



# CURRENT AND EMERGING INSURANCE COVERAGE ISSUES

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“Advocates For Policyholders in Insurance Coverage Disputes”

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## **Occurrence/Trigger**

➤ **Occurrence**

**“accident including repeated exposure to conditions which results in bodily injury or property damage neither expected or intended from the standpoint of the insured”**

*April 5, 2006*



## **Occurrence/Trigger**

- **Occurrence based CGL Policies**
  - **Requires PD/BI during the policy period**

*“What is Trigger?”*

*April 5, 2006*



## **Occurrence/Trigger**

- **When is “trigger” an issue**
  - **Continuing damages or repeated damages from same causative event**
    - **Asbestos bodily injury and other toxic torts**
    - **Environmental property damage**
    - **Construction defect property damage**

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## **Occurrence/Trigger (cont.)**

### **➤ Effect**

- **Limits of Liability**
  - **Possibility of “stacking” multiple policies from consecutive years**
- **Deductible/SIRs**
  - **Allocation to multiple policies may require all deductibles**

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## **Occurrence/Trigger (cont.)**

### **➤ Applicable Trigger**

- Exposure**
- Manifestation**
- Injury in fact**
- Continuous**

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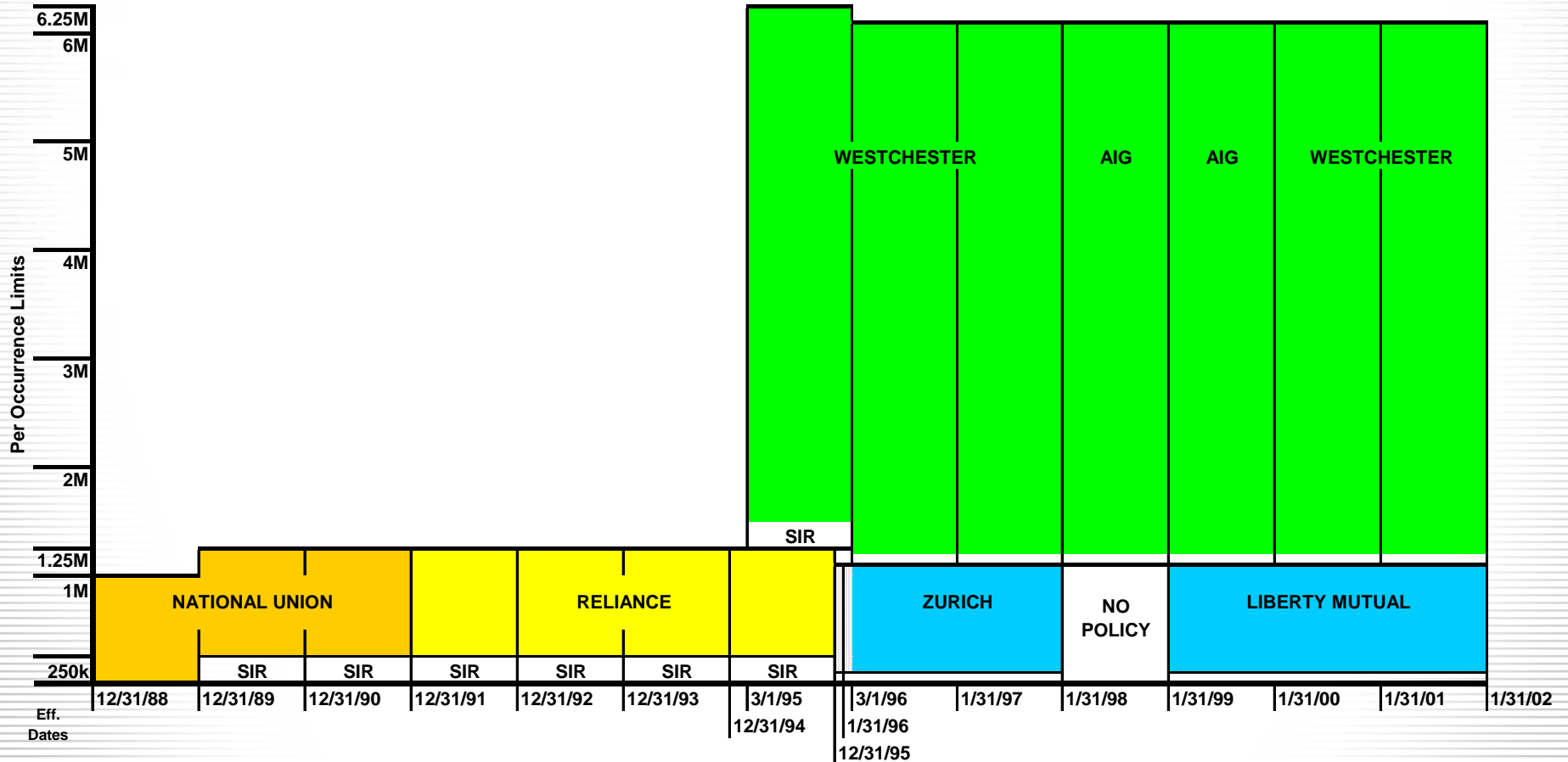
## **Occurrence/Trigger (cont.)**

