

# Real Estate Bulletin

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## Third Party Liability Insurance: Forms of Policies and Selected Coverage Issues by Glenn A. Fuller Esq.

### I. Introduction

The purpose of this article is to provide a basic primer on liability and casualty insurance for real estate practitioners for purposes of providing a general understanding of what insurance policies are available and some of the key issues in the evolution of these policies that real estate practitioners should have a basic familiarity with. This article is not intended to be in-depth examination of all issues relating to liability and casualty insurance and is limited to liability and casualty insurance although other types of insurance such as errors and omissions and builder's risk insurance can be equally important in the appropriate transaction.

In short, this article is not intended to be a detailed analysis of the law of insurance itself, which is replete with complex issues, opinions and complications, but rather to provide real estate professionals with an overview of what to look for in connection with liability and casualty insurance.

### II. Forms of Liability Policies

Most insurers engaged in liability insurance issue their liability policies based in some measure on standard form policies promulgated by the Insurance Services Office (or "ISO"), a national insurance rating agency founded in 1971. While insurers will use the ISO forms as a starting point, most large insurers have tailored their individual policies to some extent. As such, while familiarity with the ISO nomenclature is essential, each policy should be

scrutinized to identify the deviations from the ISO standard language to fully understand the nature of the coverage afforded by the policy.

In 1973, the ISO issued its first set of comprehensive policies by issuing a form of Comprehensive General Liability Coverage ("Comprehensive Coverage Policy"). In general the coverage provided by the Comprehensive Coverage Policy tended to be restrictive and, as such, required endorsements to broaden coverage and, in 1976, the Comprehensive Coverage Policy was supplemented by an endorsement known as the "Broad Form Comprehensive General Liability Endorsement" ("Broad Form Endorsement").

As a result, the requirement that the party in charge of procuring insurance for a real estate contract obtain "Broad Form Comprehensive General Liability Endorsement for real property" became common in real estate contracts.

In 1986, the ISO attempted to introduce the first set of revised forms called Commercial General Liability forms ("CGL") that were intended to replace the prior Comprehensive Coverage Policy. In theory the CGL forms would provide greater insurance coverage, and endorsements would be available to both narrow or expand coverage but not necessarily be required in every instance, as seemed to be the case with the Broad Form Endorsement. The CGL was never met with complete acceptance, however, and while many liability insurers have adopted the CGL into their policies, many real estate contracts are predicated

on the old forms. As such, many form leases used to this day still require tenants to obtain Comprehensive General Liability Insurance with the Broad Form Endorsements notwithstanding the availability of the newer CGL policies that obviate the need for the Broad Form Endorsement.

CGL provides coverage on an "Occurrence" or "Claims-Made" basis. In an Occurrence Policy (which is issued on an ISO form CG 00 01), coverage is afforded to the insured for any insurable loss that occurs within the period the insurance was made, irrespective of when the claim is made. A Claims-Made policy (which is issued on an ISO form CG 00 02) only provides coverage for claims made during the policy period. As such, the premiums for "Claims Made" coverage are significantly less than premiums for "Occurrence" coverage. However, an insured under a Claims-Made policy can purchase "tail" coverage to cover claims made after the termination of the policy period. This is very common, for instance, in the construction industry wherein prudent insureds want to insure that coverage exists for the entire period of time claims can be made within a statutory period. In fact, it is possible to, for all practical purposes, convert a "Claims-Made" policy into an "Occurrence" policy by the insured purchasing what is known as a "Supplemental Extended Reporting Period Endorsement." The costs for such endorsements tend to be extremely high.

There are three distinct coverage forms available under the CGL. Coverage

A under the CGL (“Coverage A”) insures against liability for bodily injury and property damage that occurs within the “coverage territory,” is caused by an “Occurrence” and constitutes a legal obligation of the insured to pay sums. Thus, under both the Claims Made policy form and the Occurrence policy form bodily injury or property damage must be caused by an “Occurrence.” The CGL defines an “Occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” As such, intentional actions are excluded from coverage under CGL policies.

