later in the policy) amounted to \$100,000 that would leave only \$400,000 to be paid under the policy. The wording would likely be in capital letters &/or in bold print, in the beginning of the policy (to comply with many state regulations) as

"THE PAYMENT OF CLAIM EXPENSES REDUCES THE LIMITS OF INSURANCE."

Again, in accordance with most state laws, caution has to be stressed in the beginning of the policy, that certain provisions restrict coverage – as most insurance policies do. Various provisions in this policy restrict coverage. The entire policy must be read carefully to determine the insured’s rights, duties and what is and is not covered.

The use of “first-party” nouns and pronouns used in the policy to identify parties concerned, are spelled out:

”Throughout this policy the words you and the insured’s refer to the Named Insured shown in the Declarations. The words the insurer, us, and the insurer’s refer to the Company providing this insurance (Note: in this context, the sample wording will refer to “the insured” instead of “you”, etc. The student should be familiar with insurance terminology so that they can identify “you” with “the insured”). The word “Insured” means any person or organization qualifying as such under SECTION II. Refer to SECTION II -DEFINITIONS for the special meaning of other words and phrases that appear in bold print.”

The Insuring Clause is relatively standard in most insurance contracts. Note that this policy has a deductible and this provision states that the Deductible has to be paid before the company will pay. “In consideration of the premium charged, the undertaking of the Named Insured to pay the Deductible (in other words, the Insured must pay the Deductible first), if any, and in reliance upon the statements in the application, and subject to the Limit of Liability of this insurance as set forth in the Declarations, and the Exclusions, Conditions and other terms of this Policy, the Company agrees with the Named Insured as follows:”

This Insurance Agreement states rather succinctly that the company will pay for the damages assessed against the insured, that the insured is legally – NOTE LEGALLY-obligated to pay. Of course, in keeping with the policy form, the claims must have occurred during the policy period. The Extended Claims Reporting Period will be discussed later in this policy.

COVERAGE – I

“The insurer will pay on behalf of the Insured all sums in excess of the Deductible noted in the Declarations that the insured is legally obligated to pay as Damages because of Claims first made against you during the Policy Period, and reported to us during the Policy Period or the Extended Claims Reporting Period if applicable.

At this point there are typical “Provided that” statements, which narrows and more closely defines and identifies the claims that would be paid under this policy:

- ◆ (provided that) the Claim arises out of an actual or alleged act, error or omission resulting from the insured or any entity for whom the insured is legally responsible, including the insured’s interest in joint ventures, for rendering or failure to render Professional Services;
- ◆ (provided that) the act, error, or omission took place during the Policy Period or on or after the Retroactive Date specified in the Declarations;

- ◆ (provided that) prior to the effective date of the first policy issued to the insured and continuously renewed by us, no principal, partner, director or officer of the insured’s knew or reasonably could have foreseen that a Claim would be made (this could be considered as a “pre-existing condition” for a liability policy);
- ◆ (provided that) all Claims made against the insured is made during the Policy Period; (again, more indication of a “Claims Made policy form); and
- ◆ (Provided that) the insured give prompt notice of a Claim, but not later than 60 days after expiration or termination of coverage, in accordance with the Notice of Claims conditions of this policy.

RIGHT TO DEFEND

The insurer has the right to defend with the counsel of their choice, any claims arising under this policy. After all, it is THEIR money. Claim expenses reduce the Limits of Liability of the policy. (This is mentioned so often in the policy that one must imagine that insurance companies have had problems with their insured’s over who will pay for claims expenses in the past)

“The insurer has the right and duty to defend, with counsel of the insurer’s choice, any Claim seeking Damages to which this insurance applies. Claim Expenses reduce the applicable Limit of Liability identified in the Declarations as described in Section VI Limits of Liability. The insurer’s duty to defend all Claims or pay any Claim amounts or Claim Expenses to which this insurance applies shall end when the applicable Limit of Liability has been exhausted by the payment of Claim Expenses or Damages.”

DEFINITIONS

“Definitions” appear in nearly all types of insurance policies as the terminology within any policy has a special and often specific definition used only in the particular policy form. Insurance terminology has evolved through decades of use and tradition, laws, legal rulings and general usage and has come to define words specifically in the insurance tradition. It really is no wonder that insured’s complain about not understanding insurance terminology, as an example, when the simple and important term of “insured” can vary widely from policy to policy.

- A. **Claim** means any demand made against the insured seeking Damages due to the insured’s Professional Services and alleging liability or responsibility on the insured’s part.