- **Bodily Injury v. Property Damage**
  
- **Choice of Law**

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## Occurrence/Trigger (cont.)



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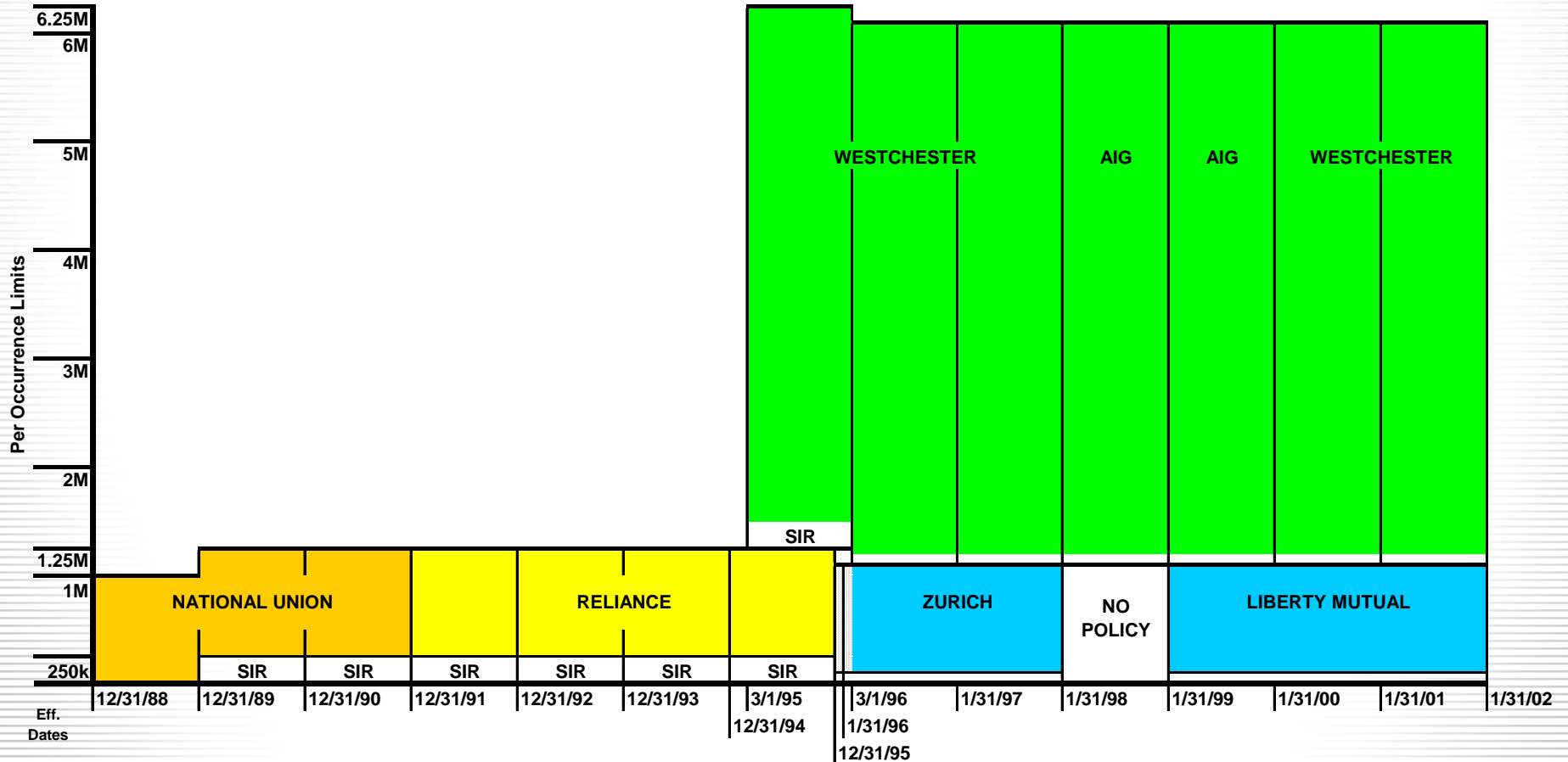
## **Occurrence/Trigger (cont.)**

- **Allocation**
  - **All Sums/Pick 'n Choose**
  - **Pro-rata**

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## Occurrence/Trigger (cont.)