Coverage B under the CGL (“Coverage B”) broadens the term “bodily injury” to include personal injury. Personal injury includes injuries not necessarily arising out of physical injuries and includes such torts as libel, false arrest, invasion of privacy, false imprisonment, malicious prosecution, embarrassment, humiliation and similar torts. Thus, Coverage B will insure against wrongful entry or eviction, but not to “other invasions of the right of private occupancy.” Coverage for advertising injury covers injuries “arising out of oral or written publication of material whose first publication took place before the beginning of the policy.”

Coverage C under the CGL (“Coverage C”) covers medical payments to third-parties if incurred and reported within one year after an Occurrence, regardless of fault. Coverage C excludes coverage for any insured, hired persons (such as employees), tenants injured on premises they normally occupy and persons injured while taking part in athletics; however, the “hired persons” exclusion may be eliminated by separate endorsement.

### **III. How to Read the Policy**

A. The Insuring Agreement. The heart of an insurance policy is the insuring agreement or “grant,” which contains the basic language in which the insurer commits to provide coverage. The standard form CGL policy contains an insuring agreement in which the insurer agrees to:

pay on behalf of the insured all sums which the insured shall become legally

*obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage even if the allegations of such suit are groundless, false or fraudulent ....*

The italics highlight the main sources of coverage disputes for policyholders. In particular, coverage disputes arising out of the insuring agreement often center on whether:

- The loss constitutes “bodily injury” or “property damage” within the meaning of the policy;
- The loss constitutes an “occurrence” under the policy; and
- The insured has become “legally obligated” to pay sums “as damages.”

**1. The Requirement of “Bodily Injury” or “Property Damage.”** Usually, the threshold issue that must be addressed is whether a third party actually sustained any “bodily injury” or “property damage”.

The insurer’s defense obligations turn on what the underlying plaintiff alleges, no matter if those allegations are “groundless, false or fraudulent.” The duty to defend is determined by comparing the allegations of the complaint to the scope of coverage under the policy. Most jurisdictions have case law that provides that an insurer must defend the insured under a complaint if the plaintiff alleged facts potentially within the policy’s coverage, assuming of course that the insurance provision in question contains language imposing liability on the insurer. Thus, regardless of the true facts as to whether the plaintiff has sustained any injury, if the underlying complaint contains such allegations, then “bodily injury” or “property damage” exists for the purpose of determining defense obligations.

Further, when the policyholder is seeking to be indemnified

for a settlement or an adverse judgment, the insurer does not have the right to determine in its own discretion whether the underlying plaintiff did in fact sustain “bodily injury” or “property damage.” Where a verdict of liability has been returned against the policyholder in the underlying case, coverage is determined by comparing the definition of “bodily injury” or “property damage” within the policy to the type of damage or injury for which the policyholder was found liable.

**2. The Requirement of an “Occurrence.”** Liability insurance policies typically define an “occurrence” as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” This definition implicates two issues: First, this language bars coverage as to certain kinds of intentional actions that cannot be deemed “accidental.” Second, the “occurrence” definition is the jumping off point for the “trigger of coverage” – i.e., the question of exactly what event must take place during the policy period to implicate the coverage of that policy, especially where the damage is a latent or progressive type.

**3. “Expected” or “Intended” Injury.** The language requiring an “occurrence” bars coverage where the conduct or event at issue does not constitute an “accident” that “is neither expected nor intended from the standpoint of the insured.” Although the conduct must be an “accident,” it need not arise as the result of a cataclysmic event. Rather, the “occurrence” definition includes situations where the event at issue is “a continuous or repeated exposure to conditions.”

With construction claims especially, insurers often contend that there is no “occurrence” because the installation of a particular component or construction of the building was intentional, not accidental. For coverage purposes, however, the focus is on whether the injury – e.g., adverse health effects or property damages – was intentional. Where the focus of the complaint is that a product or structure failed to function as intended – e.g., an HVAC system that failed to properly heat or cool or roofing system that

leaked – courts may not deem such an event a covered “occurrence” for some claims (such as mold) wherein the claim derives from an unwanted side-effect (the growth of mold) resulting from the non-functioning of a building component, coverage may be available.

