

*Casualty Agents Only*

# Errors & Omissions Insurance

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# Introduction

Errors and omissions and professional liability insurance provides important liability protection to professionals. It covers claims for damages that are not covered by other liability forms. Through the purchase of errors and omissions insurance, the professional is protected from the risk of financial loss due to errors, acts, omissions or negligence in the rendering of professional services.

The liability insurance environment is rooted in our litigation system. The agent who offers this insurance must be familiar with the legal concepts, legal terms and court decisions affecting liability insurance. The agent must also understand the elements of the insurance forms which are used to provide liability coverage. This course discusses both the legal and insurance principles an agent needs in order to be prepared to offer errors and omissions and professional liability insurance.

The course begins by discussing the current liability environment. Liability litigation has multiplied over the past few decades. Reasons for the increase in lawsuits and the legal doctrines behind liability suits are covered in this part of the course. Next, the process of managing the risk of liability is examined. This examination reveals that the purchase of insurance is an important part of liability risk management, but there are other steps a professional may take to reduce the potential for loss due to liability.

An introduction to liability insurance is the next topic considered. The basis for coverages found in liability insurance, a brief description of general liability forms and a survey of the structure of errors and omissions and professional liability forms are all included in this introduction to liability insurance. Group errors and omissions and umbrella liability insurance are also reviewed.

A detailed exploration of the structure of errors and omissions and professional liability forms follows the introduction to liability insurance topic. The policy parts and their contents are defined and explained, along with the many optional coverages available to professionals. Then, a brief summary of some of the many liability forms available for professionals is provided. Some important considerations when doing business with professionals are itemized and explained.

The elements of errors and omissions and professional liability applications and important claims processing responsibilities make up the next course topic. A discussion of the importance of properly handling claims from the perspective of bad faith litigation is also included.

Insurance agents and brokers have special liability risks. Errors and omissions forms for insurance agents provide coverages for these risks. An entire chapter is devoted to this special form of insurance. The primary liability risks of an agent or broker are examined and important steps to take to reduce each risk are provided in this chapter.

The course closes by discussing important trends in errors and omissions and professional liability insurance. A trend significant to agents with an interest in liability coverage are tort reform laws. States across the US are passing many pieces of legislation that may, over time, have a big impact on the litigation of liability. The last

chapter of the course includes an overview of the more common reform laws states have passed.

Agents offering errors and omissions and professional liability insurance provide a true service to their customers. Without this coverage, a professional is in danger of serious economic loss. This course will equip agents with the knowledge needed to offer this important coverage to their clients.

## Chapter One: The Liability Environment



There may be no other time when the need for protection against liability litigation has been greater. Newspapers and the television news discuss high profile lawsuits almost daily. Employers, businesses, municipalities, the media, professionals, and common citizens are all targets. It appears that one can sue or be sued for just about anything. The number of liability suits filed has grown tremendously in recent years.

### ***Why Lawsuits Have Increased***

Legal observers cite several reasons for the dramatic increase in lawsuits. One of these reasons is a change in the attitude of society toward bringing a legal action against another party. Individuals today, it is said, tend to look for someone to blame, for a party to “pay for” negative circumstances that occur. The vendor must pay when a customer spills coffee and is burned because the vendor kept the coffee too hot. The employer must pay when an employee is not promoted because the employer was discriminatory or failed to notice the excellent work of the employee. The municipality must pay when an auto which veered off into a ditch is damaged because the municipality did not appropriately care for the roadway. Harm which befalls an individual is not seen as happenstance – it could have been avoided if some party had not failed to do the right thing.

Another reason pointed to for the proliferation of lawsuits is the complexity of services and products which are offered today. The knowledge and technology revolutions have placed some occupations in the position of being able to offer services and products which are new and innovative, but which result in unexpected ramifications. The medical and pharmaceutical industries have created products intended to provide great advances in birth control, weight loss, or as remedies for other health concerns, but have instead resulted in harming the user. Innovative manufactured products have also brought with them some unexpected outcomes, causing skin irritations, fires, toxic fumes, and other harm. Because society’s technological prowess is outpacing its ability to foresee harmful consequences, some say, an increase in litigation is not only to be expected, but is necessary in order to protect society from services and products which are insufficiently tested before being brought to market.

A third reason given for the increase in litigation is the result of increased competition in the marketplace. Professionals and businesses are under pressure to perform. They often have large customer bases, and trying to take care of so many customers’ needs

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can lead to mistakes, delays in response times, or carelessness. This lack of care or negligence results in lawsuits.

But the primary reason most experts give for the increase in lawsuits has to do with changes in the legal environment. Several important developments in the legal arena have occurred over the last few decades. These developments, discussed below, include the ability of lawyers to advertise, the amount of money to be made by litigation, the application of joint and several liability in the awarding of damages, and a shift in the application of contract law by the courts.

### **Lawyers and Advertising**

Today, statutes and the legal profession allow lawyers to freely advertise their availability. Prior to the late 1970's, lawyers were generally forbidden by the bar, and in some cases by state law, to solicit business. In 1977, however, a Supreme Court decision stated that a lawyer's right to advertise was protected by the Constitution (*Bates v. State Bar of Arizona*, 97 S. Ct. 2691 (1977)). One of the outcomes of this decision is that lawyers now make it their business to inform the public of the many circumstances under which a lawsuit may be made and regularly and openly declare their willingness to assist in such matters.

### **The Amount of Money in Litigation**

A criticism that is sometimes made of today's litigation system is that the lawyers involved are able to earn significant amounts of money from it. In some cases, lawyers earn income even when a suit is unsuccessful. This situation is believed to encourage the practice of bringing suits that do not have a sound basis, or are *frivolous*. Another concern is that because there is so much money to be made through litigation, some lawyers may encourage bringing suits rather than finding some other, less expensive, solution.

### **Joint and Several Liability**

Joint and several liability is the practice of assigning liability for damages based on an ability to pay. For example, if a corporation or municipality is brought into a lawsuit along with an individual, and both parties are found liable, under joint and several liability rules, the corporation or municipality would likely pay the greatest amount of a damage award. Under joint and several liability rules, even if the individual was the party with the greatest fault, the corporation or municipality may pay the bulk of the damages because they are able to do so. This practice is thought to encourage bringing suits which would normally not have been undertaken because the plaintiff would have little chance of actually collecting damages. It is also thought that joint and several liability rules may encourage bringing parties into lawsuits who previously would have been excluded because their liability was negligible.

### **Application of Contract Law**

The change in the legal environment which is thought to have had the biggest impact on the number of liability suits is the view courts take today regarding transactions based on a contract. Up until this century, courts would rarely overrule the terms of a contract if the contract was legal and both parties had agreed to the terms of the contract freely. If both parties had agreed to the terms of a legal contract, liability laws, which apply when a wrong is committed against another party, would not apply. The legal phrase in Latin that was applied to this concept was *volenti non fit injuria* – “to one who is willing, no wrong is done.” If there is no wrong, there is no legal liability. Under traditional contract law, it does

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not matter whether the consumer or the vendor might suffer harm. If both had agreed to the contract, both parties must stick to the agreement.

As insurance agents know, a contract must follow certain rules in order to be legal: it must have two or more competent parties, a legal subject matter, consideration and assent by the parties. Agents are also taught that the written contract is assumed to include all oral agreements – if something is not written into the contract, unless fraud or misrepresentation is present, courts will uphold the terms of the written contract and exclude or ignore prior oral agreements or negotiations (*the parol evidence rule*).

Recently, liability courts have begun to listen to arguments involving oral negotiations and oral promises and, in some cases, have held parties liable for words spoken, even if a legal contract exists which would in the past have exonerated the parties. (This is one reason agents are often required today by the employer to use a specific telephone script or to follow a specific sales track or use a memorized answer regarding certain policy features. The employer is trying to limit exposure to lawsuits due to the communication of oral information that contradicts a written contract. ) Since liability courts will now listen to suits related to oral negotiations prior to a contract which would have traditionally been under the jurisdiction and remedy of contract law, more liability suits occur.

Another change in the legal environment related to contract law has to do with the premise of *consent* of the parties involved in a contract. As mentioned, it was commonly held that if both parties consented to a legal contract, neither party could be charged with a wrong in a liability court. Contract law would apply. However, some liability courts now hear cases involving contracts if it can be successfully argued that a party did not consent because they *did not know what they were consenting to*. In today's complex climate, contractual transactions can involve complicated clauses concerning items the average consumer knows little about. Courts have sympathy for the consumer, and may award damages against a business due to harm to the consumer resulting from a product sold or service done, even if no violation of contract occurred.

One of the outcomes of this point of view is the creation of the legal concept that some contracts are *contracts of adhesion*. A contract of adhesion is one where one party creates the terms of the contract, and the other party adheres to them. There is no real negotiation process, it is believed, under a contract of adhesion. Many business transactions are based on contracts of adhesion – one does not normally negotiate the terms of a furnace warranty, or the purchase of an airline ticket, or the price of a mail-order doll. An insurance policy is an example of a contract of adhesion. Since it is so deemed, a court of law is freer to dismiss certain clauses, provisions and terms in a policy if it feels they are damaging to the purchaser than if the contract were considered a negotiated one. Because of the concept of contracts of adhesion, liability courts now hear many cases which previously were under the jurisdiction of contract law.

### ***Reducing the Consequences of Liability Exposure***

All of these circumstances - the attitude of society, an increasingly complex and pressure filled marketplace, and the legal environment – have led to an increase in liability suits. Businesses and professionals are both more susceptible to the risk that a suit will be filed against them. However, there are steps that can be taken to reduce the consequences of this liability exposure. One of the most important is the purchase of liability insurance.

Liability insurance is available to provide protection against various types of liability. This course focuses on *Errors and Omission* and *Professional Liability* insurance. Both these forms of insurance protect professionals, such as doctors, nurses, dentists, veterinarians, accountants, engineers, and more, from the financial consequences of alleged and actual claims of negligence, errors and omissions in the carrying out of professional duties. Protection against these claims can mean that a professional will not lose his or her business and ongoing financial security because of mistakes in professional conduct.

## ***Liability and the Law***

When discussing errors and omissions and other liability insurance, the legal concepts applied to liability are important. Liability insurance provisions spring from statutes relating to legal liability and from insurance contract law.

### **Common Law**

Common law relies strongly on past court decisions, or *precedents*. Centuries ago in England, all law was based on the customs and traditions of the local people. When rule in England became united under Norman kings, judges appointed by the king would go from shire to shire to hold court and administer local law. Over time, the rulings of these judges built on and replaced popular customs. As the rulings made by these judges were used and modified by other judges, these judgments were applied throughout the land, resulting in “common law.”

The United States, as a former colony of Great Britain, generally adopted common law as the basis for civil law in most states. (The State of Louisiana is the only exception, its French roots resulting in the application of the Code Napoleon in the formation of its civil laws.) Common law is developed based on previous court rulings. Once a court makes a decision, other courts can use the decision and the arguments behind it when ruling on cases they hear. Because of this, common law is rooted in tradition and past decisions and yet can change and evolve over time.

### **Tort Law**

Common law governs the remedies for *tortious acts*. A *tort* is an act that is committed by one party which causes injury or damage to another party or to another’s property. The difference between an act which is a tort and one which is a crime is that a tort is a private wrong against a party or property, and a crime violates a public right. It is possible for an act to be both a tort and a crime, and therefore for the guilty party to be required to pay damages under tort law and also be punished under criminal laws.

A tort is not a breach of contract. Contract law provides the remedy for acts which are considered to be a breach of contract. As has been mentioned, in recent years, some acts which were traditionally the subject of contract law have become the subject of tort law.

A tort is remedied by an action for damages. A plaintiff brings suit against the *tortfeasor* – the party who is alleged to have committed the tort. The tortfeasor is the defendant in the suit. The plaintiff seeks to be awarded *damages*, an amount of money, for the injury or damage caused by the defendant.

Torts may be either against a person or against property. Personal torts are actions such as false arrest, false imprisonment, malicious prosecution, assault, battery, libel,

slander, or other forms of defamation. Property torts include the unauthorized use and assumption of control of another's property, unlawful entry on another's land (trespass), unreasonable and improper use by an individual of his or her own property that causes damage to the adjoining property (nuisance), and any act of negligence that causes damage to the property of others.

In order for a defendant to be required to pay damages, he or she must be found legally liable for the damages. Liability is generally based on establishing *negligence* on the part of the alleged tortfeasor. However, courts also award damages on the basis of *absolute liability*, *strict liability*, and *imputed* or *vicarious liability*. Before these other forms of liability are examined, negligence will be discussed.

## **Negligence**

*Negligence* is the failure to use due and reasonable care. The standards for determining what reasonable and due care are can vary based on the tort and the parties involved. Professionals are generally held to a high standard of care by the courts. Many professionals are in a position of trust – they may be responsible for a customer's financial, health, housing, or family welfare. If those within a profession are generally expected to be expert, capable, thorough and competent, a court hearing a case against such a professional will judge that conduct that is less than expert, capable, thorough, or competent, as less than reasonable and due care.

In order to establish the presence of negligence, four elements must exist:

1. a legal duty to act or to not act;
2. a breach of duty;
3. proximate cause between the breach of duty and the damage or injury; and
4. actual loss or damage.

## **Legal Duty**

The law recognizes various duties owed. There is a legal duty to protect one another's rights and property. Reasonable and due care is another legal duty owed.

## **Breach of Legal Duty**

Besides establishing that a legal duty is owed, a breach of that duty must be found in order for negligence to be present.

## **Proximate Cause**

To establish negligence, there must be *proximate cause* between the breach of duty and damage and injury. Proximate cause is the legal doctrine that states that the breach of duty must launch an unbroken chain of events that results in the damage or injury in order for liability to be found.

## **Damage or Injury**

A court must find that actual damage or injury occurred. A breach of legal duty may occur that does not cause harm. A fiduciary may make an unreasonable financial decision, but that decision may result in greater net worth for a customer. In such a situation, a court might determine that the fiduciary should be removed, but because no loss occurred, the maximum damages awarded may be expenses related to replacing the fiduciary.