B. Claim Expenses means:

1. Fees charged by an attorney designated by: (a) us; or (b) the insured with the insurer's written consent, and
2. all other fees, costs and expenses resulting from the investigation, adjustment, defense of a Claim, and the premium for appeal, attachment or similar bonds; and
3. interest on the full amount of any judgment that accrues after entry of the judgment and before the insurer has paid, offered to pay, or deposited in court the amount available for the judgment under this policy; and
4. allowable expenses of \$250 per day but no more than \$5,000 in total for the compensation to the insured's principals, directors, officers or employees for personally attending any legal proceeding at the insurer's request. These allowable expenses shall be applied towards reducing the applicable Deductible amount. Claim Expenses do not include salaries or expenses of the insurer's regular employees or officials or fees and expenses of independent adjusters retained by us.

C. Damages mean the monetary amounts for which the insured may be held legally liable, including sums paid as judgments, awards, or settlements, but does not include:

1. the restitution, return, withdrawal or reduction of fees, profits or charges for services rendered or offered or any other consideration or expenses paid to the insured or by the insured for services or products; or
2. Judgments or awards deemed uninsurable by law.

D. Named Insured means the person or entity designated in Item 1 of the Declarations;

E. Insured means:

1. The Named Insured;
2. The insured's current or former principals, partners, executive officers, directors, stockholders, trustees or employees while acting on the insured's behalf and within the scope of their duties as such;
3. the insured's current or former employees including leased personnel under the insured's supervision but only for acts within the scope of their employment or lease agreement; and
4. The insured's heirs, executors, administrators, assigns and legal representative in the event of death, incapacity or bankruptcy, but solely with respect to the liability insured herein;
5. A retired principal, partner, officer, director or employee while acting within their duties as a consultant for you;
6. Any Predecessor in Interest.

F. Mediation means non-binding intervention by a neutral third party.

G. Policy Period means the period set forth in Item 3. Of the Declarations, or any shorter period resulting from a termination of this policy.

H. **Predecessor in Interest** means any prior entity whose assets, partners, principals or shareholders have joined the insured and whose name has been provided in the application and for whose insurance the insured is responsible by written agreement.

I. **Professional Services** means those services which the insured is legally qualified to perform for others in the insured's capacity as an:

1. Architect or engineer;
2. Landscape architect, land surveyor or planner;
3. Construction manager; or
4. As specifically described in the insurer's application.

J. **Related Wrongful Acts** means Wrongful Acts which have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes.

K. **Retroactive Date** means the date on or after which any alleged or actual act, error or omission must have taken place in order to be considered for coverage under this policy, as stated in Item 4. Of the Declarations. If none is shown, the retroactive date will be the effective date of the first policy issued by us to the insured.

L. **Wrongful Act** means any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by any Insured or by any person for whose conduct the Insured is legally responsible in rendering or failing to render Professional Services, provided that:

- (1) Such error, misstatement, misleading statement, act, omission, neglect, or breach of duty occurred on or subsequent to the Retroactive Date stated in Item 4. Of the Declarations and before the end of the Policy Period; and
- (2) on or before the effective date of this Policy the Insured had no knowledge of circumstances involving any error, misstatement, misleading statement, act, omission, neglect, or breach of duty, which may result in a Claim.

CONSUMER APPLICATION

James Architects designed an office building. During construction, a metal beam broke its rivets because of a design flaw. The beam fell on a moving car, causing property damage to the car and direct bodily injury to the driver who lost control of the car, hitting a bus stop and injuring 3 persons waiting for a bus.

The Architect's E&O policy would cover these injuries and property damage. Even though the falling beam did not directly hit the people in the bus stop, they would be considered as victims of a "Related Wrongful Act."

POLICY TERRITORY

The territory in which the policy will operate is spelled out. Many such policies will only be applicable within the United States and the company does not want to have to try and defend an insured according to the liability laws of another country with all of the expenses inherent:

“The insurance afforded by this policy applies worldwide.”

EXCLUSIONS

The “Exclusions” section is one of the most important sections of the policy and the one that cause the greatest customer dissatisfaction. A professional agent will always go over the Exclusions of any policy – not only Liability policies – very, very carefully with the insured to make certain that there are no misunderstandings. Too frequently, this section will not be mentioned to the policyholder, or just mentioned “in passing” because of the fear that Exclusions are “negatives: and could kill the sale, if the policyholder took exception to any of the provisions.” Unfortunately, if Exclusions are reviewed at time of claim, that is when the real difficulties arise and the agent may have to then appeal to their own E&O Liability policy!