The language barring coverage for “expected” or “intended” injury does mean that a policyholder may be deprived of coverage if it intentionally conducted itself in a manner that was “practically certain” to cause injury or damage. This requires a much higher level of “expectation” that injury will result than the negligence standard that is applied in most tort cases; otherwise, coverage for virtually every negligence claim would be negated by the “expected or intended” language.

Importantly, at the duty to defend stage, an insurer must defend the *entire* lawsuit as long as at least one claim is within or potentially within the policy coverage. Thus, where a suit joins claims of negligence and intentionally inflicted injury, the insurer usually has a duty to defend the entire suit. And, because the insurer inherently has a conflict of interest in such a situation (if liability is found in the underlying suit on the intentional tort, then coverage could be negated) the insurer may be required to fund independent defense counsel.

**4. The “As Damages” and “Suit” Requirements.** The standard insuring agreement provides indemnity, *not* for “claims,” but for “sums which the insured shall become legally obligated to pay as damages.” This language has been the source of a variety of coverage issues.

First, where an insured settles a claim before any lawsuit is filed, insurers can attempt to deny coverage on the grounds that the settlement is not a sum that the “insured is legally obligated to pay as damages.” This argument has arisen most frequently in connection with environmental claims, where policyholders often find themselves engaged in governmental regulatory proceedings well in advance of any formal lawsuit.

Second, even where a suit has been filed, insurers also sometimes attempt to decline

to reimburse policyholders for sums they have incurred in remediation or similar compliance with injunctive remedies. The applicable case law in most jurisdiction provides that, at least where remediation expense or other equitable remedies are the result of formal court proceedings, they qualify as insured sums under the “as damages” language.

Relatedly, insurers have relied on the term “suit” in the defense clause to decline paying legal fees incurred before the onset of formal litigation. Especially in environmental claims – where lengthy regulatory proceedings pre-date the filing of a lawsuit – this rule can impose considerable litigation expense on the insured.

**5. Exclusions.** The typical insurance policy contains a number of standard-form exclusions within the policy jacket. In addition, exclusions may take the form of an endorsement – i.e., an amendatory document – appended to the jacket. Some endorsements may be standard form while others may be “manuscript” – for example, if the policyholder’s application or loss history reveals that it has been subject to particular types of claims, the insurer may endorse the policy with a specially drafted exclusion to bar coverage for such claims.

Generally speaking, the exclusions are intended to complement the requirement that coverage is available under a liability policy only where some sort of third-party property damage or bodily injury has occurred. Where the only injury is to the insured’s own product or work – e.g., a building component that the insured supplied or structure that the insured built – then the exclusions bar coverage. Where, however, the insured’s product or work caused damage to some other property, coverage generally is available, at least where the third-party damage did not arise from a failure of a product to function in the manner intended. For example, where an insulation product damages other property by emitting asbestos fibers, then coverage is available, but if pipes freeze and burst as a consequence of the insulation not working, coverage may not be available.

Typically, component suppliers and subcontractors may have more success

in recovering for property damage claims under liability policies in the face of the business risk exclusions because their “work” or “product” is only a part of the entire structure. Depending upon the facts and policy language, however, general contractors also may be able to avoid the application of the business risk exclusion.

#### **IV. Important Endorsements**

One of the most important ways a real estate professional can add value to a real estate transaction or in asset management is knowing which endorsements are available to tailor the appropriate coverage to specific anticipated risks, and to advise clients on which endorsements may not be cost-effective or appropriate for a specific asset or transaction.