## **Defenses Against Negligence**

The courts recognize several different defenses against a claim of negligence. These include *intervening cause*, *last clear chance*, *contributory negligence*, *comparative negligence*, and *assumption of risk*.

### **Intervening Cause**

Intervening cause is used to defend a case of negligence by eliminating the necessary element of proximate cause. An intervening cause breaks the chain of events leading to the injury or damage. If an intervening cause creates a new chain of events that led to the injury or damage, proximate cause between the breach of duty and the damage may not exist, and therefore, negligence may not exist.

### **Last Clear Chance**

Another defense against negligence argues that the plaintiff had the last clear chance, or the final opportunity, to avoid the loss or damage. The plaintiff's failure to act, it is argued, caused the loss or damage, not the breach of duty on the part of the defendant.

### **Contributory Negligence**

Contributory negligence was once a defense used in most states. It has been replaced in most of them by the concept of comparative negligence, but a few jurisdictions still recognize this defense. Under contributory negligence, if the plaintiff is found to have in any way contributed to the damage or loss, no damage award will be made.

### **Comparative Negligence**

Comparative negligence rules weigh the proportionate amounts of negligence contributed by all parties in the damage suit. If the plaintiff is found to have contributed to the damage or injury, damages are not dismissed. Instead, the award to the plaintiff is reduced by the amount of his or her responsibility for the loss.

### **Assumption of Risk**

Under the assumption of risk defense, the defendant must prove that the plaintiff understood the risks involved, including the possibility of the damage and injury in question, and yet allowed the act to occur. Under such a scenario, the plaintiff is said to have assumed the risk of the activity, and so cannot hold another liable for resulting harm.

### **Liability Without Negligence**

As mentioned, there are forms of liability recognized by the courts without the necessity of establishing negligence in the manner discussed above. A court may award damages based on absolute, strict or imputed liability.

### **Absolute Liability**

Negligence does not have to be proven when an activity is considered *indisputably hazardous*. A party conducting an indisputably hazardous activity is considered to have *absolute liability* for any damage or injury that arises from the activity. Examples of indisputably hazardous activities are keeping wild animals or handling dangerous materials.

## **Strict Liability**

*Strict liability* is a term first used by the courts in 1962. In that year, the California Supreme Court found a power tool manufacturer strictly liable for an injury caused by a piece of wood that flew out of the tool and hit the operator in the head (*Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 27 Cal Rptr. 697, 377 P 2d 897 (1963)). Strict liability was applied because a defect in the product was found to have allowed the piece of wood to fly out of the machine. This inaugurated the precedent that a product defect which causes damage or injury can establish liability without requiring negligence on the part of the manufacturer.

## **Imputed or Vicarious Liability**

Imputed or vicarious liability occurs when another party is held responsible for a negligent party's actions. Employers are generally held to be liable for the actions of their employees under the concept of imputed liability.

## ***Types of Damages Awarded in Liability Suits***

If the defendant is found to be legally liable, the court will require the defendant to pay damages to the plaintiff. These damages can include compensatory or actual damages, general damages, nominal damages, and punitive damages.

### **Compensatory Damages**

*Compensatory* or *actual damages* are moneys paid to compensate for the financial loss for which the defendant is liable. These are also sometimes referred to as *special damages*.

### **General Damages**

*General damages* are charged to the defendant to pay for a loss or injury that is a direct consequence of the tort committed, but not for financial loss. An example of general damages is an award for pain and suffering.

### **Nominal Damages**

*Nominal damages* may be charged in a situation where loss or injury was negligible. They are small awards made in order to show that the liable party was responsible.

### **Punitive Damages**

As the name suggests, *punitive damages* are awarded in order to punish the liable party. They are generally awarded if the court determines the responsible party acted in a malicious, vicious, or willful manner. Besides punishing the liable party, punitive damages also may have the purpose of acting as a deterrent to others, making an example of the defendant, or to teach the defendant a lesson.

## ***The Professional and Liability Insurance***

Professionals have special concerns and issues related to liability exposure. The services performed by professionals are considered very significant to their customers. The customer's finances, health, housing, or other items of critical importance can be seriously impacted by a professional's work. If a money manager fails to purchase a new investment on a timely basis, if an accountant overlooks an important tax due, if a real estate agent does not submit a timely bid, the customer can suffer financial loss. If a doctor does not prescribe the right medication, if an engineer miscalculates the amount

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of stress a structure can bear, or if an architect is ignorant of an important municipal code, the customer can suffer both monetary harm and general loss. A mistake made by a professional that causes damage or injury to a customer can, of course, lead to a lawsuit. Because of the vital nature of services provided by professionals and the potentially serious consequences of an error or omission, they need liability insurance protection.

### **State Regulation**

Another reason professionals may need liability insurance is that they may be required by state regulations to carry such coverage. Those who practice medicine are normally required to carry liability insurance in order to carry a state medical license. In many states, directors and officers of charitable organizations must carry liability coverage. Government entities may require that professionals doing business with them carry liability insurance. For example, in Florida, anyone providing legal, architectural, engineering or any other professional services must carry an amount of liability insurance determined by the state department for whom services are performed. Specific business owners may be required to carry liability insurance as well. Oregon recently established a rule that new Tavern Owners and those who offer liquor at public events must carry \$300,000 of liquor liability insurance.

### **Customer Requirements**

Professionals may also be required to carry liability insurance by non-government customers or contractors who use their services. Businesses may require professionals who are working on an independent contractor basis to carry liability insurance. Contractors may require subcontractors to carry liability insurance. Consumer groups often advise individuals who plan to hire professionals, whether architects, lawyers or plumbers, to engage only those who have liability insurance.

### **Professional Association Requirements**

Some professional associations encourage or require their members to purchase liability insurance. If the association is a legal entity, e.g. a group of dentists, lawyers or accountants who establish a partnership, the firm may require each member to carry liability insurance.

### **High Standard of Care**

Generally, occupations which require a specific degree or accreditation and a license in order to practice are viewed as professional occupations. As mentioned, professionals are expected by the courts and the general public to exercise the greatest care, diligence, judgment and skill in their work because the services they provide are often critical to the welfare of those for whom they are provided. Because of this high standard of care and the critical nature of work done, liability suits are a significant risk for professionals, making liability insurance coverage a prudent purchase. Because a mistake can cause significant harm to a customer, damage awards against a professional can be very high. Without insurance, a professional's business could be financially ruined.

### **Fiduciary Responsibilities**

If the professional is a fiduciary, such as a lawyer, accountant, trustee, real estate broker, retirement plan administrator, or money manager, special liability concerns apply. Fiduciaries are in positions of trust. They must act in the best interests of the client at all times. The law expects the fiduciary to fulfill six specific duties, regardless of the type of

occupation the fiduciary is in. These are loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting.

### **Loyalty**

A fiduciary is to act solely in the best interests of his or her *principal*, the party whom he or she is representing. The fiduciary must put all other interests aside, even his or her own, on behalf of the interests of the principal.

### **Obedience**

The fiduciary must follow the instructions given by the principal. For example, if a trust is involved, a fiduciary must abide by all the terms of the trust; if a real estate deal is involved, a fiduciary must offer the terms of purchase set out by the principal.

### **Disclosure**

The fiduciary must disclose all relevant and material information pertaining to the fiduciary relationship. A money manager must disclose risks involved in an investment; a real estate broker must disclose all potential buyers and so on.

### **Confidentiality**

A fiduciary also owes a client confidentiality. It is considered a breach of fiduciary duty if a client's affairs are discussed on the golf course or in the break room. Of course, providing information about one client's affairs to assist another client is also a breach of confidentiality.

### **Reasonable Care and Diligence**

A fiduciary must act with the care and diligence of a reasonable and prudent fiduciary. Regarding retirement plan fiduciaries, Section 404(a)(1)(B) of ERISA states that a fiduciary must discharge his or her investment duties *with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.* (Emphasis added.)

Another standard that may be applied to fiduciaries is the *prudent investor rule*. This rule is used currently applied to fiduciaries in approximately seventeen states. It is sort of an updated version of the prudent man rule. Under the prudent man rule, a trustee emphasized conservation of principle. Under the prudent investor rule, a trustee is to emphasize total returns. The prudent investor rule looks at the overall return of an investment portfolio. If some of the investments within the portfolio are risky, perhaps even too risky for the portfolio, as long as the overall portfolio has an appropriate level of risk and return, under the prudent investor rule, a trustee will generally be considered to be acting prudently. Under the prudent man rule, one imprudent investment could be the basis of a trustee's liability for loss.

When the courts hear a liability case against a fiduciary, in order to determine if the fiduciary acted reasonably and prudently, they apply the standard that the fiduciary is to be knowledgeable about his or her field of expertise. They also expect that the fiduciary will act as a fiduciary who has had experience in the profession, that the fiduciary will appropriately investigate any matter under consideration within his or her duties, and that the fiduciary will get outside help if a matter is beyond the scope of his or her experience or knowledge.

## Accounting

Finally, a fiduciary owes the principal accurate and complete records regarding the transactions and other matters handled for the principal. All money or property handled by the fiduciary for the principal is to be accounted for and appropriately safeguarded.

Because of the important duties owed by fiduciaries and the significant consequences of the services provided, they are a likely target of lawsuits, and so need liability insurance.

## Summary

For those in business, the liability environment today poses a significant risk. Lawsuits are frequent and damage awards can be high. The courts are hearing new and different types of liability suits. The many innovations in products and services offer new opportunities for financial gain and new areas of litigation. Businesses need liability protection more than ever.

Professionals have special risks that require liability protection. The services they provide are often critical to their customers. These critical responsibilities along with the high standards of conduct customers and the courts apply can make a professional very vulnerable to lawsuits with significant damage awards. In the liability climate today, professionals need the protection provided by Errors and Omissions and Professional Liability insurance.

## Chapter Two: Managing the Risk of Liability Claims

An important task of the professional is to manage the risks of the business he or she is in. A business person has many business risks that must be managed: those risks which may hinder the earning of sufficient revenue to meet current expenses, those risks which may reduce revenues needed to stay in business into the next year and beyond, those risks which impede increasing business and revenue, and those risks which can result in inferior products or services. Appropriately managing business risks results in a reduction of loss because the items that cause loss, the *loss exposures*, are dealt with.



This chapter will discuss the risk management process and especially the management of the risk of liability claims or suits. Before the risk management process is discussed, some pertinent terms and concepts relating to insurance and the risk management process must be defined.

### ***Important Risk Management Terms***

#### **Risk**

The term *risk* when used generally means the chance of loss. The term is also used to refer to a cause of loss, as in *fire risk* or *the risk of theft*, or to a condition that increases risk, as in *risky operations*. Insurance policies and related literature generally refer to causes of loss as *perils* and conditions that increase risk as *hazards*.

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In business and insurance, risk is also used as a name for all risks and risk characteristics related to a property or entity; a property, including the premises, the buildings, and equipment, may be referred to by an insurer as *the risk*. Types of losses are also referred to as risks. The potential for a loss of income is termed *income risk*; the exposure to lawsuits is called *liability risk*.

## **Loss Exposure**

Another important term used in risk management is *loss exposure*. Loss exposure refers to conditions that include the possibility of loss. For example, going for a walk exposes one to the possibility of injury. Going for a walk carrying a lot of money exposes one to the possibility of injury and robbery. Both are loss exposures. The risk management process includes looking at all the various loss exposures in a business and evaluating them in terms of their frequency and severity.

## **Hazard**

As mentioned, hazard is the term used to describe conditions that increase risk. Insurers are concerned about three types of hazards: *moral hazards*, *morale hazards* and *physical hazards*.

### ***Moral Hazard***

When used by an insurer, the term moral hazard means a condition or conditions that increase the likelihood that an insured or a person in a position to be paid by an insurer will intentionally cause, overstate or increase a loss. When insurance is used to manage a risk, the insurer takes care to make sure that the amount of the insurance coverage issued is not excessive. Excessive coverage can contribute to moral hazard.

### ***Morale Hazard***

A morale hazard is a condition or conditions that increase the likelihood that the attitude of the insured or a person who will be paid by the insurer will cause a loss. For example, once an item or operation is insured, it is possible that its owner will be less prudent concerning it. For this reason, insurers require safeguards in order to insure certain types of property or operations. A property insurer may require that sprinklers and smoke alarms are installed in a building. A liability insurer will include a question on an application asking if required continuing education hours are maintained. A crime insurer excludes any person who has ever been discovered to have committed a dishonest act from Employee Dishonesty coverage. All these actions are attempts to reduce morale hazards.

### ***Physical Hazard***

A physical hazard is a condition or conditions of property, people, or operations that can increase loss. For example, a construction site that allows access to structurally incomplete and unsound buildings increases the possibility that someone who wanders onto the site will be harmed. Insurers are interested in eliminating as many applicable physical hazards as possible prior to insuring a property, a person, or an operation.

## **Peril**

A peril is a cause of loss. In property insurance, a *named peril* policy specifically names the causes the policy provides coverage against, e.g., fire, windstorm, lightning, etc. Perils covered by *liability* insurance are perils caused by people, not by nature. Liability insurance generally covers liability arising from forms of negligence.

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## **Insurable Risk**

Another key concept when discussing risk management and insurance is that of *insurable risk*. Not all risks are insurable. As each risk is evaluated, it is important to note whether or not it can be insured. If not, the purchase of insurance is not a risk management option.

In order to be insurable, a loss must:

- arise from a *pure risk*,
- be definable,
- be calculable,
- not occur to many people simultaneously, and
- not be intentional.

## **Pure Risk**

A pure risk is one which cannot result in the possibility of gain. In order to be insurable, a risk must have the potential of only two possible results: loss or no loss. If a risk includes the possibility of gain, it is called a *speculative risk*. Launching a marketing campaign is an example of a speculative risk. It may result in a loss in sales if people are turned off by the advertising, it may result in neither an increase nor a decrease in business if the advertising makes no impact, or it may result in increased sales. Insurance policies do not provide insurance for speculative risks. Insurers protect against pure risks such as fire. If no fire occurs, no loss occurs. If fire occurs, loss occurs. Liability claims or suits are pure risks. If a liability claim does not occur, no loss occurs. If a liability claim occurs, loss occurs, ranging from defense expenses to the payment of a damage award.