“This policy does not apply to any Claim or Claim Expenses based upon or arising out of-

- A. any dishonest, fraudulent, criminal, intentional or malicious act, error or omission, or
 - those of a knowingly wrongful nature or
 - the willful violation of any statute, regulation, ordinance, or
 - administrative complaint, notice or
 - instruction of any governmental body or agency, committed by the insured or at the insured’s direction, except that this exclusion will not apply to an Insured who did not commit, participate in, or have knowledge of any of the acts described;
(This is self-explanatory and is designed for liability policies. The “has knowledge of” section is particularly important for “pre-existing conditions”).
- B. a Claim made by any Insured against any other Insured (obviously, this keeps the insurer from “being in the middle” between two or more insureds);
- C. a Claim by any individual or business enterprise or its subrogees or assignees;
 - (1) That wholly or partially owns, operates or manages the insured; or
 - (2) In which the insured has an ownership interest in excess of 20 percent; or
 - (3) that is controlled, operated or managed by the insured; or
 - (4) In which the insured is an officer or director (This ensures that an insured cannot sue itself, with the insurance company footing the bill. Since most exclusions derive from unfortunate previous claims, it could be assumed that in the past, some enterprising insured sued, or attempted to sue, some firm or situation wherein the insured had a financial interest, or, perhaps, some actuary was far-seeing enough to anticipate such shenanigans...);

- D. actual or alleged wrongful termination or discrimination on any basis, by the insured against any past or present employee, officer, or applicant for employment (a suit against the insured for wrongful termination or discrimination falls outside the intent of the policy – which is to insure professional decisions. Coverage for these other exposures can be obtained in another policy);
- E. any obligation for which the insured or any party may be liable under any workers' compensation, unemployment compensation, employers liability, disability benefits law or under any similar law. (This exclusion also covers situations other than the professional actions of the insured);
- F. conduct by an individual, corporation, or partnership of which the insured is a partner, director, officer, member or employee, that is not designated in the Declarations as a Named Insured (Similar to a previous exclusion which avoids an insured suing itself and the insurer paying the insured for claims against itself);
- G. the advising, requiring, obtaining or maintaining of any form of insurance, suretyship or bond, or the failure to do so (Failing to obtain insurance can be grounds for a suit, but again, it is not within the professional actions of the insured);
- H. any express warranty or guarantee (not within professional action of insured);
- I. liability of others assumed by the insured under any contract or agreement, unless such liability would result by operation of law in the absence of such agreement (the insured cannot assume someone else's liability, even if it is his brother-in-law);
- J. fines, penalties, punitive or exemplary damages, including but not limited to any damages which are a multiple of compensatory damages, unless such damages arise solely out of a claim for libel and slander and payment by us is not held to be against public policy. (This is an interesting exclusion. As explained elsewhere in this text, punitive damages are usually not an insurable occurrence, as it is a penalty afforded by the courts for wrongful actions and such penalty can not be passed on to another. However, liability policies of this type will pay for certain libel and slander claims, but note that payment of these claims cannot be contrary to public policy. An oft-cited reason for insurers not paying for punitive or exemplary damages is the “against public policy” position of the insureds. Incidentally, “exemplary damages” are interchangeable with “punitive damages”);
- K. any project that is insured under a project specific (“project specific” means that the policy is for a specific project or job) insurance policy, provided, however, that this exclusion shall not apply where the insured's liability is found to be in excess of the limits of liability available under such project specific insurance policy which has been specifically included for excess coverage by endorsement to this policy (This rather confusing statement simply means that this policy is not designed to cover any liabilities arising from one specific job or project. Policies are available to cover specific jobs, or a

specific job that may create unusual liabilities. Coverage may be available as an Endorsement, in which case it would be covered, of course);

L. the design or manufacture of any goods or products which are sold or supplied by you, or by others under license from you (This policy is for architects and engineers, not manufacturers or sales representatives);

M. the cost to repair or replace faulty construction workmanship or materials in any construction, erection, fabrication, installation, assembly or manufacturing process if performed or provided by you, including materials, parts or equipment furnished in connection therewith (Insurance covering these types of liability are available and are not within the purview of the professional liability policy).

Most policies of this type recognize that claims that have incurred during the policy period may not be known immediately to the insured. Therefore, provision is usually made that would cover any claims reported after the date of policy termination but occurring during the policy period. Please note that if the insured simply stops paying premiums and the policy is therefore cancelled, this extended reporting period does not apply. It would certainly be in the best interests of the agent and policyholder to make sure that when the insured no longer needs or wants the policy, the insurer be notified in writing immediately. Of course if the policy was obtained by fraud on the application, the policy would have been declared terminated “ab initio” (from the beginning).

CONSUMER APPLICATION

James Architects owns 40% of Plastic Building Products, Inc., which supplies specialized individually developed building products, made of plastic. They had purchased this firm as many of their designs use plastic decorative products and James was unable to find any manufactured locally. Therefore, he and his brother formed Plastic Building Products. James does not hold any position with Plastic Building except as a stockholder. His brother is majority stockholder and President.

One particular job used unique plastic building supplies, which was to be furnished by Plastic Building. The supplies were not used as designed, causing damage to the building for which the contractor is holding Plastic liable. Plastic is suing James as the specifications furnished by James were incorrect and as a result, Plastic has suffered damage to its reputation and is being sued by the Contractor.

In this situation, James’ E&O policy will not provide coverage against the suit, as James owns more than 20% of Plastic.