**A. Additional Insured and Named Insured Endorsement.** The definition of “persons insured” under most policies sets forth the “named insured” on the declaration page of the policy. Consequentially, unless an appropriate endorsement is obtained, the coverage accorded by the policy will be solely for the benefit of the “named insured.” Since parties such as landlords and lenders routinely require tenants and borrowers to cover the landlord or lender on the tenant or borrower’s insurance policies, usually the party carrying the insurance must obtain the appropriate insurance by way of an endorsement naming the added party as an “additional” or “named” insured.

There is a great deal of uncertainty regarding the difference between “additional” insured versus “named” insured. This confusion is exasperated by the lack of case law and statutes on this subject. It is generally assumed, however, that a named insured will receive full protection under the policy as if the party actually procured the insurance. As such, a landlord who is a “named” insured on a tenant’s policy expects more protection than if the landlord were merely named as an “additional” insured. It is unclear, however, if when a party is added as a named insured, that party assumes additional burdens as well, such as the requirement that the party comply with policy provisions (which can

include the payment of premiums and maintenance obligations) in order to receive the protections afforded by the policy.

The prevailing conventional wisdom in the insurance industry is that if a party is an “additional” insured, that party stands behind a “named” insured in recovery. In other words, the named insured recovers first and only if there are sufficient funds left under the policy are the additional insureds entitled to a recovery.

Often, there is no premium for adding a party as an additional insured. There is normally, however, an additional premium if parties are added as named insureds because of the perceived resulting increased scope of coverage.

**B. Cross-Liability.** Under most liability policies, one insured cannot recover under the policy for injury caused by another insured. In the absence of this endorsement, an insured cannot recover for loss resulting from negligence by another party who is a named insured on the policy. A cross liability endorsement allows for recovery by one insured for the negligence of the other. It should be noted, however, that some policies contain what is known as a “Severability Of Interest” clause, which serves the same purpose.

**C. Fire Legal Liability.** Fire legal liability coverage can be secured either as a separate policy or as an endorsement to a standard liability policy. Fire legal liability insurance insures a party against damage to another person resulting from a fire started by the negligence of the insured. For example, if one tenant in a multi tenant building negligently starts a fire that destroys the premises of another tenant, this endorsement will insure the negligent tenant’s actions. Under a standard liability insurance policy, the negligent action would not be insured.

**D. Contractual Liability.** This endorsement is intended to provide coverage for claims of bodily injury or property damage under all contracts entered into by the insured (if a broad form of this endorsement is obtained), or only liability under particular contracts (if a limited form endorsement is obtained). For instance, many form leases

require tenants to obtain a contractual liability endorsement to insure the tenant’s indemnity obligations and other insurable provisions of the lease. However, a contractual liability endorsement may not completely insure a party’s indemnity obligations if the indemnifying party to indemnify another party for more than personal injury, property damage or other insurable claims.

**E. Boiler and Machinery.** Most liability and casualty insurance policies exclude many losses relating to machinery or boiler breakdowns. This endorsement is necessary to adequately insure an asset that has machinery and boilers.

**F. Products Liability.** A products liability insurance endorsement should be obtained if manufacturing activities are undertaken or when a party is engaged in the sale of merchandise.

**G. Dram Shop.** If alcoholic beverages are to be served on the premises, a so-called “dram shop” endorsement should be obtained that covers the insured for accidents caused by intoxicated patrons. Obtaining this endorsement is especially important for businesses selling alcohol since the normal CGL policy specifically excludes claims resulting from the sale of alcoholic beverages in certain circumstances.

**H. No Coverage for Work Performed.** One other important characteristic of the CGL is that liability coverage for property damage for work performed on real property by the insured, or any contractors or subcontractors working directly or indirectly on behalf of the insured, is excluded. This exclusion also extends to restoration, repair or replacement of any property due to the incorrect performance of work performed by, or on behalf of, the insured (e.g., work resulting from construction warranties). Thus, property owners who perform work on behalf of tenants in the initial buildout or subsequent alteration of space, or who restore or repair damaged or destroyed premises, must thus obtain separate coverage either through endorsement or a separate policy for these construction situations to be insured.