## **Definable Loss**

Insurance covers losses that can be defined in terms of cause, time, place and amount. Cause must be definable in order to make sure that the coverage applies to losses arising from the cause. Time must be definable in order to make sure the loss occurred during the policy period or whatever terms the policy provides regarding the period of time in which claims may be made. Place must be definable to ensure that the loss occurred within the coverage territory stated in the policy. Amount must be definable so that the insurer pays the benefit due under the benefit limits of the policy.

## **Calculable Loss**

Insurers must be able to calculate both actual and expected losses. Expected losses are the basis of premiums charged. Actual losses may result in an adjustment of premium in the preceding period and for ongoing coverage. Actual losses also are the basis for paying benefits from the policy.

## **Not Occur to Many People Simultaneously**

In order to provide insurance, premiums must be collected from a large number of people exposed to the same type or types of loss. Even though the insureds are exposed to the same type of loss, the exposure for each insured must be independent. If all the insureds were exposed to loss by the same fire; for example if they all operated businesses in connecting wood buildings on the same street the insurer would not have sufficient premium to pay for their losses should a fire break out. In order for the insurer to pay all claims, losses must occur to a certain expected percentage of the insureds at a certain expected frequency. If a large number of the insureds are all affected by the

same loss exposure, the insurer will either have to charge premiums of an amount that would make the insurance unaffordable or no more affordable than if the business were self-insured, or the insurer will not have sufficient premium collected to pay for losses suffered.

### **Unintentional Losses**

Intentional losses are never insurable. First of all, intentional losses do not fit the models of probability used to determine premium amounts. Premium amounts are based on the frequency and severity of unintentional losses. Secondly, intentional losses may be criminal or fraudulent. Contracts must have a legal purpose. Insurance may not pay for losses which arise from illegal activity.

### ***The Risk Management Process***

The risk management process has the objective of reducing loss. Loss is reduced by identifying risks, evaluating them for frequency, severity and type, determining the best risk response, implementing the response, monitoring the results and making changes as necessary.

### **Identifying Risks**

There are several different methods that can be used for systematically locating risks. Insurers often have checklists available which can be used to locate risks in a business. Another method used to identify risks is through the review of financial statements. Each item on the financial statements is analyzed in terms of risks which arise from that item. A third method is to identify all business activities such as hiring, training, customer services, record keeping and accounting, and to identify the risks related to them. Actual losses can also be reviewed and the risks which led to each loss identified.

### **Evaluation of Risks**

Each identified risk must be analyzed for its potential frequency and severity. Frequency refers to the number of times a loss is likely to occur, and severity to the amount of financial loss that is likely to come from each loss. A loss which is likely to be infrequent and small is less important to a business than one which may be infrequent and large, and even less important than a loss which may be both frequent and large. After reviewing each risk based on loss frequency and severity, the risks with the potential for the most serious impact on the business can be given a higher priority. Each risk from the highest to lowest priority are then subject to the processes of determining and implementing a response.

### **Risk Response**

Risks can generally be responded to in five ways - avoiding, preventing, retaining, reducing and transferring.

### **Avoiding Risk**

A business or professional may want to avoid a risk because its potential for financially ruining the company is high. For example, new medical studies may indicate that a certain procedure has some serious negative health consequences. A doctor may decide to immediately stop performing that procedure, and thereby avoid the risk of harming a patient because of it from that point forward. An accountant may believe others are in error by interpreting a tax regulation in a manner he feels will not be upheld by the IRS, so he decides to provide more conservative advice. As a fiduciary, the

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accountant may even decide to refer customers affected by the regulation to an accountant who specializes in that area. Avoiding risk may be an appropriate response for high risk circumstances such as these.

### **Preventing Risk**

Action can be taken to prevent some risks. For example, the risk that someone will fall through rotting boards on the steps to a building can be prevented by fixing the steps. The risk of shortage may be prevented by inventory control procedures. The risk of spreading germs or disease through the use of unsanitary tools can be prevented by using new, disposable tools for each patient.

### **Retaining Risk**

Some risks are retained. They may be retained because the loss exposure is small, there is no way to transfer or reduce the risk, or because the risk was not identified. In some cases, risk is partially retained. Purchasing insurance with a deductible results in the partial retention of risk.

### **Reducing Risk**

Reduction of risk occurs when steps are taken to minimize loss. The reduction of risk may be accomplished several ways. Safety procedures may be implemented, disclosures and warranties may be provided to customers, employees may be trained not to answer certain questions but rather to refer them to specialists within the firm, contract language may be rewritten to reduce ambiguity, etc.

### **Transferring Risk**

Risks may be transferred. They may be transferred through contracts, or through the purchase of insurance. Risk is transferred in contracts such as automobile and apartment rental agreements, construction contracts or through a loan agreement that requires a guarantor to assume the risk should the borrower default on the loan. When a business changes hands, liabilities of the business may be transferred through contract to the new business owner. Risk is transferred from the insured to the insurer under an insurance contract. Insurance is often the primary mechanism used to transfer risk.

Risks are not always responded to in just one way. A business owner may put into place procedures to reduce risk and purchase insurance on the risk as well. Insurers often encourage loss reduction and prevention techniques and will reduce premium in some circumstances if loss reduction steps are taken. Or, a risk may be transferred in part through a contract and the remaining exposure transferred through the purchase of insurance. For example, a renter may be contractually liable for damage to a home rented, but the owner will generally carry property insurance on the dwelling as well.

### **Implementation and Monitoring of Risk Responses**

After risks have been identified and evaluated and an appropriate risk response has been determined, the response must be implemented. Steps to do so should be documented and monitored.

Once the appropriate responses have been implemented, the process is not over. Risks need to be evaluated on a regular basis. Businesses tend to change over time – new services are offered, new staff is hired, new locations are purchased. Each change can bring new loss exposures. The insurance agent can assist the professional in the

ongoing monitoring of the risk management of her business by reviewing the risk management program each year when insurance is to be renewed. By doing so, the agent can make sure the right types and amounts of coverage are offered.

## **Responses To the Risks of Liability Claims**

Liability suits and claims seem an ever present risk for the professional. However, some professional liability risks can be reduced, and perhaps even prevented. The best ways to reduce these risks include raising the awareness of the professional and any staff of the key liability risks of the occupation, providing education and training in these areas, establishing and following procedures aimed at reducing liability claims, incorporating the business to protect the professional from losing personally owned assets, using contracts to limit liability, and purchasing Errors and Omissions or Professional Liability insurance to reduce the financial consequences of liability claims.

### **Raising The Awareness of Key Liability Issues**

Each profession has different key liability issues related to that profession. If the professional is not aware of these issues, he or she may be able to get information about them from professional associations, from lawyers who specialize in liability issues, or from liability insurers. By being aware of the items the courts are focusing on, the professional can identify those activities in his business that could put her at risk for claims or suits in these areas.

### **Education and Training**

Many professionals have employees who need education and training on what activities or actions can put the professional's business at risk. Each member of a firm or business should have sufficient training to be able to competently perform assigned duties. Time put into training can seem to a small business person to be a drag on productivity and an unnecessary expense. However, a well-trained staff can be well worth the investment not only because of the satisfied clientele it helps to develop, but also because of the liability exposures that are eliminated or reduced solely due to competence.

In some professions, certain positions should be filled by licensed personnel. Again, if a license is not a legal requirement, a business owner may feel equipping staff in this manner is expensive and unnecessary. However, the pre-licensing training and continuing education that come with many licenses can provide liability protection for the professional employer.

### **Establishing and Following Procedures**

Some procedures are critical to a business. Certain disclosures may have to be signed prior to taking on a customer. In some businesses, it is illegal to describe certain services or products in certain ways. For example, in the insurance profession, only certain policies can be referred to as "Medigap" policies, one cannot discuss a state guaranty association except under very limited conditions, and anyone selling annuities has to disclose that the annuity is not FDIC insured. In the securities industry, risks associated with any product must be disclosed and a prospectus must be provided to each purchaser. Every professional outside of a lawyer or tax professional is forbidden to give tax advice. To reduce liability claims it is important that the professional and those working with him follow the required procedures of his or her occupation. One of the best ways to make this happen is to establish procedures, train all staff on them, document

them in a procedural manual, and verify that they are followed. By doing so, liability related to omitting such procedures can be avoided or reduced.

Billing disputes are a common subject of claims or suits. Billing disputes can be significantly reduced if procedures are established and followed. Professionals sometimes like to leave the business side of an operation to someone else, preferring to concentrate on the services they provide. But the professional is the one with the liability risk, not the secretary who mails the bills, so the professional should take the time to ensure proper billing procedures are in place. All types of billing situations should be contemplated: Will the professional allow payments over time? What amount of penalties should be charged for late payments? How often should reminder notices be sent? When will a payment be considered so delinquent that it must be turned over to a collections agency? What amounts will be written off as uncollectible? All these questions should be considered, procedures developed and consistently applied. Additionally, customers should be required to sign a statement indicating their understanding of their responsibility to pay for the professional's services, and the signed statement should be kept on file. Should a dispute occur, the court will want to see that all customers are subject to the same billing rules, and that consistent documentation is kept.

### **Keeping Good Records**

Keeping complete records of all services rendered to customers is important in virtually all professions. Insurance agents, securities brokers, lawyers, accountants, doctors, dentists, psychologists, retirement plan administrators and hair stylists all need to keep some form of client records to ensure they are providing appropriate services.

There are many important considerations regarding record keeping. First of all, consistency in record keeping is important. Using standardized forms and following the same steps in dealing with customers in similar matters helps if a liability case must be defended. Following consistent, thorough procedures and documenting them in files can demonstrate to a court that a reasonable standard of care has been met.

Records must also be kept in a safe place. Confidentiality of customer information is also a requirement in most professions and a consideration in the location of customer files. Another issue to consider is access. If too many staff members have access to the records unnecessarily, important documents may be lost or misplaced. Records should also be stored in fire proof cabinets. If the records are kept on electronic media, a back-up procedure should be established and followed.

Whenever a change is made to a document, the date of the change should be noted. If the change is of any significance, the reason for the change should also be noted.

Some professions, such as insurance agents and securities brokers, are subject to regulations regarding the types of records which must be kept, the number of years they must be kept, and where the records must be located (e.g. at a branch location or at the home office). Any professional subject to such rules should ensure that he or she has a complete understanding of these rules and that they are consistently followed.

### **Incorporating the Business**

Another method of reducing the financial effects of a liability claim or lawsuit for the professional is to consider incorporating his or her business. A corporation is liable for its

activities, and only the assets of the corporation can be the subject of a lawsuit based on those activities. The personal assets of the corporation founder or an employee of the corporation cannot generally be targeted in a lawsuit based on the activities of the corporation. On the other hand, if a professional has not incorporated a business, his or her assets and possibly those of his or her spouse, can be at risk should a lawsuit be filed. Incorporating can protect a professional from the financial devastation a lawsuit can bring.

### **Using A Well-Worded Contract**

Another method for reducing liability is through the use of a well-worded contract. As mentioned in the previous chapter, the tort courts have expanded their activity regarding contracts in recent decades, but a well worded contract is still the best protection against costly disputes. The majority of court decisions still honor the provisions of a legal contract. By clearly stating the services to be provided, including the scope, duration and all fees involved, the professional can protect himself from most disputes regarding these matters.

Contract provisions which should be included in order to avoid disputes include provisions which provide:

- clear payment terms,
- a dispute-resolution method,
- indemnification terms, and
- a detailed scope of services.

### **Using Contractual Liability Limits**

Certain professionals can include clauses in their contracts to limit certain types of liability. For example, a financial planner can use a contract with her customers that states that liability will be determined only on the basis of gross negligence or bad faith. Such language makes it more difficult for claims to be made which are not based on serious errors or omissions on the part of the professional.

### **Performing Due Diligence**

A professional should practice due diligence whenever a professional relationship is contemplated. For example, an insurance agent should investigate the financial condition of an insurer prior to placing business with the insurer. A financial planner or stockbroker should investigate investments thoroughly before recommending them to clients. An accountant, lawyer or doctor should investigate the backgrounds of other professionals who seek to join a practice. The status of licenses should be checked if the profession is one in which a license is required. Licensing boards can generally provide information regarding any disciplinary orders or complaints. References should be thoroughly checked on any professional or employee who will join a professional's business.

### **Purchasing Error & Omissions or Professional Liability Insurance**

Even if a professional takes the aforementioned steps to reduce exposure to liability claims, lawsuits can still occur. Negligence, errors or omissions happen because professionals are human. They can make mistakes.

Even if a mistake is not made, an unhappy customer can decide to file a suit. Being found error free does not mean that a lawsuit will not bring financial loss. A professional can be found to be not liable and yet still undergo great expenses in defending a suit.

Purchasing insurance protection as a response to the risk of liability claims means that the insurer will pay for the damage award for suits to which the insurance applies. The insurer will also pay the expenses involved in defending the insured against the claim, up to the limits of the insurance. The professional who buys liability coverage has the security that should a lawsuit occur, he will be able to afford the costs the lawsuit inevitably brings.

## ***The Place of Errors and Omissions and Professional Liability in Business Insurance***

Businesses have many different types of risk exposures. There are risks related to property damage, employer liability, damage during transportation, theft and more. A business can purchase insurance protection for many of the risks or loss exposures it faces.

### **Commercial Package Policies**

Businesses of any size can purchase commercial package policies. These policies include property coverage, general liability coverage and may also include other forms of insurance, such as professional liability. By purchasing insurance as a package, a business may be able to receive a premium reduction from the insurer. It also has the convenience of dealing with only one policy when questions or claims arise. The coverages within the policy do not overlap – if more than one coverage part applies, the coverages may designate one as primary and one as excess. In some cases the coverage will state that it will not apply at all if any other coverage exists for the same damage or injury. The lack of overlapping coverages is an advantage to the purchaser because she is not paying for unneeded coverage.