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## **Occurrence/Trigger (cont.)**

- **Insurer Reaction**
  - ▣ **Deemer Clauses**
  - ▣ **Cumulation of Limits**
  - ▣ **Batch Clauses**

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## Occurrence/Trigger (cont.)

➤ **Sample Deemer Clause**

**“The definition of Occurrence is amended to include the following provision:**

**In the event of continuing or progressive bodily injury or property damage over any length of time, such bodily injury or property damage shall be *deemed to be one occurrence* and shall be *deemed to occur only when* such bodily injury or property damage *first commenced.*”**

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## **Coverage for Construction Issues**

- **Is faulty workmanship an occurrence?**
- **Occurrence**  
**“accident including repeated exposure to conditions which results in bodily injury or property damage neither expected or intended from the standpoint of the insured”**

*cf.* **American Girl, Inc.** and **L – J, Inc.**

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## **Coverage for Construction Issues (cont.)**

- **“Property damage means:**
  - (1) physical injury to tangible property, including all resulting loss of use of that property...**
  - (2) loss of use of tangible property that is not physically injured...”**

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## **Coverage for Construction Issues (cont.)**

➤ **Business Risk Exclusions**

**“This insurance does not apply to:**

**\* \* \***

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

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

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### Coverage for Construction Issues (cont.)

- **Damage to that particular part:**
  - **Eliminates coverage for property damage to:**
    - **That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the property damage arises out of those operations**
    - **That particular part of any property that must be restored, repaired or replaced because your work was incorrectly performed on it**

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### Coverage for Construction Issues (cont.)

- **Damage to that particular part (cont.)**
  - **Courts have split**
    - **Excludes entire project**
    - **Excludes damage only to the piece of the work actually worked on which results in damage to other non-excluded work**

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## **Coverage for Construction Issues (cont.)**

- **Under “impaired property” exclusion the insurance coverage does not apply to:**

**“Impaired property” or property that has not been physically injured, arising out of:**

- 1. a defect, deficiency, inadequacy or dangerous condition in “your product” or “your work;” or**
- 2. a delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.**

**This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.**

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## **Coverage for Construction Issues (cont.)**

- **“Impaired property” is defined as:**
  - 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;**

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## **Coverage for Construction Issues (cont.)**

**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.**

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## **Coverage for Construction Issues (cont.)**

- **Impaired property (cont.)**
  - **AOL case**
    - **AOL 5.1 inserted into computers**
    - **Class action claims damage to data, programs and operating systems**
    - **No property damage**
    - **Restoration**

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## Coverage for Indemnity Agreements

“This insurance does not apply to:

\* \* \*

### Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the *assumption of liability* in a contract or agreement.

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## Coverage for Indemnity Agreements (cont.)

This exclusion does not apply to liability for damages:

- (1) Assumed in a contract or agreement that is an *“insured contract,”* provided the “bodily injury” or “property damage” *occurs subsequent to the execution* of the contract or agreement; or
- (2) That the insured would have in the absence of the contract or agreement.”

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## Coverage for Indemnity Agreements (cont.)

- “Insured Contract” means:
  - (a) A contract for a lease of premises;
  - (b) A sidetrack agreement;
  - (c) Any easement or license agreement;
  - (d) An obligation, as required by ordinance, to indemnify a municipality;
  - (e) An elevator maintenance agreement;
  - (f) That part of any other contract or agreement under which you *assume the tort liability of another party* to pay for “bodily injury” or “property damage

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## Personal and Advertising Injury

- Trigger of coverage is different
  - Date of offense is trigger not date of injury

“This insurance applies to personal and advertising injury caused by an offense arising out of your business but only if the *offense was committed* in the coverage territory *during the policy period*”

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## **Personal and Advertising Injury (cont.)**

- **Intentional acts can be covered**
  - **No restriction that damage or injury be neither expected or intended from the standpoint of the insured**

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### Personal and Advertising Injury (cont.)