**I. Business Risk Exclusion.** Standard liability policies have a series of interrelated exclusions barring coverage for the policyholder’s “own product” and “own work,” “loss of use,” design defects, “repair and replacement,” “impaired property,” and product recall or withdrawals. These exclusions are often loosely grouped under the rubric of “business risk exclusion,” although sometimes that term is used to refer to a particularly worded exclusion barring coverage for certain type of “design defect” claims.

## **V. Other Important Insurance Issues**

**A. Ensuring Adequate Coverage.** Coverage and coverage amounts that may have seemed adequate and reasonable at the time they were issued may become inadequate for a variety of reasons such as new developments in insurance law or because of a run up in property values. As such, it is imperative that parties contemplating long-term agreements (such as a ground lease) provide some mechanism to reassess the insurance program to ensure that all coverage is up to date and for adequate amounts.

### **B. Umbrella and Blanket Policies.**

**1. “Umbrella” Policies.** An umbrella liability insurance policy provides increased limits of liability insurance. Umbrella policies normally specifically identify and require the insured to keep in force, an underlying liability insurance policy that includes provisions for payment of legal defense costs. Because the right to defense is one of the most expensive elements in the standard Commercial General Liability insurance policy, an umbrella policy with high limits is often substantially less expensive than the underlying basic coverage.

**2. “Blanket” Policies.** Blanket policies are single policies that cover multiple locations. Generally, blanket insurance is appropriate so long as required coverage is not decreased as a result of the use of the blanket policy.

**C. Deductibles.** Most insurance policies contain some form of deductible pursuant to which the insured party must bear some portion of the cost of any claim. Since the amount of a deductible can end up being assumed by a party for whom coverage is being obtained (such as a lender or landlord), it is imperative that these parties scrutinize insurance policies since these costs may be picked up by the party for whom coverage is being obtained if the primary insured refuses or is unable to pay the costs of the deductible. Prudent industry professionals should include specific limitations on deductible amounts when insurance is obtained by another party for themselves or their clients. These can be tied to net worth and net current asset tests or other indicia of financial capacity of the party obtaining insurance.

## **VI. Environmental Insurance**

**A. Pollution Exclusion.** The Comprehensive Coverage Policy form contains a pollution exclusion; however, the policy language applying to the pollution exclusion provides that the exclusion will not apply to “sudden and accidental discharge, dispersal, release or escape of hazardous materials.” This “sudden and accidental” exception to the pollution exclusion has been extensively litigated and ultimately interpreted by the California courts to apply to almost all types of hazardous material related claims (Aydin Co. v. First State Insurance Company [1998] 18 Cal.4th 1183, 1186-1187, 77 Cal.Rptr.2d 537, 538.) To exasperate the situation for insurance companies, California courts have held that because the “sudden and accidental” exception negates the pollution exclusion that focuses on a “discharge” of pollutants (as opposed to the resulting environmental damage caused by the discharge), all resulting damage is considered covered. In order to close this loophole, the 1986 version of CGL policies does not include the “sudden and accidental” exception and, indeed, implements “absolute pollution exclusions.” In addition, the CGL specifically excludes from coverage costs incurred in connection with government ordered or requested cleanup of hazardous materials.

While the new pollution exclusion of the CGL appears on its face extremely broad, the issue of certain bodily injury or property damage resulting from hazardous materials are covered has been extensively litigated. For instance, some cases have held that coverage can be triggered when the damage is caused by both covered and non-covered occurrences. In addition, some cases have found that coverage can be triggered through a “personal injury endorsement” available in some CGL policies.

**B. ELI Policies.** Responding to the restrictive language of the CGL, the insurance industry has promulgated a broad array of Environmental Liability Insurance (“ELI”) policies for parties desiring environmental insurance. Currently, most ELI policies are what are known as “manuscript” policies, which means that each policy is drafted separately and no common policy form or standard language has been developed in the industry. As such, it is vital that real estate professionals work closely with their advisors to ensure that any ELI policy obtained covers the insured adequately at an acceptable price.