### **Businessowners Policies**

Certain small businesses can purchase businessowner policies. Eligible businesses, which can vary by state, generally include wholesale and service businesses. Eligible buildings are limited to apartment buildings, office buildings and other buildings that contain no more than 15,000 total square feet.

Wholesale businesses which can normally purchase a businessowners policy include auto parts and supplies distributors, baked goods wholesalers, barber or beauty shop supplies distributors, coin, stamp or rare book distributors, drug distributors, fabric distributors, fruit and vegetable distributors, grocery distributors, hardware and tool distributors, hearing aid distributors, janitorial supplies distributors, optical goods distributors, toy distributors, and other wholesalers and distributors. Service businesses which can purchase businessowners policies include bakeries, barber shops, beauty parlors, dental laboratories, funeral homes or chapels, laundries and dry-cleaners, photocopy shops, printers, tailors and dressmakers, television or radio repair shops, watch, clock and jewelry repair shops, and similar small service businesses.

Like the commercial package policy, businessowners policies include property coverage, businessowners liability coverage and can include other forms, such as those that add or exclude certain insureds or that provide professional liability coverage.

### **Property Coverage**

Property coverage provides a business protection against the risk of financial loss due to property damage. Property coverage forms or policies generally cover losses due to

perils such as fire, windstorm, explosion, smoke, riot, vandalism, sprinkler leakage, sinkhole collapse, volcanic action, and also cover transportation damage to property in transit, and aircraft or vehicles. Some property policies are available which cover damage due to all perils except those which are specifically excluded. These policies are known as broad forms or open peril forms. Property insurance claims are made by and paid to the insured. Property insurance does not provide coverage for liability to a third party for property damage.

### **Workers Compensation Insurance**

Workers Compensation insurance is never part of a package policy. It covers employer risks, such as injury, disability or death that occurs to employees while on the job. Most businesses are required to carry Workers Compensation insurance by the state or states in which they do business. If the employer does not purchase workers compensation insurance, the employer generally has to set up a fund which acts as a form of self-insurance and must comply with certain state regulations regarding the structure of the fund.

Workers Compensation insurance pays two types of benefits:

1. compensation and benefits to the employee who has been injured or disabled, or to his beneficiaries if the employee is deceased, because of a work-related accident; and
2. payments for sums the insured becomes legally obligated to pay because of a work-related injury or occupational disease.

Note that Workers Compensation does not cover other forms of employer liability such as discrimination, failure to promote, wrongful termination, or sexual harassment. Such coverage is provided through some professional liability forms and through employer liability forms.

### **Inland Marine Insurance**

Inland marine insurance covers a wide variety of transportation risks. Included are imports, exports, domestic shipments, instrumentalities of transportation or communication, personal property floater risks, and commercial property floater risks. A *floater risk* is a risk that stays with or floats with the property. For example, property may be stored at an office and in a storage unit. A floater policy protects the policy when it is on and off the premises.

Instrumentalities of transportation or communication protected by inland marine insurance include items such as telecommunications equipment, bridges, tunnels, oil pipelines, and loading docks. Such property does not move, but it is related to items that move, to transportation. Inland marine insurance does not protect against liability for property damage.

### **Boilers and Machinery Insurance**

Some businesses have equipment that requires special coverage because of the consequences of its breakage or damage. Boilers, for example, can cause severe damage should they explode. Electrical equipment, refrigeration objects, mechanical objects, and turbine objects can also be covered by Boilers and Machinery insurance. Boilers and Machinery insurance provides coverage for these higher risk types of machinery that are excluded by the commercial property and businessowners property

forms. Like other property insurance, it does not cover liability for damage arising from the covered equipment.

A unique aspect of Boilers and Machinery insurance is the emphasis insurers who offer it place on loss prevention. Property covered by such a policy must be inspected and serviced regularly.

### **Crime Insurance**

Crime insurance protects a business against certain types of crimes. Forms include coverage for Employee Dishonesty, Theft, Disappearance and Destruction, Premises Burglary, Robbery and Safe Burglary, Computer Fraud and more. Crime insurance can be purchased as part of a commercial package policy or can be purchased as a stand alone, or monoline, policy. Crime insurance does not provide liability protection.

### **General Liability**

General liability and businessowners liability forms cover certain types of liability, but **exclude** liability that arises out of professional acts (errors) or failure to act (omissions) while conducting professional services. The types of liability protection offered by a general liability or businessowners liability form include bodily injury and property damage liability and personal and advertising injury liability. These liability forms also cover medical expenses arising out of bodily injury on the insured's premises, or on the ways next to the insured's premises, or arising from the insured's operations.

### **Professional Liability and Errors and Omissions Insurance**

So far, insurance to protect against the risk of property damage on premises, the risk of property damage off premises, the risk of employee injury, disease or death, the risk of severe damage resulting from boilers and machinery, the risk of crime and the risk of general liability has been discussed. However, none of these coverages protect a professional from the risk of liability due to negligence, errors or omissions. Special insurance forms have been developed to cover such risks.

Insurance liability forms which apply to specific professional occupations have been developed because each profession has different risks. A beautician has a much different set of risks than a doctor or lawyer. An accountant's risks are different from a veterinarian's, and a real estate agent's risks differ from a funeral director's. Premium amounts vary from occupation to occupation because of the difference in risk, which is another reason specific occupational forms have been developed. A doctor may be subject to lawsuits with higher potential damage awards than a barber, for example, and so pays higher premiums for coverage. Some occupations are more likely targets of suits than are others. Lawyers are more likely to be sued than are funeral directors. The frequency of lawsuits also causes premiums to vary from occupation to occupation.

### **Summary**

The risk of liability lawsuits is one which requires action on the part of the professional. Even if lawsuits may not occur frequently, they can cause severe financial damage. Professionals can be greatly helped by an insurance agent who will work with them through the risk management process and help them identify their liability risks. Because of the potential severity of liability risks, they should be responded to actively by taking steps to prevent, reduce and transfer them. One of the most important liability risk

management tools can be the purchase of insurance coverage. Insurance coverage can protect the professional from the financial devastation lawsuits can create.

## Chapter Three: Introduction to Liability Insurance

Liability insurance is used to reduce loss exposures related to the risk that a claim for damages will be brought by a third party against the insured. These loss exposures include the possibility of loss due to investigating, negotiating, settling, defending and paying damages to the party bringing the suit. Anytime a claim or suit is brought, expenses related to these activities are likely to occur. Liability insurance pays for these expenses, up to the limits of the coverage.

### ***Coverages and Exclusions in Liability Insurance***

#### **Negligence**

Professional liability and E&O policies cover some forms of negligence in the course of rendering professional duties. They do not cover criminal negligence, however, because criminal acts cannot be covered by insurance contracts.

#### **Strict Liability**

Strict liability may be covered by liability policies. Strict liability is a form of liability which arises from product defect. It is not considered criminal liability.

#### **Imputed Liability**



Imputed liability is covered in employer liability insurance forms and in some professional liability forms where the insured has risks as an employer. A businessowners policy form, the Employment-Related Practices form, is also available for this type of coverage. General liability forms provide some employer liability coverage, although liability for bodily injury and liability that is covered by Workers Compensation laws are excluded.

#### **Legal Obligation for Damages**

Liability policies pay only amounts to which the insurance applies and that the insured is legally obligated to pay. This obligation is determined through a court, or, under most policies, the insurer may settle a claim and establish outside a court of law the amount that the insured must pay.

#### **Claims Expenses**

Liability insurance also covers expenses related to liability claims such as defense expenses, payment of bail bonds and bonds to release attachments, loss of earnings, and interest on any judgment amount. These expenses all arise from the liability claim

and are considered within the scope of the coverage. In some cases, these expense are paid in addition to damages paid under the policy and are included as supplementary payments.

## **Damages**

Liability insurance may cover compensatory or actual damages, nominal damages, general damages and possibly even punitive damages up to the limits of liability in the policy. If the policy does not cover certain types of damages, these damages will be listed as an exclusion within the policy terms.

In some cases, punitive damages may not be covered even if they are not specifically excluded in the contract. The reason for this is that the basis for punitive damages may be fraud, malice (which is by definition a willful act) or the commission of certain criminal acts. Insurance policies will not pay benefits for any act which is fraudulent, willful or criminal.

In certain states, punitive damages can be awarded without the plaintiff establishing fraudulent, willful or criminal conduct on the part of the defendant. If punitive damages are awarded in such a state and the damages are not based on fraud, nor on a willful or criminal act, the insurer may pay them (up to the limits of the insurance and as long as the policy does not specifically exclude coverage of punitive damages). However, in states that require that fraud, malice or the commission of a criminal act be present in order for punitive damages to be applied, punitive damages would not be paid by the insurer, even if the policy terms do not specifically exclude punitive damages.

In some cases, courts have excluded punitive damages from insurance coverage because punitive damages are not for the benefit of the third party. They are awarded to punish the defendant. Since liability insurance is purchased for the benefit of the third party victim, and premiums are paid in order to compensate that victim, having insurers pay for them is against the purpose of the insurance. And, some courts have determined, if insurers are required to pay for punitive damages, premiums will rise for all, in effect causing innocent insureds to take the punishment for the guilty defendant.

Punitive damages, then, may or may not be covered by a policy. If a client has questions regarding whether punitive damages are covered, the insurance company's legal department may be the best place to find an answer. However, there may not be a definitive answer until a claim is decided by a court of law.

## **Intentional Wrongs**

Under the law, insurance is considered an instrument intended to pay for loss which is *fortuitous*, or beyond the control of the insured. Therefore, generally, intentional wrongs are not covered by any insurance policy. However, in some cases, intentional acts are covered by liability insurance. For example, an insured dentist may intentionally remove a tooth from the mouth of a patient because she thought it was the correct tooth, when in fact she was mistaken. Or, an insured doctor may prescribe medicine intentionally, but make an error in doing so because the patient has an allergy to the medication. Wrongs such as these which are intentional but are also mistakes are generally covered by Professional Liability and Errors and Omissions insurance. In order to be excluded from coverage under these policies, courts generally have to find an *intent to cause harm*. Intent to act is not alone sufficient reason to exclude a wrong from coverage.

## **Types of Liability Forms**

There are three broad types of liability forms for businesses or professionals, other than automobile liability forms: General Liability, Businessowners Liability and Professional Liability or Errors and Omissions forms.

### **Commercial General Liability Forms**

Commercial General Liability forms cover bodily injury and property damage liability, personal and advertising injury liability and medical expenses incurred for bodily injury caused by an accident on or by the premises owned or rented by the insured, or that arise from the insured's operations. The definitions of bodily injury, property damage, personal injury and advertising injury provide an explanation of the coverage provided:

#### **Bodily Injury**

Under the Insurance Services Office, Inc., Commercial General Liability form, © *Insurance Services Office, Inc., 1994*, bodily injury means bodily injury, sickness or disease sustained by a person. Bodily injury includes death resulting from any of these at any time.

#### **Property Damage**

Under this same form, property damage means physical injury to tangible property, including all resulting loss of use of that property. Property damage also means loss of use of tangible property that is not physically injured.

#### **Personal Injury**

Personal injury is defined in this form as injury, other than bodily injury, that arises out of one or more of the following:

- False arrest, detention or imprisonment;
- Malicious prosecution;
- 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;
- Oral or written publication of material that slanders or libels a person or organization or that disparages a person's or organization's goods, products or services; or
- Oral or written publication of material that violates a person's right of privacy.

#### **Advertising Injury**

Advertising injury is defined in the commercial general liability form as *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 person's 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.*

Notice that none of these injury definitions deal with **economic damage**.

## **Businessowners Liability Form**

The Businessowners Liability form includes these same coverages, and defines them very similarly. This form also does not recognize coverage for economic damages.

Both the Commercial General Liability and Businessowners Liability forms can be endorsed to add other liability coverages. Commercial liability forms are available for pollution liability, liquor liability, railroad liability, and many other specific types of liability. Businessowner Liability forms can also be endorsed to extend pollution liability coverage, covered tenants liability and many other types of liability coverage.

## **Professional Liability and Errors and Omissions Forms**

The third type of liability insurance is Errors and Omissions and Professional Liability. As has been discussed this is the only type of liability form that meets the special liability needs of professionals.

## **Occupation Specific Coverage**

Each professional liability form includes definitions and terms that are related specifically to the occupation of the professional insured. For example, the form may define *professional services* to mean “the services for which the insured is licensed, trained and qualified to perform in the insured’s capacity as a [name of occupation].” The definition of the *named insured* will also typically refer to the specific occupation being covered, e.g. a lawyer’s professional liability form might declare that “**named insured** means the lawyer named in the declarations.”

## **Consent of the Insured**

The terms *Professional Liability* and *Errors and Omissions* (E&O) are often used interchangeably to discuss liability insurance for professionals. There is a slight difference between the technical definitions of Professional Liability and E&O insurance, however. Under the strict definition of E&O insurance, an E&O’s contract’s provisions must state that the insurer is not required to have the insured’s consent in order to settle a claim. Under a strictly defined professional liability insurance contract the insurer would have to have the insured’s consent in order to settle any claim. In every other way, the two types of insurance are virtually indistinguishable from one another. The distinction regarding the insured’s consent is not generally recognized by insurers today; many, if not most, “professional liability” policies allow the insurer to settle a claim without the insured’s consent. (Because the two terms are commonly used interchangeably within the industry today, and because many policies, whether called *Professional Liability* or *Errors & Omissions*, allow the insurer to settle without the insured’s consent, this course also uses either term to describe insurance that covers the liability risks of professionals.)

Some policy forms give the insurer the right to remove itself from a claim if the insured will not accept a settlement to which the insurer and the plaintiff **both** agree. In such a situation, the insured will likely continue to defend himself or herself against the claim, but the insurer will pay no more to the insured once a damage award is set or a new settlement is agreed to than the settlement amount which the insurer had originally offered. This provision basically allows the insurer to change the limit of liability from the limits in the policy to the amount offered to settle the claim in question. Such a provision does give the insured a way to block the insurer from settling a claim without his or her consent and includes protection for the insurer because the insurer can limit its liability payments related to the claim.