EXTENDED REPORTING PERIOD:"

A. Automatic Extended Claims Reporting Period

If the insurer or the insured terminate or fail to renew this insurance for any reason, other than: nonpayment of premium, the insured's failure to comply with any term and condition, fraud or material misrepresentation; the insured shall be entitled to a period of sixty (60) days from the date of policy termination to report Claims which are made against the insured prior to such termination date. This Automatic Extended Claims Reporting Period may not be canceled by us and does not require the payment of an additional premium. This Automatic Extended Claims Reporting Period shall be included within the Optional Extended Claims Reporting Period if such is purchased.

CONSUMER APPLICATION

Doug is an architect who was involved in a large project that has been completed. He had purchased an Architects' E&O policy from Central Casualty as they have a reputation of specializing in the insuring of liability coverage on large projects. Doug usually designs large private homes, so he considers dropping Central Casualty, and taking another policy with Horizon Casualty, which is less expensive. He is justifiably concerned about dropping one liability insurer when he could still be found liable for some structural defect arising from the architectural plans. On the other hand, being a small businessman, he must watch his expenses closely.

Rather than dropping his Central Casualty liability policy – even though he was purchasing another policy from another company – it would be in his best interest to keep his existing policy with Central Casualty, until such time that it would appear he could not be liable for any further damages as a result of that particular job. It may seem that once a professional of this type has liability insurance with one company, he is pretty well “stuck” with the policy to be safe. Of course, in this case he has an additional 60 days of Extended Reporting coverage. Remember that this is a claims-made form. If nothing else, an insured of a policy of this type should not take the cancellation or changing of policies or insurers lightly!

B. Optional Extended Claims Reporting Period

(An Optional Claims Reporting Period may be obtained by the payment of additional premium, as outlined below. Please note that non-payment of premium will not allow the insured [former insured] to even purchase an additional reporting period).

“If the insured does not renew or replace this insurance, or if the insurer cancels or refuses to renew this policy for reasons other than the non-payment of premium or Deductible, or non-compliance with the terms and conditions of this policy; upon the payment of an additional premium, the insured shall have the option to extend the period by which a Claim can be made against the insured and reported to the insurance company.”

(At this point, some discussion is in order. Note that this Optional provision actually renews the policy so that any claims that arise or have arisen during the original policy period will be covered. If the insured simply dropped the policy and then obtained

another policy, the new policy would not cover any claims that occurred prior to the effective date of the new policy. Therefore the insured must determine how long a “tail” [the length of time that claims that occurred but were not reported] is needed).

The premium for the Optional Extended Claims Reporting Period shall be determined by charging

(1) 100% of the annual premium for twelve (12) months,

(2) 150% for twenty-four (24) months, or

(3) 200% for thirty-six (36) months. The purchase of an Optional Extended Claims Reporting Period shall be endorsed herein. The insured’s right to purchase the Optional Extended Claims Reporting Period must be exercised by notice in writing not later than thirty (30) days after the cancellation or termination date of this Policy. Effective notice must indicate the total Optional Extended Claims Reporting Period desired AND MUST INCLUDE PAYMENT OF PREMIUM FOR SUCH PERIOD. If such notice and the premium are not mailed to us within thirty (30) days, then the insured shall not at a later date be entitled to purchase an Optional Extended Claims Reporting Period. (The purpose of this part of the provision is obviously to not allow a former insured to wait for an extended period of time, and then when hit with a lawsuit not previously reported, then apply for the extended coverage. Trying to defend a lawsuit after a period of time has passed increases the difficulty of a successful defense.)

At the commencement of any Optional Extended Claims Reporting Period, the entire premium therefore shall be deemed earned, and in the event the insured terminates the Optional Extended Claims Reporting Period before its term for any reason, the insurer shall not be obligated to return to the insured any portion of the premium. (This part of the Optional period provision seems rather strict – if the insured decides that he doesn’t need the coverage any longer, he will not receive any unearned premium.)


The fact that the period during which Claims can be made against the insured and reported to us is extended by virtue of the Optional Extended Claims Reporting Period shall not in any way increase the Limits of Liability of this policy. *The insurer’s liability shall further be limited to cover only those Claims or Claim Expenses which arise out of the insured’s providing or failure to have provided Professional Services prior to the expiration date of the Policy Period or any earlier termination date, if applicable, and prior to the Optional Extended Claims Reporting Period.*

(Note the portion in Italics. It must be made clear at this point that even with a purchase of Extended Claims Reporting Period, the claims that will be covered must have occurred prior to the expiration date of the original policy and prior to the date that the Optional Extended Claims Reporting Period was purchased. Note, however, that the premium charged is 100% of the annual premium of the entire original policy. The reason that the premiums would be so high even though the benefit period has been restricted is called “anti-selection”, as the insurer can be “selected against” as a disproportionate number of insureds would purchase the optional coverage – those who would be in a position to know or suspect that a claim may arise from past activities.)