➤ **Defense provided under personal and advertising injury coverage:**

- **Janitors locked in during night shift at Target**
- **Sheriffs threaten/beat/jail/violate civil rights of arrestee**
- **Prosecute infringement with knowledge that patent invalid**
- **Denial of subdivision approval by municipality**
- **Forcing drug test upon employee without proper motive**
- **Bank's bad credit reference**
- **Faxing unsolicited DirecTV advertisements**

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## Personal and Advertising Injury (cont.)

“ ‘Personal and advertising injury’ means *injury*, including consequential ‘bodily injury’, arising out of one or more of the following offenses:

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## **Personal and Advertising Injury (cont.)**

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

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## **Personal and Advertising Injury (cont.)**

- f. The use of another’s advertising idea in your ‘advertisement’; or**
- g. Infringing upon another’s copyright, trade dress or slogan in your ‘advertisement’.”**

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## **Additional Insured Issues**



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## **Additional Insured Issues**



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## Emerging Additional Insured Issues

### CG 20 10 11 85

- “WHO IS AN INSURED is amended to include as an insured the person or organization shown in the Schedule, but only with respect to *liability arising out of ‘your work’* for that insured by or for you.”

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## Emerging Additional Insured Issues (cont.)

### CG 20 10 07 04

- “A. Section II – WHO IS AN INSURED is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to *liability* for ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ *caused in whole or in part by:*
  1. Your *acts or omissions*; or
  2. The acts or omissions of those acting on your behalf; in the *performance of your ongoing operations* for the additional insured(s) at the location(s) designated above.

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## **Emerging Additional Insured Issues (cont.)**

### **CG 20 10 07 04 (cont.)**

**With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:**

**This insurance does not apply to ‘bodily injury’ or ‘property damage’ occurring after:**

- 1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or**

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## **Emerging Additional Insured Issues (cont.)**

### **CG 20 10 07 04 (cont.)**

**2. That portion of ‘your work’ out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.”**

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## **Emerging Additional Insured Issues (cont.)**

### **Broker Issues**

- **Know contractual insurance requirements**
- **Know your insured's policy**

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## **Environmental Coverage**

### **➤ Specific Exclusions**

- Asbestos**
- Silica**
- Mold/Fungi**
- Lead-based paint**

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## **Environmental Coverage (cont.)**

### **➤ Pollution Exclusions**

- None**
- Qualified Pollution Exclusion (1973) a/k/a “Sudden & Accidental Pollution Exclusion**
- Absolute Pollution Exclusion (1986)**
- Total Pollution Exclusion (late 1990’s)**

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## **Environmental Coverage (cont.)**

### **➤ Qualified Pollution Exclusion**

#### **■ This insurance does not apply:**

**(f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.**

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### Environmental Coverage (cont.)

- **Absolute Pollution Exclusion**
  - **This insurance does not apply:**
    - f.(1) **“Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:**
      - (a) **At or from premises you own, rent or occupy;**
      - (b) **At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;**
      - (c) **Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or**

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## **Environmental Coverage (cont.)**

- **Absolute Pollution Exclusion (cont.)**
  - (d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:**
    - (i) if the pollutants are brought on or to the site or location in connection with such operations; or**
    - (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.**
  - (2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.**

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## **Environmental Coverage (cont.)**

### **➤ Absolute Pollution Exclusion (cont.)**

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

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## **Environmental Coverage (cont.)**

### **➤ Total Pollution Exclusion**

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## **Healthcare Provider Coverage Hot Topics and Bridging the Gaps**

### **Key Policies**

- **Professional Liability/claims made**
  - **Medical Incidents (involving the provision of professional services)**
- **CGL/occurrence based**
  - **Bodily injury or property damage caused by an occurrence (or accident)**
  - **Professional services typically excluded**
  - **Injuries to patients and/or residents may be excluded**

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## **Healthcare Provider Coverage Hot Topics and Bridging the Gaps**

### **Key Policies (cont.)**

#### **➤ D&O**

- Intended to cover wrongful acts of directors and officers of healthcare facility in the course of performing their duties for the facility**
- Maintenance of Part C coverage for the healthcare facility may be prudent in current environment (i.e. lawsuits by doctors for loss of privileges)**

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# **Healthcare Provider Coverage Hot Topics and Bridging the Gaps**