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## **Damages**

Professional liability forms generally pay “damages” which the insured is legally obligated to pay because of a claim. Damages under a general liability form includes damages arising from bodily injury, personal injury, advertising injury and property damage. The definition of damages under an E&O policy is broader and generally means monetary amounts for which the insured is legally liable, and includes amounts paid as judgments, awards or settlements.

## **Other Injury**

If a professional liability form does not include a broad definition of damages, it will generally include a broad definition of injury in order to cover professional liability risks. General liability forms specifically cover liability for certain harms that are defined in the policy. These are bodily injury, property damage, personal injury and advertising injury. E&O forms that are based on general liability policies, or which are used as endorsements to general liability policies cover these four harms and cover liability for **other injury** that arises out of the rendering or failure to render professional services.

## **Occurrence**

The definition of “occurrence” in a general liability form is normally similar to the following: an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Under a professional liability form, any act or omission arising out of the rendering or failure to render professional services is included in the definition of occurrence.

## **Premises Liability**

Regarding **property damage**, the general liability forms exclude liability for property damage arising out of property owned, rented or occupied by the insured, out of premises sold, given away or abandoned by the insured, out of property loaned to the insured, out of personal property in the care, custody or control of the insured, out of the part of real property on which the insured or any contractor or subcontractor working on the insured’s behalf or out of part of any property that must be restored, repaired or replaced because the insured’s “work” was incorrectly performed on it. Many professional liability forms do **not** exclude any of these forms of property damage, or offer it at an additional charge since a possible area of liability for a professional can occur when a customer is harmed on the insured’s property, or on property the insured is occupying. This type of property damage liability coverage is known as *premise liability*.

## **Employee Liability**

Bodily injury or personal injury that arises out of an employee’s failure to provide professional services is excluded under general liability forms. Under an E&O form, bodily injury, personal injury, property damage, advertising injury or other injury is covered that arises out of an employee’s rendering or failing to render professional services in connection with the insured’s business.

## **Employment Practices Liability**

Most professional liability forms exclude employment practices liability such as liability that arises out of actual or alleged termination or discrimination. In order to be covered for such liability the professional must purchase additional employment practices liability coverage.

## **Contractual Liability**

Most contractual liability is excluded from liability forms for professionals. However, contractual liability protection can generally be added to coverage for additional premium.

## **License Protection Coverage**

Some coverages of E&O insurance are applicable only to certain occupations. For example, some professionals are responsible to a board or commission that oversees the professional's actions. For example, a securities representative may be responsible to the SEC or the NASD. A doctor may be responsible to a medical board. A lawyer may be responsible to a state bar association. These professionals may be subject to discipline from these entities. Within professional liability forms for professions such as these, definitions related to disciplinary proceedings or hearings will be included. Some policies provide *license protection* or *licensing board coverage* which includes reimbursement for expenses related to such disciplinary hearings, including defense expenses. In order for licensing board coverages to apply, the insured is generally required to notify the insurer in writing about the proceeding and to provide documentation of all expenses. The licensing board coverage may be indemnity coverage, meaning that the insured must pay the defense costs and be reimbursed by the insurer.

## **Insurability Under Professional Liability Forms**

Liability insurance is different from other forms of insurance because the ability to forecast frequency and severity of claims is difficult. Life insurance issuers can use mortality tables along with health risk factors to establish insurability and premium charges. Property insurers have statistics regarding fires and other perils they can base their rates upon. Automobile property damage insurance relies on accident statistics by make and model of automobile to help establish rates. Liability risks are much more difficult to plot on a graph or include in a calculation. They do not establish a frequency distribution pattern like the other types of risks mentioned.

In order to determine insurability, professional liability underwriters look at three basic issues: (1) whether the applicant has a prior history of claims, (2) whether the applicant has a prior history of licensing board complaints or other disciplinary actions and (3) whether the applicant has ever been cancelled or been denied coverage. Coverage will not necessarily be denied if any of these factors are found to exist, but premium rates may be increased or exclusions added to the policy. Whether or not coverage is denied or premiums are increased depends upon the circumstances surrounding the complaint, claim or coverage denial. A complaint regarding the late filing of an advertisement to the NASD will be less significant to an insurer underwriting a securities rep than would a complaint regarding misrepresentation.

## **Claims Made vs. Occurrence Based Policies**

Liability policies are offered as either "claims made" or "occurrence" based policies. These two terms refer to the conditions under which a policy will pay a claim, or what "triggers" the payment of benefits under the policy.

### **Occurrence Based Policies**

Under an occurrence based policy, in order for the coverage to apply, the injury or damage must occur during the policy period. As long as the policy applies to the injury or damage, if the injury or damage occurs during the policy period, the policy will pay, even if the claim is made after the policy period ends.

All professional liability policies at one time were occurrence based policies. However, not only have lawsuits become more prevalent since that time, resulting in more claims, but the subject of lawsuits has become more often about damage or injury that occurred years ago. Courts ruled that even though damage and injury occurred years ago, if damage was only just discovered, the occurrence based insurance policies that were in force when the injury was **discovered** provided coverage. The increase in lawsuits and the fact that current occurrence based policies had to cover risks from years ago made occurrence based policies very expensive to purchase.

### **Claims Made Policies**

Because of this, most professional liability policies issued today are claims made policies. Under a claims made policy, both the damage or injury **and** the claim must be made during the policy period. Claims made policies help limit the insurer's exposure to injury and damage that occurred in the distant past because the claim must also be made during the policy period. An insurer has a fair degree of certainty that claims to which the coverage applies will be known while the policy is in force. The insurer can then review the risk annually and make premium adjustments based on the experience of the risk over the coverage year.

Claims made policies can have provisions for expanding the coverage period. They can be written with a *retroactive date* and/or an *extended reporting period*, or *ERP*.

A retroactive date, typically a date no more than six months before the policy inception date, moves the policy coverage to that earlier date. Injury or damage that occurs before the retroactive date is not covered. Any injury or damage that occurs from the retroactive date until the policy coverage ends is covered, assuming the claim is made during the policy period. The retroactive date is sometimes referred to as a *nose*.

An ERP extends the amount of time under which a claim may be made. ERPs may include two coverages: a relatively short *mini tail* and a longer *midi tail*. The mini tail provides an extended period of time, for example sixty days, to report claims that arise out of covered injury or damage that had not been reported during the policy period. The midi tail, which may be for a period of up to five years, gives an additional period to make claims that arise out of an occurrence that was reported during the policy period or during the mini tail period. ERPs may also provide just one tail coverage – one period of time to report claims for injury or damage that occurred during the policy period.

A Supplemental ERP can be purchased for some insurance that provides an unlimited period of time to report claims for an occurrence reported during the policy period. This is known as *full tail coverage*. There are two ways to purchase full tail coverage. One way is known as a *pre-paid tail*. The charge for the tail is part of the annual premiums paid. The other way is to purchase the coverage purchases at the end of the policy period. Such coverage must normally be purchased while the policy is in force or within a limited time frame after the policy period ends. The price of full tail coverage varies. Generally, however, the cost of a tail is from 175% to 250% of the last premium. The cost is higher for a tail because the likelihood of a claim is greater as time goes on. A benefit of many claims made policies is free full tail coverage upon death, permanent disability or permanent retirement.

Retroactive dates and extended reporting periods are generally purchased in order to remove any gaps in coverage when one policy replaces another. An ERP provides

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coverage on a policy which will be replaced if the new claims made coverage has an inception date or retroactive date later than the prior coverage's policy period ends. A retroactive date provides coverage from the new policy to cover the gap if the old policy ends prior to the new policy's inception date.

### **Group Professional Liability Insurance**

Professional liability insurance can be provided on a group basis. Group policies are normally issued to a group of people in the similar or same business type who are subject to the same loss exposures. The advantages of buying a group policy is that premiums are likely to be lower than purchasing an individual policy and persons who may not be insurable under an individual policy may be insurable under a group policy.

The reason for these two advantages - lower premium expense and insurability – can also be seen as a disadvantage. The reason group policies may provide lower premium and insure otherwise uninsurable risks is that the coverage under a group policy is normally more limited than that of an individual policy. Group policies also often have lower limits of liability than are found in individual policies. However, policy benefits vary, and a group policy may be equivalent to available individual forms.

### **Liability Insurance for a Legal Group**

Professional insurance may be issued to a legally formed group, such as a corporation or a partnership of doctors, lawyers or other professionals. There are provisions in such policies which are not necessarily applicable to individual policies.

### **Severability**

Severability means that each insured under the policy has his or her own liability limits. If several lawyers are covered under a policy with severability of limits, for example, and the policy has a five million per occurrence and twenty million total liability limits, each lawyer would be covered for \$5 million / \$20 million in liability.

### **Conditions for Coverage**

In some cases, legal group coverage applies only if all members of the group carry their own individual liability policies as well. For example, a policy covering a partnership of doctors may require that each doctor carry malpractice insurance. If so, the policy issued to the group will normally apply as excess insurance over each doctor's own policy.

### **Premiums**

Premiums for a legal group are generally calculated based on the number of professionals, independent contractors and staff to be covered by the policy. A policy may require that additional premium be paid immediately if an additional insured is added during the policy period. Other policies calculate the extra premium required at the end of the policy period.

### **Umbrella Liability Insurance and Excess Policies**

Umbrella liability insurance is purchased to provide additional, high limit insurance that applies to liability for damages that arise from a suit or claim. These liability policies are called "umbrella liability policies" because they provide broad coverage that

encompasses many forms of liability and provide additional insurance over other insurance policies the insured owns.

In order to purchase an umbrella liability policy, the insured must already have general liability insurance. The insurer may also require other forms of liability insurance as well, such as automobile liability insurance. The requirements for underlying coverages depend upon the coverages the umbrella liability policy provides. This requirement is known as *required underlying limits*. The reason for this requirement is that umbrella insurance is structured to pay for damages as excess over underlying policies. Premiums are calculated and provisions written based on this assumption.

Umbrella policies generally include some coverage that is not found in underlying policies. For such coverage, the insured is required to pay for damages up to a certain amount, for example \$100,000, before the umbrella insurance will pay. This practice of requiring the insured to pay for damages related to coverages not provided by underlying policies is called *self-insured retention*. Self-insured retention acts as a sort of deductible on the policy.

*Excess policies* are similar to umbrella liability policies, but do not generally provide broader coverage than the underlying liability policies. Excess policies that offer additional coverage for the **same** kind of coverage as the underlying policy or policies are called *following form policies*. Since a following form policy does not provide any coverage not found in the underlying policy, no self-insured retention requirement is involved. Excess policies are also available which do not require underlying insurance, but include *other insurance* provisions that apply the coverage as excess over any other applicable coverage the insured owns.

Two types of payment clauses are found in umbrella liability policies. One is an *indemnity* clause which states that the insurer will reimburse or indemnify the insured for amounts which the insured becomes legally liable to pay or which are assumed under contract. The other is a *pay on behalf* clause which states that the insurer will make direct payment on behalf of the insured for amounts which the insured becomes legally liable to pay or which are assumed under contract.

An umbrella policy or excess insurance policy can be an excellent complement to a professional liability policy if the professional is subject to high damage awards. Purchasing an umbrella or excess policy can be less expensive than purchasing an E&O policy with a high liability limit.

## **Summary**

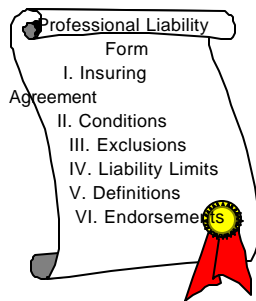
Liability insurance provides coverage against the risk that a lawsuit will be brought against the insured. Generally, the coverage protects against liability for acts resulting from the insured's negligence, but types of liability that do not require the presence of negligence, such as strict and imputed liability, may be covered. The basic types of liability forms available for businesses and business owners are commercial general liability forms, businessowners liability forms and professional liability forms.

Professional liability forms differ from the other type of business liability forms because they cover liability arising from rendering or failing to render professional services. They are occupation specific forms and may include premises liability coverage, license protection coverage and coverages that apply only to the professional's occupation.

Liability forms may be claims made or occurrence based policies. Most E&O policies are claims made policies today. However, the ability to file claims after the policy period can be provided through adding an extended reporting period to the policy. The extended reporting period can be purchased with a length of several weeks, several years, or for an unlimited time period.

## Chapter Four: E&O & Professional Liability Forms

There are a wide variety of liability forms available for the professional. Some provide limited coverage provisions and others have broad coverage provisions. Generally, all professional liability and E&O forms include the following items:



- Coverage or Insuring Agreement;
- Definitions;
- Conditions;
- Exclusions;
- Limits of Liability;
- Policy Period;
- Coverage Extensions, if any, and
- Endorsements, if any.

Insurance Services Office, Inc., which is a service organization to Property/Casualty insurers, creates and files many property/casualty insurance forms with the state Insurance Departments. Many insurers use the forms as created, or customize them for their own use. ISO's professional liability forms are generally endorsements to their Commercial General Liability policies or their Businessowners Liability policies. Because the ISO forms are widely used, this course will refer to them from time to time, particularly the Businessowners Liability Coverage Form (*Copyright, Insurance Services Office, Inc., 1996*), along with various Professional Liability endorsements from ISO. The Businessowners Liability form is very similar to the Commercial General Liability form from ISO.

Professional liability forms are generally available in two ways – as an endorsement to a commercial general liability or businessowners liability form or as policies which stand alone or are not an endorsement to any other liability form.

### Coverage or Insuring Agreement

Basically, the insuring agreement of a professional liability form states that the insurer will pay the sums that the insured becomes legally obligated to pay because of "damages" or "claims" that arise out of acts, errors, omissions or negligence of the insured. Some forms state that the insurer will pay for damages because of "bodily injury," "property damage," "personal injury," "advertising injury" or "other injury," that arise out of the rendering or failure to render professional services in connection with [occupation description].