LIMITS OF LIABILITY

The “Limits of Liability” are discussed in detail. Again, many policies would state that the claims expenses will reduce the limits of liability.

“LIMITS OF LIABILITY: NOTE: CLAIM EXPENSES ARE INCLUDED WITHIN, AND WILL REDUCE, THE LIMITS OF LIABILITY.”

 **Note that there are limits of liability for each claim and an aggregate limit of liability.**

- A. **Each Claim Limit of Liability** - The insurer’s liability for Damages and Claim Expenses for each Claim shall not exceed the amount stated in the Declarations as the “Each Claim Limit of Liability.”
- B. **Aggregate Limit of Liability Each Policy Period** - Subject to paragraph A. above, the insurer’s liability as a result of all Claims for Damages and Claim Expenses shall not exceed the amount stated in the Declarations as “Aggregate Limit of Liability Each Policy Period” and the Optional Extended Claims Reporting Period, if purchased.
- C. **Deductible** - The Deductible amount as stated in the Declarations shall be paid by the insured and shall be applicable to each Claim and shall include all Damages and Claim Expenses up to the Deductible amount for each Claim. (NOTE: This is a “per occurrence” deductible, i.e. for each claim, the deductible must be paid by the policyholder. This is common on insurance policies where claims are normally experienced infrequently, as opposed to those policies where claims are frequent [such as health insurance policies]).

The insured’s total Deductible payments, in respect to each Claim shall not exceed the Deductible amount stated in the Declarations. The insurer may from time to time advance payments for Damages and Claim Expenses within the Deductible. Any amounts first paid by us within the Deductible shall, upon written demand by us, be paid by the insured within thirty (30) days. This basically means that if the insurer pays a claims amount and the deductible has not been paid by the insured, the insured agrees to pay the deductible within 30 days to the insurer. This is typical as a settlement for a claim will generally be in a lump sum and if the deductible had to be paid by the insured, the claim settlement would require two separate checks – one from the insured to satisfy the deductible, and the other from the insurer. It is better for all parties to make a single payment when possible.

D. Multiple Insureds, Claims and Claimants (Provisions are usually made, as follows, wherein claims arising out of one act will be treated as one act, etc.)

- (1) Two or more Claims arising out of the same Wrongful Act or Related Wrongful Acts shall be treated as a single Claim and shall be considered first made at the earlier of the following times:
 - (a) the time at which the earliest Claim involving the same Wrongful Act or Related Wrongful Acts is first made, or
 - (b) The time at which the Claim involving the same Wrongful Act or Related Wrongful Acts is deemed to have been first made pursuant to policy provisions.
- (2) The inclusion of more than one Insured in the making of a single Claim, the bringing of more than one Claim regarding the same Wrongful Act or Related Wrongful Acts or the making of a Claim by more than one person or organization shall not increase the Limit of Liability. (It will be noted that the policy also very sensitive about the limits of liability. The insured purchases a specified limit of liability, both single claim and aggregate, and regardless of what happens, these limits will be upheld.)

E. Mediation – (Mediation is the normal method of resolve differences in resolving claims. Since the insurer will not have large legal fees for court costs, the insurer is induced to agree to mediation by reducing the deductible.) If the insurer and the insured agree to use mediation to resolve a Claim brought against the insured and if such Claim is resolved thereby, the Deductible stated in the Declarations shall be reduced by 50% for such Claim subject to a maximum reduction of \$20,000. Deductible payments made prior to the mediation will be reimbursed within 30 days of the resolution of the Claim.

CONSUMER APPLICATION

James Architects is being sued by United Baldwin, Inc. for design flaws in their new home office building. James E&O carrier, Magnificent Casualty is notified and appoints an attorney to represent James. United is suing for \$1 million, the aggregate limit of James E&O policy. James is hoping that his situation can be pleaded in front of a jury, as he feels his reputation has been sullied, and by presenting his case he can clear his name and firm's reputation. Further, United has had some business problems lately, and its business reputation is not very good.

Magnificent determines that in order to contest this suit; legal fees could easily reach \$150,000. Even if they were able to have the amount awarded for less than \$1 million, with the legal fees it probably will be a maximum claim anyway. They, too, are aware of United's reputation.

United's attorneys are agreeable to submitting to mediation as they do not want additional publicity at this time.

This is an excellent time to use mediation, as it would appear to be in the best interests of both parties. It is quite possible that Magnificent could pay considerably less than \$1 million, and the possibility exists that the mediator may find for James.

James is not too happy with this situation, but under the terms of the policy, he must comply. However his deductible would be cut in half (or \$20,000).

NOTICE OF CLAIMS

A separate provision is included which states that if a claim is suspected and reported to the insurer, the date of reporting will govern. This is important for claims investigation purposes and the costs affiliated with it. It simply behooves the insured to notify the insurer of any situation that MAY ARISE, and not necessarily of a claim being filed against the insured.