**C. Pollution Legal Liability.** Pollution Legal Liability (“PLL”) policies are intended to protect owners and operators against environmental liabilities that emanate covered locations specified in the policy, result from the transportation of the insured’s product or waste, arise from the disposal of waste at a non-owned location and may cover off-site pollution resulting from conditions on the insured location. Costs of current cleanup efforts and costs related to known contamination are not covered by PLL policies, however.

For instance, while known liabilities may not be covered, either before or after a remediation plan is formulated, a party may want to obtain a PLL policy for unknown or future conditions.

In addition to coverage for buyers and sellers of real property, some insurers offering PLL insurance policies will specifically design PLL policies to support environmental indemnities.

PLL policies usually include coverage for

liability for bodily injury, property damage, and cleanup costs. They may also include business interruption coverage.

**D. Property Transfer.** Property Transfer policies are specifically tailored for real estate transactions. These policies usually provide coverage for Pollution Legal Liability and Cost Cap Coverage. Like PLL policies, Property Transfer policies provide coverage for pre-existing, unknown contamination. Some may also provide coverage for known contamination below reportable levels, or even levels above regulatory limits but permitted by a governmental agency.

**E. Cleanup Cost Cap.** Cleanup Cost Cap policies apply to a specific property undergoing cleanup, and protect against cost overruns for known contamination resulting from the discovery of additional amounts or newly discovered contaminants, or changes in regulatory requirements.

These policies commonly exclude costs of legal defense, negotiations with governmental agencies, regulatory fines and penalties, radioactive contamination, asbestos contamination, and contractual liability.

In general, Cleanup Cost Cap policies provide the following coverage:

- (i) Cleanup costs, as defined in a remediation study, that are above the anticipated cost of cleanup.
- (ii) Cleanup costs at, adjacent to, or from the defined site location.
- (iii) Off-site cleanup costs incurred in the cleanup of pollutants that originated from the cleanup at a covered location pursuant to the Remedial Action Plan.
- (iv) Change orders required by governmental authorities that are incurred during the policy term.
- (v) Additional, optional coverage for new-found contamination discovered in the course of performing cleanup pursuant to the Remedial Action Plan at a covered location.

The following features characterize Cleanup Cost Cap insurance policies:

- (i) The policy attaches over a prescribed self-insured retention, which is equal to the expected cost of cleanup plus a "buffer layer."
- (ii) Premium discounts are available if the insured shares in the cost overruns.
- (iii) \$70 million per loss and aggregate limits are available.
- (iv) The insured may select to cover professional liability.
- (v) Multi-site programs are usually available.
- (vi) Terms of ten years or more are usually available.
- (vii) Preliminary premium indications can be provided within 24 hours based on the insured's selection of estimated cleanup costs, coverage limitations, the buffer layer, co-insurance, etc.

This type of insurance is attractive to landowners and prospective owners, lenders, government agencies, and investors. Cleanup Cost Cap insurance permits landowners to set reserves and makes attracting buyers easier. Prospective owners are protected against a financial loss that could damage their operations. This type of insurance helps to assure lenders that borrowers will be able to repay the loan. Government agencies have assurances that if the costs exceed the budgeted amounts, insurance is available to complete the remediation. Finally, contaminated property can become a good investment in conjunction with this type of insurance.

**F. Secured Lender.** Secured lender policies (sometimes called "Secured Creditor Impaired Property Policies") are specifically designed to protect lenders in the event of default owing to contamination on the insured property. They typically provide coverage for the lesser of (1) the loan balance due, or (2) the cleanup cost. They may also provide third party liability coverage for bodily injury, property damage

and cleanup costs resulting from onsite and off-site conditions; however, known, existing contamination is not covered by these policies.