## **Hot Topics**

- **“Medical Incidents” – What are they?**
  - **Medical malpractice clearly covered**
  - **Incidents involving sexual misconduct sometimes fall within the meaning of “medical incident”**
    - **Dentist case**
  - **Incidents involving improper billing practices sometimes assessed as “medical incident”**
    - **Whitehall Nursing Home case (billing drugs above cost)**
    - **Hampton Medical Group case (fraudulent billing claims by HMO)**

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## **Healthcare Provider Coverage Hot Topics and Bridging the Gaps**

### **Hot Topics (cont.)**

- **Shared liability – Hospital v. physician**
  - **Non-issue where hospital wants to control litigation and voluntarily “cover” physicians**
  - **If hospital does not “cover” – hospital policy likely to be primary unless competing “primary insurance provisions”**

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## **Healthcare Provider Coverage Hot Topics and Bridging the Gaps**

### **Potential Gaps to Look Out For**

#### **➤ Gaps**

- **Injury to patient unrelated to “medical incident”**

- **Professional liability/CGL**

- “This insurance does not apply to ‘bodily injury’, ‘personal injury’ or ‘advertising injury’ sustained by a person while: (1) Your patient; or (2) At premises (including while entering or leaving the premises) for the purposes of receiving health care or service.”**

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## **Healthcare Provider Coverage Hot Topics and Bridging the Gaps**

### **Potential Gaps to Look Out For (cont.)**

- **Gaps (cont.)**
  - **Purchases/Laterals/Retirees**
    - **Retroactive dates**
    - **Tail coverage**

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## **Missing Insurance Policies**

### **Reconstructing Policy Coverage**

- **The importance of old policies**
  - **Especially in cases seeking coverage for gradually occurring bodily injuries and property damage (i.e. exposure to toxic substances or discharge of pollutants or contaminants)**
  - **Instruct clients to keep all policies**

*April 5, 2006*



## **Missing Insurance Policies**

### **Reconstructing Policy Coverage (cont.)**

- **Old policies are often lost or destroyed**
  - **Missing policies (existence, terms and limits) may be proven by secondary evidence, such as:**
    - **Correspondence with insurance company**
    - **Correspondence with brokers**
    - **Invoices for premium**
    - **Cancelled checks showing premium payment**
    - **Certificates of insurance**
    - **Claims files re: other claims under the policy**
    - **Policy renewal information**

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## **Missing Insurance Policies**

### **Reconstructing Policy Coverage (cont.)**

- **Burden of proof is on insured to prove existence and contents of policies (including limits)**
- **Once coverage is established, burden of proof shifts to insurer re: exclusions**

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## D&O Coverage

- **Claims made coverage**
- **3 Separate components:**
  - (a) Part A – covers directors and officers directly for loss, including defense**
  - (b) Part B – reimburses corporation for money paid as indemnification to insured directors and officers**
  - (c) Part C – covers the corporation itself, even if no director or officer is named as a defendant (“entity coverage”)**

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## **Emerging D&O Coverage Issues**

### **➤ Severability Issue**

- **Request policy language ensuring that innocent directors and officers will be severed from effects of a policy rescission**

***cf. Cutter & Buck, Inc. v. Genesis Ins. Co., 306 F.Supp.2d 988 (W.D. Wash. 2004) (rescission permitted as to all directors and officers including innocent directors and officers where signer of application misrepresented information in the application);***

***Federal Ins. Co. v. Homestore, Inc., 2005 WL 1926483 (9<sup>th</sup> Cir. 2005) (policy rescinded as to all insureds including innocent insureds where Cal. Ins. Code provides for rescission based on misrepresentation unless contract provides otherwise).***

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## **Emerging D&O Coverage Issues (cont.)**

- **Shared Limits Issue**
  - **Require policy language that allocates policy limits exclusively for the protection of the directors and officers vs. sharing limits with the corporation**

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## **Emerging D&O Coverage Issues (cont.)**

- **Bankruptcy Issue**
  - **Prevent D&O policy from being considered an asset of the corporate estate**
  - **Require a Priority of Payments provision which puts payments for protection of individual directors and officers ahead of payments for protection of company (pre-set allocation of limits)**
  
- **Advancing Defense Costs Issue**
  - **Require policy language that specifies *when* the insurer must reimburse the directors and officers for defense costs incurred**

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### Emerging D&O Coverage Issues (cont.)