- A. Notice of Circumstance - if during the Policy Period the insured becomes aware of a circumstance from which a Claim is reasonably anticipated and if during the Policy Period the insured gives notice to the insurer of-
1. The act, error or omission;
 2. The Damages which has or may result from such act, error or omission; and
 3. how and when the insured first became aware of such act, error or omission; then any Claim, for which coverage is provided by this policy, that may be made against the insured arising out of such act, error or omissions, shall be deemed for the purposes of this insurance to have been made on the date on which the notice was given to the insurance company. Any costs associated with the investigation of a circumstance prior to a Claim being made will not be considered Claim Expenses.

CONSUMER APPLICATION

Playground Equipment Corp. provided the playground equipment for the Northside Elementary School. An employee of Playground reported to his foreman that one of the swings had broken and had injured 3 children. Playground's attorney was alerted and immediately went to the school and photographed the swing set, interviewed the playground supervisor, and checked with the emergency room at the hospital.

The parents did not immediately file suit against Playground (or the school), waiting to find the extent of the children's injuries before they initiated suit. When the lawsuit was eventually filed, Playground filed claims with the insurer for claims expenses, including the attorney's initial investigation. Even though the rapid action of the attorney undoubtedly reduced the amount of the claim, as the school and parents were impressed that Playground would act so rapidly and seemed to care for the injured children, the policy would not pay for any investigative action that occurred before the claim is filed.

CLAIMS

The Claims Provisions outline what an insured must do when a claim arises, necessary filing of forms, cooperation in investigating the claim, and the obtaining of counsel.

- A. **Notice of Claim** -In the event of a Claim, prompt notice containing particulars sufficient to identify the insured or any Insured involved and reasonably obtainable information with respect to time, place and circumstances, and the names and addresses of any injured parties and of available witnesses, shall be given by or for the insured to us. In the event of oral notice, the insured agrees to furnish a written notice and send us copies of all demands or legal documents as soon as possible. Written notice must be provided to us no later than 60 days after the expiration or termination of the policy. The insured's knowledge of Claim shall be deemed to have occurred when a principal, partner, director, or executive officer first learned of the Claim. (Point to keep in mind, particularly where there is a partnership or where there are remote locations. If one of the key persons receives notice of a claim – or has grounds to suspect that a claim will be filed – they should immediately notify the insurance company and all others that may be brought into the claim). All Claims are to be reported to the Insurance Company at their home office.
- B. **Claims Expenses** -No costs, charges or related Claims Expenses shall be incurred without the insurer's written consent which shall not be unreasonably withheld. The insurer shall have the right and the duty to designate legal counsel for the investigation, defense or settlement of a Claim. The insurer will not settle or compromise any Claim without the insured's consent. The insured shall do nothing to prejudice the insurer's rights under this policy nor shall the insured admit liability or settle any Claim without the insurers written consent. If the insured refuses to consent to any settlement or compromise recommended by us involving any part of the insurer's limits of liability and acceptable to the claimant, and the insured elects to contest the Claim, suit or proceeding, then the insurer's liability shall not exceed the amount which the insurer would have paid for Damages and Claim Expenses at the time the Claim or suit or proceeding could have been settled or compromised. (Important point – situations may arise whereby a settlement of a claim can cast reflections on the professionalism of the insured, and the reputation of the insured is more important to the insured, than the agreeing to a settlement. A settlement, whether it so states or not, will in all likelihood, reflect adversely on the person named in the complaint. If the insured wants to take the case to court in an effort to vindicate him/her completely, the insured could end up paying for additional court costs and possibly a higher judgement, out of their own pocket.)
- C. **Cooperation of Insured** -The insured shall assist and cooperate with us in the investigation, settlement and defense of all Claims made against the insured and upon the insurer's request shall authorize the release of records and other information,

secure and give evidence, attend hearings and trials and obtain the location of and cooperation of witnesses.

D. Independent Counsel -In the event that the insured is entitled by law to select independent counsel to defend the insured at the Company's expense and the insured elects to select such counsel, the attorney's fees and all other litigation expenses the insurer must pay to that counsel are limited to the rates the insurer actually pay to counsel the insurer retain in the ordinary course of business in the defense of similar Claims in the community where the Claim arose or is being defended. (Forget hiring F. Lee Bailey, et al, and don't expect the insurer to pay their fees!)

Additionally, the insurer may exercise the right to require that such counsel have certain minimum qualifications with respect to their legal competency including experience in defending Claims similar to the one pending against the insured and to require such counsel to have errors and omissions insurance coverage. As respects any such counsel, the insured agrees to require the insured's counsel to, in a timely manner, provide us with information regarding the Claim and to respond to the insurer's request for information regarding the Claim.

The insured may at anytime, by the insured's signed consent, freely and fully waive the insured's right to select independent counsel.