### **G. Careful Review of Policies Critical.**

As noted, there is little in the way of standardization for most environmental insurance products available in the market today. As such, even relatively sophisticated insurance brokers may be unfamiliar with the available insurance products. This can require careful canvass of available brokers to find a broker with appropriate skill. Even so, the insured and its counsel should carefully review the insurance policy to ensure that the parties' needs are taken into account. The following are additional issues that may arise in connection with a review of environmental policies:

- (i) Frequently, the limit of liability and deductible are unclear, which means that the declarations page must be rewritten. The same is true for the discussion of the deductible in the insuring grant.
- (ii) Cleanup cost insurance should include a section concerning cost overruns for discovery of pollutants that are not identified in the Remedial Action Plan.
- (iii) Frequently, the cancellation clause should be changed to "non-cancelable." For example, if a client is the seller and the buyer agrees to retain the environmental liabilities, then what happens if the buyer sells the property? When a property is sold and the policy is transferred to another party, often the new buyer has named insured status, which affords the new buyer the right to cancel the policy. If this occurs, it leaves the previously named insured, the original buyer, and not the insured, responsible for paying past indemnities. Because the whole purpose of environmental liability insurance is to have the insurer pay (since the party assuming the liability may be unable to pay for the cleanup or liability), the clause should be non-cancelable.

(iv) The deductible language should be clear.

(v) The definition of "insured" usually

includes "affiliated companies," which may be problematic. For example, if the insured party was the seller and the buyer is a company that purchases impaired properties that agreed to assume all the environmental liabilities, this definition could cause the policy limits to be diluted by other losses, if the company's affiliates also make claims under the policy.

(vi) Frequently, a buyer who is accepting the environmental liabilities in return for a reduction in the purchase price wants the policy to cover a number of sites, which also can dilute coverage.

(vii) Often, insurers propose loss limits for renewal provisions that are too low. Parties should request a loss limit of at least 60 percent. Also, the renewal provision often contains a number of limitations, which will be out of the insured's control, that should be deleted.

(viii) The policy should explicitly refer to the environmental indemnity agreement between the client and the other party.

(ix) The insured party should request a "Restatement of Aggregate Limits" premium charge, and negotiate with the insurers the wording of a provision that reinstates aggregate limits in the event they become exhausted.

(x) The "Additional Insured Endorsement" should be reviewed carefully. For example, if the client is the seller and the buyer is the insured, the attorney should make certain that the seller's coverage is not restricted to liability arising out of the buyer's management or ownership of the property. As an additional insured, the client should be indemnified for all liabilities, not just those resulting from the buyer's management or ownership.

(xi) The definition of the term "pollution conditions" should be defined to include any conditions naturally present or occurring in the environment.

## **VII. MOLD**

**A. Mold Exclusions.** Starting in approximately 2002, many liability insurers inserted exclusions in their general liability

policies for the express purpose of precluding insurance for mold claims. For example, ISO developed its form "Fungi or Bacterial Exclusion," No. CU 21 27 04 02, effective May 1, 2002, which bars coverage in CGL policies for:

(i) "Bodily injury" or "property damage" that would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

(ii) Any loss, cost or expense arising out of the abating, test for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the affects of, "fungi" or bacteria, by any insured or by any other person or entity.

The endorsement defines "fungi" as "any type or form of fungus, including mold or mildew or any mycotoxin, spores, scents or by-products produced or released by fungi.

In the alternate to completely barring coverage for such claims, the ISO also drafted its Endorsement CG 24 25 04 02, called "Limited Fungi or Bacteria Coverage." That endorsement provides for separate aggregate limits of liability for mold claims, presumably at an increased premium above the standard liability coverage. In addition, coverage for mold may be available under separately purchased Pollution Legal Liability Policies, again for an additional premium.

Policyholders should not, however, assume that merely because their policy was issued during or after 2002 it contains an exclusion for mold claims. The ISO form, for example, is an "endorsement" – i.e., a separate rider that is supplemental to the main policy form. There may be situations in which the policy was issued without the exclusion. As is the case in virtually every situation involving questions of insurance coverage, the starting point of any analysis is to read the policy.

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