- **Insured v. Insured Exclusion**
  - ▣ **Concept is that there should be no coverage when an insured sues itself to recoup consequences of business mistakes**
  - ▣ **In bankruptcy context, directors and officers may face claims from creditors, trustees, etc.**
  - ▣ **Coverage for directors and officers may hinge on specific language of exclusion:**
    - a) **Exclusion for any claim “brought by or on behalf of an insured organization” → excludes trustee claims from coverage**
    - b) **Exclusion for any claim “brought by an insured organization” → includes trustee claims within coverage**
    - c) **Carve-out for trustee claims**

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## **Emerging D&O Coverage Issues (cont.)**

➤ **Defining the “Claim”**

- **SEC investigation and cease and desist order constitutes a “claim” under the D&O policy triggering defense coverage**

**See Minuteman Int’l, Inc. v. Great American Ins. Co.,  
2004 WL 603482 (N.D. Ill. 2004)**

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### Emerging D&O Coverage Issues (cont.)

- **D&O Coverage – Part D**
  - **Coverage available for directors and officers while serving as director or officer of an Outside Entity (e.g. nonprofit entity)**
  - **Policy may have separate insuring agreement for Outside Entity coverage**

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## **EPLI Coverage**

- **Employment-related claims typically excluded from CGL coverage**
- **EPLI offered in various forms:**
  - **Endorsement to D&O Policy**
  - **Endorsement to CGL Policy**
  - **Stand Alone Policy**
- **“Claims made” coverage (including CGL endorsements)**

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## **EPLI Coverage (cont.)**

- **EPLI covers “Wrongful Acts” of employers, including:**
  - **Wrongful Termination**
  - **Sexual Harassment**
  - **Employer Discrimination (Ex. Age, Race, Disability, Gender)**
  - **Retaliation (Ex. Whistle-blowing)**
  - **Libel/Slander**
  
- **EPLI applies to past, present and prospective employees (and possibly to third parties such as customer, vendor, service provider, or business invitee)**

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## **EPLI Coverage (cont.)**

- **EPLI Common Exclusions**
  - **Punitive damages**
  - **Intentional acts**
  - **Personal profit**
  - **Statutory violations (ERISA)**

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## **EPLI Coverage (cont.)**

- **EPLI Coverage Denials**
  - a. **Lack of Notice**
    - 1. **Circumstances that give rise to a “claim”**
    - 2. **Notice of “claim”**
  - b. **Material Misrepresentations/Failure to disclose information (rescission of policy/reimbursement of fees to insurer)**
  - c. **Punitive damages (state specific)**

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## **Anatomy of a DJ Action**

- **DJ actions seek a judicial declaration of the rights and obligations of the parties.**
- **DJ actions are pursuant to statute and may be brought in Federal Court (Federal Declaratory Judgment Act) or State Court.**

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## **Anatomy of a DJ Action (cont.)**

- **Typically brought by insured when insurer denies coverage and underlying claim is pending**
- **Alternative for insured is to sue insurer for breach and seek damages**
- **Viability of DJ action: Not affected by no-action clause in policy**
- **Can be brought to resolve coverage issues among multiple insurers**

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## **Anatomy of a DJ Action (cont.)**

➤ **Conditions for DJ:**

- 1. Party seeking declaratory judgment has an interest, legal or equitable, as to party's rights or other legal relations;**
- 2. There is actual bona fide and substantial question or issue in dispute or substantial uncertainty which requires settlement;**
- 3. Even if alternate procedure exists, court is of opinion that party should be allowed to proceed with claim for declaratory judgment.**

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## **Anatomy of a DJ Action (cont.)**

### **➤ Procedures for DJ:**

**■ Requires that all persons who have interest in subject matter that is direct, immediate, and adverse to interests of one or more of the plaintiffs or defendants shall be made parties to DJ action or shall be given reasonable notice thereof.**

**■ Include certificate in complaint stating all interested persons have been joined as parties or given notice.**

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## **Anatomy of a DJ Action (cont.)**

- **Include all necessary and indispensable parties**
- **Typically, attorneys' fees are not awarded to prevailing party absent an applicable statutory provision (*cf.* New York/Florida rules)**

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## **DJ Action - Strategy**

- **Choice of Law/Conflicts of Law**
- **Insurance coverage law is state specific**
- **Specific state's law may be outcome determinative**

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## **DJ Action Strategy - Example**

- A. Policyholder in NJ**
- B. Insurer in Illinois**
- C. Broker in NY**
  - **NJ law on issue favors policyholder**
  - **Illinois law on issue favors insurer**
  - **Conflicts of Law – place of contracting v. most significant relationship test**

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