CONDITIONS

(The final Provision, usually called "Conditions" or similar title, is sort of a "catch-all" that specified how a policy terminates, the relationship between the insured and insurer, right to audit or inspect, etc.)

A. Action Against Us - No action shall lie against the insurer unless, as a condition precedent thereto, there shall have been full compliance with all of the terms and conditions of this policy, and both the insured's liability and the amount of the insured's obligations to pay has been finally determined either by judgment against the insured after an actual trial or by the insured's written agreement with the claimant or the claimant's legal representative with the insurer's approval. (What this provision says is that if the insured feels that the insurer did not perform according to the provisions of the policy, they cannot sue until everything has been settled, i.e. "The fat lady has sung.")

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. (This still refers to an unsatisfied Insured taking action against the insurer). No person or organization shall have any right under this policy to join us as a party to any action against the insured to determine the insured's liability, nor shall the insurer be impleaded (fancy legal word meaning sued or prosecuted, usually generally when there are several defendants) by the insured or the insured's legal representative.

- B. Assignment** - Assignment of interest under this Policy shall not bind us without the insurer's express written consent.
- C. Audit and Inspection** - Solely for the insurer's benefit, the insurer may audit or inspect the insured's books, records and operations at any time during the Policy Period or within three years after the termination of this policy, as far as they relate to the subject matter of this policy.
- D. Bankruptcy or Insolvency** - The insured's bankruptcy or insolvency shall not relieve us of the insurer's obligations under this policy.
- E. Cancellation, Non-renewal or Renewal**
1. Cancellation
 - a. This policy may be canceled by the insured by surrender thereof to us or any of the insurers's authorized representatives or by mailing to us written notice stating when thereafter such cancellation shall be effective.
 - b. If this policy has been in effect less than sixty (60) days and is not a renewal of a policy issued by us, the insurer may cancel this policy for any reason. (This allows for the insurance company to run its usual inspection reports and gives it wide latitude for cancellation. Also, this helps persistency, as if the insured cancels a professional liability policy, any replacement policy will probably have such a provision. Therefore, the insured is not 100% sure that a new policy will be issued).
 - c. If this policy has been in effect for sixty (60) days or more or is a renewal of a policy issued by us, this policy may not be canceled (by the insurer) except for one or more of the following reasons:
 - (1) Nonpayment of premium;
 - (2) Fraud or material misrepresentation affecting the policy;
 - (3) Violation of any of the terms or conditions of the policy; or
 - (4) Substantial increase in hazard.(Remember the problems discussed earlier with potential claims occurring just prior to the policy cancellation).
 - d. Written notice of cancellation shall be mailed or delivered by us to the insured at least:
 - (1) Fifteen (15) days prior to the effective date of cancellation, if this policy is canceled for nonpayment of premium; or
 - (2) Sixty (60) days prior to the effective date of cancellation, if this policy is canceled for any other reason. (Insurers just do not like to have policies cancel because of nonpayment of premium).
 - e. Written notice of cancellation, including the reasons for cancellation, shall be mailed or delivered to the insured at the insured's last known mailing address.

- f. The insurer shall not be held liable in any Claim or suit for Damages arising solely from failure to comply with any requirement that the reason(s) for cancellation be specified.
- g. Notice of cancellation shall be sent by certified mail unless the reason for cancellation is due to nonpayment of premium, in which case notice shall be sent by certified mail or certified mailing. Delivery shall be considered to be equivalent to mailing. Proof of mailing shall be considered to be proof of notice.
- h. If this policy is canceled by us, the earned premium shall be computed pro rata. If this policy is canceled by the insured, the insurer shall retain the customary short rate proportion of the premium. (Again, a little on the side of the insurer, but that is justifiable as the insurance company has the administrative cost involved in cancellation).

2. **Non-renewal**

- a. If the insurer elects not to renew this policy the insurer will send notice at least sixty (60) days prior to expiration or anniversary unless:
 - (1) The insurer has manifested the insurer's willingness to renew; or
 - (2) The reason for non-renewal is due to nonpayment of premium or the insured's deductible obligations or if the insured failed to comply with any other term and condition;
 - (3) The insured fail to pay any advance premium required by us for renewal; or
 - (4) The insured has obtained replacement coverage with another insurer.
- b. Written notice of non-renewal shall be mailed or delivered to the insured at the insured's last known address. Mailing of such written notice shall be by certified mail. Proof of mailing shall be considered to be proof of notice.

3. **Renewal**

- a. If the insurer elect to renew this policy and have the necessary information forty-five (45) days prior to the expiration date of this policy, the insurer will confirm the insurer's intention to renew in writing at least thirty (30) days prior to such expiration date. Such confirmation will also include the premium at which the policy will be renewed.
- b. If the insurer does not comply with subsection 3-a above, the insured will be granted renewal coverage at premiums in effect under the expiring or expired policy or at rates lawfully in effect on the expiration date, whichever is lower. Such coverage shall continue for forty-five (45) days after the insurer confirm in writing the insured's renewal coverage and earned premiums for these forty-five (45) days shall not apply if the insured accepts the renewal coverage.