If the policy is a claims made policy, as many professional liability forms are, the insuring agreement will normally include stipulations that the coverage applies only if the damage or injury results from a claim that is first made against the insured during the policy period and based on any injury or damage that occurred during the policy period, including any applicable retroactive date. If any ERP is provided in the coverage, the form will state

that the claim cannot be made later than the time period the ERP encompasses in order for coverage to apply.

Another important part of the insuring agreement or the conditions of a policy is that the insured must have had *no prior knowledge* before the effective date of the policy that any act, omission or error could result in the claim in order for the coverage to apply. Some policies include language to the effect that the insured could not have *foreseen* that any act, omission or error could result in a claim in order for coverage to apply.

Such language places a serious responsibility upon the insured to disclose, at the time of policy application, any acts, omissions or errors he or she is aware of that could result in a claim. If this information is not disclosed, the insurer may not cover damages that result from such acts, errors or omissions. Depending on the circumstances, the insurer may cancel coverage if the insured did not properly disclose such information.

## **Definitions**

The definitions within the policy vary depending on the type of occupation the form covers. Some of these occupation-specific definitions will be discussed later in the chapter when types of professional liability and E&O forms are covered. Definitions which are commonly found in professional liability forms, regardless of what occupation is being covered, are discussed below:

### **Claim**

Generally, a claim is defined to mean a notice that is received by an insured from a person or entity that advises that the person's or entity's intention is to hold the insured liable for damages or injury covered by the insurance. A claim can include a demand for money or services and the serving of a suit. Some forms include the institution of arbitration proceedings in the definition of a claim.

### **Claim or Suit Expenses**

Liability forms for professionals generally pay for various expenses related to claims or suits. The expenses included in policy coverage normally are:

- all reasonable expenses related to investigating and defending the suit or claim;
- all costs taxed against the insured in any suit to which the insurance applies;
- interest that accrues on the full amount of any judgment after the entry of any judgment and before the insurer has paid, or offered, or deposited in court the amount of judgment that is within the policy's limits of liability or limits of insurance;
- premiums on appeal bonds and premiums on bonds needed to release attachments, up to the specified limit in the policy; and
- reasonable and necessary expenses the insurer asked the insured to incur related to the investigation or defense of a claim or suit. Some policies include loss of earnings as a reasonable and necessary expense and other policies exclude from payment loss of earnings.

### **Damages**

Damages are generally defined to mean a monetary judgment determined by a court of law or due under a settlement. They may include an arbitration awards as well.

Exclusions from damages commonly included in the policy are:

- punitive damages;
- fines;
- penalties;
- restitution of fees, profits or charges for services rendered; and
- any judgments of damages that are not insurable.

### **Advertising Injury**

Forms, such as Businessowners Liability Forms with Professional Liability endorsements from Insurance Services Offices, which include a definition of advertising injury generally define it to mean injury that arises out of one or more of the following:

- oral or written publication of material that slanders or libels a person or entity or disparages goods, products or services of a person or organization;
- oral or written publication of material that is in violation of a person's right to privacy; and
- infringement of copyright, title or slogan.

### **Bodily Injury**

Bodily injury is defined in the businessowners professional liability forms to mean bodily injury, sickness or disease, including death that is sustained by a person.

### **Personal Injury**

Personal injury is defined to mean injury other than bodily injury that arises out of:

- false arrest, detention, or imprisonment;
- malicious prosecution;
- 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;
- oral or written publication or material that slanders or libels a person or organization or that disparages a person's or organization's goods, products or services; or
- oral or written publication or material that violates the right to privacy of a person.

### **Property Damage**

Property damage is defined in the businessowners liability forms to mean physical injury to tangible property, including all loss of use of the property or loss of use of tangible property that is not physically injured.

### **Insured**

The insured is generally defined to include the named insured; the spouse of the named insured in certain cases; principals, partners, executive officers, directors, stockholders, or trustees if acting on behalf of the named insured within the scope of their respective duties; the executor or legal representative of the insured; and any predecessor in interest. Employees may also be covered for rendering or failure to render professional services in connection with the insured's business.

## Coverage Territory

Some professional liability forms provide worldwide coverage. Others limit the coverage territory to the United States, Puerto Rico and Canada. Still others provide some form of limited worldwide coverage in addition to coverage in the US. Worldwide coverage is often available as an additional coverage to professional liability policies if the insured desires to purchase it.

## Consent of the Insured

If the policy requires the consent of the insured to settle a claim, the language usually includes a condition that the consent may not be *unreasonably withheld*. The policy may also state that if the insured does not give consent to a settlement approved by both the insurer and the plaintiff or claimant, the insurer's liability related to the claim or suit will not exceed the amount the insurer would have been liable for should the insured have approved the settlement.

If the form does not require the consent of the insured, the policy language will give the insurer the right to settle any claim or suit.

## Professional Services

The definition of professional services is the definition which limits the coverage to services related to the occupation covered. For example, a form covering a lawyer would include in professional services items such as acting as an attorney, a notary public, a conservator, a trustee, and so on. A form covering an architect would include services as an architect, and might specifically include landscape architecture or other types of architecture. An accountant's form might include services such as bookkeeping, tax preparation, and similar services in addition to accounting services.

## Occurrence

Liability forms may use the definition of occurrence to describe the trigger for a claim or suit, or may use the term "wrongful act" or use "incident," as in "medical incident."

An *occurrence* in professional liability or E&O form is defined to mean an accident, including continuous or repeated exposure to substantially the same general harmful conditions and will include acts or omissions that arise out of the rendering of or failure to render services as a [name of occupation.]

If the term *wrongful act* is used it will be defined using terms such as any error, act, omission, neglect, or breach of duty actually or alleged to have been committed or attempted by an insured. Such acts, of course, must be in the course of performing professional services.

Forms using the definition of an *incident* commonly use language similar to those used in the *wrongful act* definition – any act, error, or omission in the insured's rendering or failure to render professional services.

## Complaint

If a form includes licensing board coverage or similar coverage, terms related to this coverage will also be defined. A *complaint* may be defined as the official documentation that is required by the licensing board or other entity that regulates the insured's professional activities and conduct.

## **Hearing, Professional Review or Proceeding**

Also related to licensing board coverage, the form may need to define the various types of proceedings that the board may undertake and for which the insurer will pay defense expenses.

## **Premises**

If *premises liability* coverage is provided, the form will include a definition of *premises*. Premises are generally defined to be the location that is stated on the declarations or certificate of insurance, approaches that adjoin the premises, and may include additional locations that are used by the insured for professional purposes as long as the insurer is notified of the additional locations at application or within a specified time frame stated in the form.

## **Product**

Not all E&O forms include a product definition, since many professions do not include a product in any way, but rather are services only. In those forms which include coverage for liability related to an insured's product, product is defined to mean any good or product, other than real property, that is manufactured by the insured, those trading under the insured's name or a person or organization whose business or assets the insured had acquired. Containers, materials, parts or equipment that are furnished in connection with the product are also included in the product definition. Policies vary as to whether they also cover products sold and distributed by the insured. If selling and distribution of product is excluded, it is normally because the professional covered would normally provide the product as part of his or her professional services, not as a retailer or wholesaler. If included, it is normally because selling or distributing the product is a minor part of the professional's occupation, again, not because the professional is a retailer or wholesaler. True retail and wholesale risks are covered by other types of liability forms.

The product definition often includes any warranty or representation made by the insured regarding the fitness, quality, durability, performance or use of the product and the providing of or failure to provide warnings or instructions related to the product.

## **Work**

Work means work or operations performed by the insured, or on behalf of the insured and materials, parts or equipment that is furnished in connection with the work. It also generally includes warranties or representations regarding the fitness, quality, durability, performance or use of the product and the providing of or failure to provide warnings or instructions related to the product.

## **Employee**

An employee is generally defined to exclude temporary workers.

## ***Policy Conditions***

### **Bankruptcy**

Bankruptcy or insolvency on the part of the insured does not relieve the insurer of its responsibilities under the policy. Bankruptcy generally relieves an insured of debts. Under bankruptcy rules, an insured would therefore not be responsible for damages

awarded under a lawsuit. However, several years ago many state legislatures decided that a liability insurer should pay harmed third parties even if an insured declared bankruptcy. State legislatures felt the third party should be able to collect damages and believed that since the insurance was paid for, the insurer should pay regardless of the bankruptcy. As more and more states adopted such legislation, insurers began making this bankruptcy condition a part of their liability policies, and today this clause is standard.

### **No Action Against the Insurer**

The no action against the insurer condition provides the terms under which an insured can be paid by the insurer. If the policy states that no action can be made against the insurer until the insured has **paid** a third party an amount fixed by a final judgment or an agreement between the insured, the third party and the insurer, the policy is actually an indemnity policy, not a liability policy. Indemnity policies pay back the insured after the insured pays for the damages. If the no action against the insured clause states that no action can be made against the insurer until the amount of the insured's obligation to pay has been determined by a judgment after a trial or by an agreement between the insured, the third party and the insurer, the policy is a liability policy. It pays once the amount of liability is established.

### **Duties in the Event of A Claim**

The duties of the insured in the event of a claim are generally quite extensive. This is understandable since an insurer normally will be defending the insured and/or working on a settlement, so needs a lot of information as early as possible in order to do so. Common duties included under professional liability policies include notifying the insurer as soon as possible in writing of any claim or if the insured has reason to believe there will be a claim. The written notice should include:

- the names and addresses of any injured persons or witnesses;
- the nature and location of any injury or damage arising out of the occurrence or offense;
- the act, error, omission, injury or circumstances that caused the claim or likelihood of claim;
- how, when and where the occurrence, act or incident took place; and
- the injury or damage that occurred and/or may occur from the act.

The insured must also immediately send the insurer copies of any demands, notices, summonses or other legal papers that are received regarding the claim or suit. Additionally, the insured generally must authorize the insurer to obtain records and other information related to the claim, cooperate with the insurer in the investigation, settlement or defense against the suit, and assist the insurer in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which the insurance applies.

### **Subrogation**

*Subrogation* is the legal term for the process through which an insurer is able to recover damages from the party liable for damages once the insurer has paid an insured or other claimant. A typical subrogation clause states that the insurer will be subrogated to the insured's right of recovery related to any payment the insurer has made. To subrogate means "to substitute." The insurer's right to recover damages are substituted for the insured's right to the damages since the insurer paid damages on behalf of the insured.

There are five legal elements to the concept of subrogation:

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1. the party, e.g. the insurer, who claims the right of subrogation must first pay the debt;
2. the party who claims the right of subrogation is not a volunteer, but has a legal obligation to pay the debt;
3. the party who claims the right of subrogation is secondarily liable for the debt – in the case of liability insurance, the insurer is secondarily responsible;
4. a third party is primarily liable for the debt; and
5. no injustice may result by allowing the right of subrogation to the party.

Regarding point 4, the third party who is primarily liable is the person or entity from whom the insurer seeks to recover payment. For example, in the case of a suit involving contributory negligence, the insurer may seek to recover damages from a third party who contributed to the loss or damage for which the insurer paid.

Subrogation is important because of the service it performs for all parties involved in a claim or suit:

- the process results in the party who is liable for damages or loss to be held responsible;
- by being able to recapture certain losses, an insurer is able to keep premiums lower than if such recovery was not possible; and
- since the insurer recovers the payment, not the insured or the plaintiff in the suit, payment is made to the rightful party.

## **Cancellation**

Cancellation rules vary by state – some states mandate the number of days of notice the insurer must give the insured and vice-versa in order for a policy to be cancelled. The period of time between notice and actual cancellation may also be regulated by state law.

A standard cancellation condition will generally state that the named insured can cancel the policy at any time. In order to cancel the policy, the insured must return the policy to the insurer or its representative and mail the insurer a written notice of the cancellation and when it will be effective. In order for the insurer to cancel the policy, the insurer must mail the insured a notice at the address shown in the declarations not less than a certain number of days, normally 30 or 60, before the cancellation becomes effective. If the policy is being cancelled for non-payment of premium, the notice can normally be mailed 10 days before the cancellation becomes effective.

If the policy is cancelled, any premium refund due is paid on a pro-rata basis. If the policy is cancelled by the insured, the policy may state that the premium refund will be calculated on a *short rate basis*. Calculating premium under the short rate basis allows the company to recoup some expenses related to the issue and administration of the policy.

## **Other Insurance**

The condition related to other insurance explains how the insurance will be applied if other insurance is in force regarding the same occurrence or incident. Generally, liability policies state that the coverage will apply as excess, unless other insurance is written as specific insurance over the limits of liability in the policy, as an excess or umbrella policy may be.

## **Concealment or Fraud**

If the insured intentionally conceals or misrepresents any material fact or circumstance relating to the insurance, the insurer will cancel the policy or it will be voided. This includes knowingly notifying the insurer of any fraudulent or false claim against the policy.

## **Assignment**

No assignment of a policy can be made without the insurer's consent. Assignment does not include an executor or other legal representative acting as the named insured if the named insured dies. An executor or other legal representative will be treated as the named insured in such a circumstance.

## **Inspection and Audit**

Under some policies, the insurer has the right to inspect the insured's property and operations at any time. If such an inspection is done, the insurer does not warrant that the property or operations inspected are safe or healthful, or are in compliance with any law, rule or regulation.

A policy may also give the insurer the right to examine and audit the insured's books and records at any time while the policy is in force. The insurer may also have the right to perform such an audit regarding the insurance up to a specified time frame after the policy has terminated.

## **Liberalization Clause**

Some policies include a liberalization clause. Under a liberalization clause, if the insurer submits to a state insurance department a filing that results in extending or broadening the insurance either by endorsement or by substituting a policy form, and the broader coverage does not require additional premium, and the filing is approved while the policy has been in force, or within a specified number of days, e.g. 45, prior to its inception, the benefit of the extended or broadened insurance will apply to the insured as though the endorsement or substitution were a part of the policy.

## **Separation of Insureds**

If the policy includes a separation of insured provision, the insurance applies as if each named insured were the only named insured and separately to each insured against whom a claim or suit is brought, up to the limits of insurance in the policy. A separation of insureds provision is important in a situation where there are covered employees, partners or executives in addition to the named insured.

## **Changes**

Policies state that the terms of the insurance may not be waived, changed or modified except by endorsement issued or as otherwise agreed to in writing by the insurer.

## **Premium**

A variety of premium programs are available for professional liability policies. Some policies charge an annual premium which is adjusted based on experience each policy period. Others use a stepped-up premium program. Under such a program, premium increases incrementally over a specified period of time, for example five years. After the end of the specified period, the annual premium amount remains relatively stable, unless a change of risk occurs.

## **Exclusions**

Some liability forms include many exclusions and some include only a few. The number of exclusions depends on the insuring agreement and conditions – if the insuring agreement is broad, there will generally be many exclusions. If a policy's insuring agreement and conditions provide a more narrow scope of coverage, there tend to be few exclusions.

### **Nuclear Liability Exclusion**

The nuclear liability exclusion endorsement is standard to broad form professional liability policies. Basically, this endorsement excludes bodily injury or property damage if the insured is also an insured under a nuclear energy liability policy issued by a specified insurer, or if the insured would be an insured under such a policy except for the policy being terminated due to reaching its limit of liability. Also excluded is bodily injury or property damage that results from the hazardous properties of nuclear material, and either covered persons are required to maintain financial protection as required by the Atomic Energy Act of 1954, or the insured is entitled to indemnity from the US or any US agency entered into by the US or any agency with the insured.

The endorsement also excludes the payment of expenses under any medical payments or supplementary payments provisions relating to first aid for bodily injury resulting from the hazardous properties of nuclear material and that arises out of the operation of a nuclear facility.

Finally, this endorsement excludes bodily injury or property damage under liability coverage that results from hazardous properties or nuclear material if:

- the nuclear material is at or has been dispersed from any nuclear facility owned by, operated by or on behalf of the insured;
- the nuclear material is contained in spent fuel or waste at any time that was possessed, handled, used, processed, stored, transported, or disposed of by or on behalf of an insured;
- or the bodily injury or property damage arises out of the furnishing of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation, or use of any nuclear facility by an insured. If the facility is located within the USA, its territories or possessions, or Canada, the exclusion applies only to property damage to the nuclear facility and any property at the facility.

It may seem odd to include a nuclear liability exclusion endorsement to a lawyer's or dentist's professional liability policy, but the exclusion is made a part of broad form liability policies.

### **Expected or Intended Injury**

Expected or intended injury is excluded from E&O and professional liability forms.

### **Dishonest Acts**

Also excluded, either by a stated exclusion or because of accepted insurance law, are acts, errors, omissions and personal injuries that arise out of dishonest, fraudulent, criminal or malicious intent.

## **Contractual Liability**

Contractual liability is liability assumed under a contract. Contractual liability is generally excluded under professional liability forms, although additional coverage or endorsements can be used to provide contractual liability under a professional liability policy; this coverage is being included as standard coverage in more and more forms.

Under some forms, certain types of contractual liability is not excluded. The businessowners form covers bodily injury and property damage arising from contractual liability assumed under an insured contract. An insured contract is defined to mean items such as a contract for a lease of premises, a sidetrack agreement, any easement or license agreement, an elevator maintenance and other specifically mentioned contracts.

Other forms do not include liability assumed under an insured contract. Generally all forms include liability which would have existed even if the insured had not assumed the liability under a contractual agreement.

A professional may need contractual liability coverage. For example, if a doctor or other medical professional works for a managed care organization or other health care organization, the organization often includes in its contract with the doctor that the doctor must assume liability for any claims against the doctor which also result in a claim against the health care organization.

## **Liquor Liability**

The businessowners forms also exclude liability for bodily injury or property damage for insureds which are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages if the bodily injury or property damage arises out of:

- causing or contributing to the intoxication of any person;
- furnishing alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- which violates any statute, ordinance, or regulation related to the sale, gift, distribution or use of alcoholic beverages.

ISO has a Liquor Liability coverage form which can be used by businesses which sell, serve or furnish alcoholic beverages.

## **Workers Compensation and Similar Laws**

E&O and professional liability forms generally exclude liability which the insured has under any workers' compensation, unemployment compensation, employers liability, disability benefits or other similar law. Businesses can purchase workers compensation insurance to cover such liability.

## **Employer's Liability**

Employer's liability protects an employer against claims arising out of acts of an employee while acting within the employee's scope of duties. Employer's liability is sometimes also called *vicarious liability* when used to describe coverage under a liability form. Vicarious liability actually encompasses the insured's liability for acts of any other party, not just for employees. Under some forms, employer's liability for bodily injury to an employee while in the employ of the insured and carrying out duties related to the conduct of the insured's business is excluded. Other forms include such coverage. Employer's liability or vicarious liability is based on the legal principle of *Respondet*

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*Superior.* This principle is based on the idea that the employer, or under the original principle, the “Master,” is responsible for damages arising out of the actions of the employee, or under older laws, the “Servant.” Under this principle, if injury or damage arises out of the employee’s scope of duties, the employer is generally liable. This is the case even if an employee seeks to conceal damage or injury or the actions leading up to such damage or injury from the employer, because the employer should have oversight processes in place.

A professional may need vicarious liability coverage for claims arising from acts of employees and other professionals within a group. When professionals establish a group, the law recognizes an association between the parties within the group and may hold one party liable for another party’s action. If a professional needs employer’s liability coverage for such items and it is not included in a liability form, additional coverage can generally be purchased to cover this risk.

### **Employment Practices Liability**

Employment practices liability coverage protects against liability for actions arising from activities as an employer. Specifically, it covers damage and injury that arise out of discrimination, wrongful termination, failure to promote, sexual harassment or out of a complaint filed with the EEOC.

In order to file a complaint with the EEOC, an employee must be employed by an employer with 15 or more employees. The employee files the complaint directly with the EEOC; the employee does not need an attorney to file the complaint. The EEOC will attempt to resolve the situation with the employer. If it cannot be resolved to the EEOC’s satisfaction, the EEOC will sue the employer in federal court, or provide the employee with a “right to sue” letter, which allows the employee to sue the employer in federal court. Typically, an attorney representing the employee will work on a contingency basis, because the plaintiff, if found liable, will be responsible for the employee’s attorney costs.

Like other optional coverages, employment practices liability is generally available with the payment of additional premium if such coverage is not part of the basic professional liability form purchased by the insured.

### **Pollution Liability**

Liability for bodily injury or property damage due to pollution is generally excluded. However, forms which cover professionals who may have liability for such a risk, such as an engineer, may include pollution liability coverage.

If pollution is excluded, the exclusion provision generally excludes bodily injury and property damage that arise out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

- at or from any premises, site or location which at any time was owned or occupied or rented or loaned to any insured) ;
- at or from any premises, site or location which at any time was used by or for any insured for the handling, storage, disposal, processing or treatment of waste;
- which at any time were handled, transported, stored, treated, disposed of, or processed as waste by or for any insured or those for whom the insured is legally responsible; or

- at or from any premises, site or location on which any insured or contractors or subcontractors working for the insured if the pollutants are brought on or to the premises, site or location by the insured or contractors or subcontractors working for the insured, or if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or to respond to, or assess the effects of pollution in any way.

### **Directors and Officers Liability**

Directors and officers have special risks. They are responsible for decisions that affect an entire company, especially those relating to the financial health of the organization, and therefore are held responsible for the value of the company's stock. A director or an officer can be subject to suits by stockholders, employees, and other directors or officers. Because of the special risks involved some forms exclude liability of directors and officers. If such coverage is needed, there are professional liability forms available just for directors and officers.

### **Fiduciary Liability**

Also excluded from some E&O and professional liability forms is fiduciary liability. The responsibilities of fiduciaries was discussed earlier in this course. Because of the special exposures of fiduciaries, liability for acts as a fiduciary may be excluded under a form. There are special E&O forms for fiduciaries which may be purchased.

If fiduciary liability is excluded, the exclusion will generally be worded similarly to the following:

This insurance does not apply to claims arising from the insured's capacity as a fiduciary or representative capacity.

An ISO endorsement entitled "Exclusion – Fiduciary or Representative Liability of Financial Institutions," *Copyright, Insurance Services Office, Inc., 1994*, states the following:

*This endorsement modifies insurance provided under the following:*

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

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" or "property damage" arising out of the ownership, maintenance or use, including all related operations, of property in which you are acting in a fiduciary or representative capacity.*

B. *The following exclusion is added to paragraph 2., Exclusions of COVERAGE B – ADVERTISING INJURY LIABILITY (Section I—Coverages):*

*This insurance does not apply to "personal injury" or "advertising injury" arising out of the ownership, maintenance or use, including all related operations, or property in which you are acting in a fiduciary or representative capacity.*

### **Claims By Insureds Against Another Insured**

Liability forms do not cover claims by an insured against another insured. This is one reason why many firms require each professional to carry his or her own liability policy.

### **Certain Damages**

Fines, penalties, punitive or exemplary damages are excluded from coverage under many E&O forms. Damages which are a multiple of compensatory damages may be

excluded as well. Some forms allow the paying of damages which are multiples of compensatory damages if the claim is for libel or slander.

### **Securities Transactions**

Some forms, such as those for lawyers or accountants, exclude coverage for claims that arise out of giving advice regarding the purchase or sale of securities or other investments. Other exclusions related to securities transactions exclude claims that arise out of acts, errors, omissions or personal injury involving any security or any transactions subject to the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisors Act of 1940. All these Acts regulate various types of securities transactions and securities advisors. Any purchase, sale or offering of a security subject to any state Blue Sky or Securities law may also be excluded. "Blue Sky" rules require state registration and in some cases, licensing, for securities representatives.

### **Sexual Impropriety Allegations**

Some professional liability forms, such as those for doctors or psychologists, include an exclusion for claims that involve sexual impropriety allegations. Some actual cases of such impropriety have been highly publicized and have resulted in large damage awards, so some insurers are unwilling to assume this risk.

### **Certain Personal or Advertising Injury**

Certain types of personal and advertising injury are excluded under the businessowners forms. In other forms, similar exclusions are generally included, although they may be stated as exclusions to covered claims. These common exclusions include personal injury or advertising injury:

- that arises out of oral or written publication of material which publication the insured directed or did with knowledge that it was false;
- that arises out of oral or written publication of material that was first published before the beginning of the policy period; or
- that arises out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured.

Regarding personal injury or advertising injury that arises out of oral or written publication of material that was first published before the beginning of the policy period: prior acts may or may not be covered by professional liability policies. Generally, if included, prior acts coverage would also exclude those acts that the insured knew or could reasonably have known could result in a claim, or simply excludes those that the insured knew could result in a claim. Prior acts coverage can often be added to a policy's coverage if it is excluded.

Advertising injury is excluded from the businessowners forms if it arises out of:

- breach of contract, other than the misappropriation of advertising ideas under an implied contract;
- the failure of goods, products or services to meet advertised quality or performance; or
- the wrong description of the price of goods, products or services.

## **Certain Bodily Injury**

Bodily injury to any insured is not covered by a professional liability policy. Such coverage is generally provided through workers compensation insurance.

Bodily injury to a person while taking part in athletics is also generally excluded. Finally, bodily injury due to war is excluded. War is generally defined to include civil war, insurrection, rebellion or revolution.

## **Limits of Liability**

The limits of liability clause of a policy generally includes four parts - an each occurrence or each claim limit, an aggregate limit of liability, a deductible amount and the application of the liability limits to multiple insureds, occurrences or claims.

The limit for each occurrence or claim is the most the policy will pay for covered damages and injury related to one claim or one occurrence.

The aggregate limit of liability is the most the policy will pay for all claims or occurrences made in one policy period, plus any extended reporting period if applicable.

The deductible amount is generally applicable to each claim or occurrence.

If more than one insured is involved in the making of a claim, or if more than one claim or suit is brought, or there are multiple persons or entities involved in making the claim, the limits of liability of the policy will not be increased.

## **Policy Period**

The policy period is generally annual. However, the policy period may be extended through the use of a retroactive date under a claims made policy. The policy period will appear in the declarations of the policy. If a retroactive date applies, both the retroactive date and the policy period will be stated.

## **Coverage Extensions**

Coverage extensions are coverages which are added to a policy which may have different limits of liability from the other coverages in the policy. A wide variety of extensions to liability coverages are available. Coverage extensions can be made to add worldwide coverage, additional locations, additional insureds, pollution liability, licensing board coverage and more.

## **Endorsements**

Many endorsements may be made to professional liability policies. Endorsements may be used to add contractual liability coverage, premises liability coverage, employers liability coverage, a deductible, additional insureds, additional locations and many other coverages. Endorsements can also be used to exclude certain risks. For example, an insurer may exclude a specific coverage or may exclude claims related to certain activities which are seen as too risky to insure.

## **Premium Discounts**

Professional liability and E&O forms offer premium discounts in various forms. Some of the discount programs available offer significant premium savings.

## **Prepayment Discount**

Some insurers offer a premium discount if premiums are prepaid. For example, if an insured pays for two years of premium, a 10% discount may apply.

## **New Business Discount**

A new business may qualify for a discount for the first few years of coverage. The likelihood of claims grows as time goes on, so the insurer can charge lower rates in the early years. An insurer may offer a 75% discount for the first year, a 50% discount for the second year, a 25% discount in the third, and thereafter charge the professional the normal premium rate.

## ***Continuing Education Discount***

Some professionals are required to take or have available to them continuing education courses. Some insurers reduce premium if a certain number of continuing education courses are taken.

## ***Use of Contractual Liability Language***

Insurers may reduce premium for certain loss control measures. One loss control method that may reduce premium is the use of language in contracts which limits liability. The insurer provides sample language to the professional to be used in contracts, and/or the insured provides the insurer with proof that contractual language limits liability.

## ***Peer Review***

Some professions are subject to peer review boards. As another incentive to institute loss control measures, some insurers will reimburse the insured the cost of a peer review. At least one insurer reimburses 50% for the cost of the review upon receiving verification of the peer review and the other 50% at policy renewal.