F. Representations – The insurance company must rely upon information supplied it by the customer and the agent. Therefore, a statement stressing the importance of accurate information is traditional. It also states that the insurance policy and official endorsements

and Declaration, constitute the entire contract, which would stop an agent or anyone else, from attaching a document changing any provision in the policy. In some policies, this section is called "Entire Contract." "By acceptance of this policy, the insured agreed that the statements in the application and its attachments are the insured's agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy, its Declarations and endorsements embody all agreements existing between the insured and us relating to this insurance."

- G. Other Insurance** - The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance, which is stated to be applicable to the loss on an excess basis, the amount of the insurer's liability under this policy shall not be reduced by the existence of such insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess, or contingent, the insurer shall not be liable under this policy for a greater proportion of the loss than that stated in the Declarations or the following contribution provision; whichever is lower:

- a) **Contribution by Equal Shares** - If all of such other valid and collectible insurance provides for contribution by equal shares, the insurer 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.



STUDY QUESTIONS

1. Because claims are first made against the insured and reported to the insurance company while the policy is in effect. Therefore, this is a
 - A. Reported Claims policy.
 - B. Claims Made policy.
 - C. Non-notification Claims type of policy.
 - D. Blanket Coverage.

2. Duane's E&O policy has been in force for 2 years with a policy limit of \$500,000. He was sued for malpractice and his attorneys charged \$150,000 in claims expenses. The claim was adjudicated against Duane for \$400,000. How much will his policy pay?
 - A. Duane would have to come up with \$50,000.
 - B. The entire amount of claim plus expenses.
 - C. \$400,000.
 - D. \$150,000.

3. Under his typical E&O policy, Claims must be reported to the insurer
 - A. during the policy period, unless an extended reporting period applies.
 - B. prior to the extended reporting period, but less than 60 days prior to policy date.
 - C. only during the extended reporting period.
 - D. whenever Duane gets around to it.

4. under the policy definitions, Damages
 - A. includes punitive damages or other judgements not considered insurable by law.
 - B. includes the return of fees for services rendered.
 - C. is monetary amounts for which the insured may be held legally liable.
 - D. restitution.

5. John sues James for bodily injury. They call for non-binding intervention. Under the policy this is called
 - A. Mediation.
 - B. Non-judicial Disposal.
 - C. Habeas Corpus.
 - D. Arbitrary Decision.

6. A claim by one insured against another insured, under and E&O policy
 - A. will be always paid without investigation.
 - B. is excluded by the policy.
 - C. is covered but for 50% of the claims amount.
 - D. will be paid, but with maximum aggregate limit of twice the claims amount.

7. Joseph stops payment on his E&O policy as he is retiring and giving up his Agent's license. For any claims that have occurred during the policy period, but not yet reported,
- he has 60 days of coverage from date of termination, to file claims that occurred during the policy period.
 - no coverage is provided under the policy because of policy termination for nonpayment of premium.
 - the insured will be given a period of 1 year to file claims that occurred during the policy period.
 - he must file claims within 30 days after termination of the policy.
8. 30 days after purchasing an E&O policy, the insured suffers a large claim, reported immediately to the insurer.
- The insurer has the right to cancel within 60 days for any reason, and will do so.
 - The insurer cannot cancel the policy except for fraud or misrepresentation, so the policy will be in force.
 - The insurer has the right to cancel if a claim is more than 50% of the aggregate limit of the policy and occurs within 1 year of the policy period.
 - The insurer can always cancel after returning the unearned premium.
9. An E&O insured must leave the US for a period of 6 months for personal reasons, so he notifies the agent in the agent's office that the policy is to be cancelled. He had paid an annual premium in advance, and had had the policy for 3 months.
- the policy will be cancelled as of the date of his visit to the insurance agent's office.
 - the policy will not be cancelled without written notice to the insurance company and signed by the insured.
 - the policy will be cancelled when the home office of the insurer is notified by the agent.
 - Since the policy has been cancelled after inforce for only 3 months, and assuming there are no pending claims, the policy will be cancelled ab initio and all of the premiums returned.
10. Engineering, Inc. carried both Professional E&O coverage with Ajax Insurance, and a Commercial General Liability Policy with another insurer. They file a claim that would be covered by both policies.
- The E&O is primary, with the CGL as excess.
 - The CGL is primary, and E&O is the excess.
 - Neither Company would be liable.
 - Each insurer will pay equal amounts until its applicable limits have been reached, or the claim has been paid, whichever comes first.

ANSWERS TO STUDY QUESTIONS

1B 2A 3A 4C 5A 6B 7B 8A 9B 10D