## ***Alternative Dispute Resolution Methods***

If an insured uses alternative dispute resolution methods, such as mediation, some insurers will reimburse premium. Since alternative dispute resolution can provide substantial savings over the cost of defending a case in court, the premium reimbursement can be substantial, as much as 50% of the annual premium.

## ***Temporary Disability***

Some policies will reduce premium if the professional is temporarily disabled. For example, if a professional is disabled for thirty days or more, premium will be reduced for up to six months, or as long as the disability lasts, whichever is shorter.

## **Risk Management**

Besides offering premium discounts for loss control measures, some insurers who specialize in professional liability for certain occupations offer risk management tools which will help insureds control losses. For example, the insurer may have self-assessment tools which provide a method for the insured to evaluate exposures. These tools often include suggested procedures to implement to help reduce any exposures found.

In addition to self-assessment tools, some insurers give presentations and seminars which educate insureds on important loss exposures found in their occupation and also provide information to reduce such exposure. Insurers may offer these seminars as a

benefit to their customers at no charge. Some insurers require attendance at these presentations and hold them all over the US.

## **Retirement Benefits**

Some claims made policies include *retirement benefits*. These can include no-cost tail coverage if the insured has been covered by the insurer for a specified period, for example for five years. Some policies also offer continuous coverage on an occurrence basis upon retirement.

## **Example of a Businessowners Professional Liability Form**

The Businessowners Veterinarians Professional Liability Form, *Copyright, Insurance Services Office, Inc. 1997*, is a professional liability endorsement which is attached to the ISO Businessowners Liability form. It is a one page document that adds and amends the businessowners liability form in order to provide professional liability for veterinarians. There are a wide variety of such forms available from ISO for many occupations. This occurrence form will be examined in order to provide an example of an actual professional liability form.

## **The Businessowners Liability Coverage Form**

The Businessowners Liability Coverage Form includes two coverages: business liability and medical expenses. It also has a coverage extension or supplementary payments coverage which pays for expenses related to suits, such as premiums for certain bonds, expenses to defend the suit and interest on any damage award. It excludes:

- contractual liability which is not assumed under an insured contract;
- liquor liability of a business manufacturing, distributing, selling, serving or furnishing alcoholic beverages;
- pollution;
- professional liability; and
- the other common exclusions discussed earlier in this chapter such as those related to war, nuclear material, and certain personal and advertising injury.

## **Definitions**

The Business Liability coverage includes several definitions.

### **Advertising Injury**

“Advertising injury” is defined similarly to the definition found in the commercial general liability form. It means injury that arises 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 person’s 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.*

### **Bodily Injury**

“Bodily injury” is defined in the businessowners policy to mean bodily injury, sickness or disease sustained by any person that occurs during the policy period. It includes death that results at any time from the bodily injury.

## **Executive Officer**

An “executive officer” under the policy is a person who holds any of the officer positions created under the business’s charter, constitution, by-laws of any other similar governing document.

## **Leased Worker**

Leased workers are included under the businessowners policy as an “employee.” A leased worker is not a temporary worker. A “leased worker” under the provisions of the form is a person leased to the insured by a labor leasing firm to perform duties related to the conduct of the insured’s business.

## **Temporary Worker**

Temporary workers are excluded from coverage under the businessowners liability form. A “temporary worker” is defined in the form to mean a person who is furnished to the insured to substitute for a permanent “employee” who is on leave or to meet seasonal or short-term workload conditions. Temporary workers are usually covered under liability policies of the temporary agency for which they work.

## **Products - Completed Operations Hazard**

The “products - completed operations hazard” of the businessowners policy includes “bodily injury” and “property damage” that arises out of “your product” or “your work,” except:

- products that are still in the physical possession of the insured; or
- work that has not been completed or abandoned.

“Your work” is considered to be completed at the earliest of the following:

- when all work under the contract has been completed,
- when all work at the site of operations has been completed, or
- when the portion of the work done at a job site, other than by another contractor or subcontractor working on a part of the same project, has been put to its intended use.

The product - completed operations hazard does not include “bodily injury” or “property damage” arising out of:

- the transportation or property, unless the injury or damage arises out of a condition in or on a vehicle created by the loading or unloading of the property: or,
- the existence of tools, uninstalled equipment or abandoned or unused materials.

## **Insured Contract**

The businessowners policy covers liability assumed under an **insured contract**. An “insured contract “ under the policy is:

- a contract for a lease of premises, other than the portion of the lease, if any, that indemnifies any person or organization for damage by fire to premises while rented to the insured or while temporarily occupied by the insured with permission of the owner;
- a sidetrack agreement;
- any easement or license agreement, except in connection with construction or demolition operations on or within fifty feet of a railroad;

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- an obligation, required by ordinance, to indemnify a municipality, unless in connection with work for a municipality;
- an elevator maintenance agreement;
- that part of any other contract or agreement pertaining to the insured's business (including an indemnification of a municipality in connection with work performed for a municipality) under which the insured assumes the tort liability of another party to pay for "bodily injury" or "property damage" to a third party **other than** that part of an agreement or contract:
  - ◊ that indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within fifty feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;
  - ◊ that indemnifies an architect, engineer or surveyor for injury or damage arising out of preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications, or giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
  - ◊ under which an insured architect, engineer, or surveyor assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services.

## **Loading and Unloading**

Under the businessowners policy, unloading and unloading means the handling of property after it is moved from the place where it is accepted and is moved into or onto an aircraft, watercraft or auto. It also means the handling of property while it is inside of or on an aircraft, watercraft or auto and the handling of property while it is being moved from an aircraft, watercraft or auto to the place where it is finally delivered. It does not include moving property by means of a mechanical device other than a hand truck, that is not attached to an aircraft, watercraft or auto. Generally, damage to property while it is being unloaded or loaded is excluded from coverage under this policy.

## **Who Is An Insured**

The definition of insured in the businessowners form varies based on the insured business' type of legal structure .

### ***Individual***

If the insured is an **individual**, the individual and the individual's spouse are insureds with respect to the conduct of a business of which the insured is sole owner.

### ***Partnership or Joint Venture***

If the insured is a **partnership or joint venture**, the partnership or joint venture is an insured. The partners and the partners' spouses are also insureds, but with respect to the conduct of the business only.

### ***Other Organization***

If the insured an organization **other than a partnership, joint venture or limited liability company**, the organization is an insured. Executive officers and directors of the organization, with respect to their duties as officers and directors of the organization, are

also insureds. Stockholders are insureds and are covered with respect to their liability as stockholders.

### **Employee**

Any **employee** of the named insured is an insured while acting within the scope of his or her duties as an employee. By including the employee in the definition of an insured, the form provides some employer's liability coverage. However, an exclusion which pertains to employer's liability, discussed later, specifies that "bodily injury" of an employee acting out of and in the course of employment by the insured is **not covered**, except as related to liability assumed under an insured contract. Personal injury, advertising injury or property damage for which the insured becomes liable out of the conduct of an employee acting out of and in the course of employment by the insured is covered by the policy.

### **Real Estate Manager**

Any person or organization while acting as a real estate manager for the insured is an insured.

### **Partnerships and Joint Ventures**

In order for "bodily injury," "property damage," or "personal injury" arising out of the conduct of any partnership or joint venture in which the insured is a partner or member to be covered, the insured must be designated as a partnership or joint venture on the policy's declaration.

### **Occurrence**

An "occurrence" under the businessowners form is an *accident, including continuous or repeated exposure to substantially the same general harmful conditions.*

### **Personal Injury**

"Personal injury" is injury that arises out of any of the following:

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

### **Property Damage**

"Property damage" under the businessowners form means physical injury to or destruction of tangible property that occurs during the policy period, including loss of use. It also includes loss of use of tangible property that has not been physically injured or destroyed, if the loss of use is caused by an "occurrence" during the policy period.

### **Suit**

A "suit" under the businessowners form means a civil proceeding in which damages are alleged arising from "bodily injury," "property damage," "personal injury," or "advertising injury" to which the insurance applies. "Suit" also includes an arbitration proceeding and any other **alternative dispute resolution** proceeding under which such damages are

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claimed and to which the insured submits with the insurer's consent. The businessowners form covers alternative dispute resolution expenses, as long as the insurer consents.

### **Your Product**

Goods or products manufactured, sold, handled or distributed by the "named insured" or by others who trade under the named insured's name are the "named insured's products." Included are containers, other than vehicles, and excluded are vending machines or any container rented to or located for use of others, but not sold. "Your product" also includes warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product" and the providing of or failure to provide warnings or instructions. This definition relates to the "products-completed hazard" coverage of the form.

### **Your Work**

"Your work" means work or operations performed by the insured or on behalf of the insured. It includes materials, parts or equipment furnished in connection with the work or operations, and also includes warranties or representations made at any time regarding the fitness, quality, durability, performance or use of "your work" and the providing of or failure to provide warnings or instructions.

### **Territory**

Policy territory means:

- the United States of America, its territories or possessions, or Canada; or
- international waters or air space, as long as the injury or damage do not occur in the course of travel or transportation to or from any other country, state or nation; or
- anywhere in the world with respect to damages because of "bodily injury" or "property damage" that arises out of the insured's "product" that was sold for use or consumption within, and the original suit for damages is brought within, the USA, its territories or possessions, or Canada.

## ***Businessowners Liability Coverage***

### **Insuring Agreement**

Under the insuring agreement of the businessowners liability coverage, the insurer promises to pay sums which the insured becomes legally obligated to pay due to "bodily injury," property damage," "personal injury" or "advertising injury" to which the insurance applies.

The policy states that insurer has **the right and duty to defend** the insured against any claim or suit against the insured to which the insurance applies. The insurer may settle the suit. Notice that the insured does not have to consent to the settlement of any suit. Notice also the inclusion of the statement "right and duty to defend." This means the insurer will defend the insured against any covered claim.

### **Supplementary Payments**

Related to the business liability coverage, the insurer will pay:

- all expenses incurred by the insurer,

- up to \$250 for the cost of bail bonds required because of accidents or traffic law violations that arise out of the use of any vehicle to which the “bodily injury” coverage applies;
- premium for appeal bonds and for bonds necessary to release attachments;
- expenses incurred by the insured for first aid to others at the time of an accident for “bodily injury” to which the policy applies;
- reasonable expenses incurred by the insured at the request of the insurer; and
- all costs taxed against the insured in the “suit, including interest on any judgment that accrues after the entry of the judgment and before the insurer has paid or tendered or deposited in court the judgment, up to the policy’s limit of liability.

## Exclusions

The businessowners liability coverage includes the following exclusions:

### Aircraft, Auto or Watercraft

“Bodily injury” or “property damage” that arises out of the ownership, maintenance, use or entrustment to others of any aircraft, auto or watercraft owned or operated by or rented or loaned to an insured is excluded. “Loading or unloading” and operation is considered use.

The exclusion **does not apply** to a watercraft that is ashore on premises owned or rented by the insured, nor to a watercraft that is not owned by the insured that is less than 26 feet long and which is not being used to carry persons or property for a charge. It also does not apply to parking an auto that is not owned by or rented or loaned to an insured on, or on the ways next to, premises owned or rented by the insured. Liability assumed under an “insured contract” for the ownership, maintenance or use of aircraft or watercraft is also not excluded. “Bodily injury” or “property damage” that arises out of the operation of cherry pickers and similar devices used to raise or lower workers, or from air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment is also not excluded.

### Contractual Liability

The businessowners form excludes certain types of contractual liability. If the insured is obligated to pay damages resulting from “bodily injury” or “property damage” by reason of the assumption of liability in a contract or agreement, such liability is excluded **unless** the liability for damages is:

- liability the insured would have in the absence of the contract or agreement, or
- liability assumed under an “insured contract” if the “bodily injury” or “property damage” occurs after the execution of the agreement or contract. Under such circumstances, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be *damages because of “bodily injury” or “property damage”* if the payment for such expenses was part of the terms of the “insured contract” **and** the expenses are for the defense of that party against a civil or alternative dispute resolution proceeding which the insurance covers.

## **Employer's Liability**

The businessowners liability form does not cover "bodily injury" to an "employee" that arises out of and in the course of employment by the insured or the performing of duties related to the conduct of the insured's business. Also excluded is coverage for "bodily injury" to the spouse, child, parent, brother or sister of the "employee" as a consequence of such employment or performance of duties. This exclusion does not apply to liability assumed under an "insured contract."

## **Expected or Intended Injury**

Expected and intended "bodily injury" or "property damage" is excluded from the form. The exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect property or people.

## **Liquor Liability**

"Bodily injury" or "property damage" for liability of an insured who is in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages which arises from causing or contributing to the intoxication of any person, the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol, or based on any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages is excluded.

## **Mobile Equipment**

Also excluded from coverage is "bodily injury" or "property damage" that arises out of the transportation of "mobile equipment" by an auto that is owned, operated by or rented or loaned to any insured and the use of "mobile equipment" in, while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

## **Personal or Advertising Injury**

Some types of "personal injury" and "advertising injury" are excluded. For example, injury that occurs from the oral or written publication of material that the insured knows is false when published is excluded. Injury that arises out of the willful violation of a statute or ordinance is excluded, as is injury that arises out of oral or written publication of material that occurred before the beginning of the policy period. Liability for injury that the insured has assumed through a contract or agreement is also generally excluded.

## **Pollution**

Pollution is defined under this exclusion as *any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste*. Waste is defined to include materials to be recycled, recondition or reclaimed.

Excluded from the businessowners liability form is "bodily injury" or "property damage" *arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:*

- at or from any premises which at any time was owned or occupied or rented or loaned to any insured;
- at or from any premises which at any time was used by or for any insured for the handling, storage, disposal, processing or treatment of waste;
- which at any time were handled, transported, stored, treated, disposed of, or processed as waste by or for any insured or for those whom the insured is legally responsible ;

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- at or from any location on which any insured or contractors or subcontractors working for the insured if the pollutants are brought on or to the premises by the insured or contractors or subcontractors, or if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or to respond to, or assess the effects of pollution in any way.

Coverage also does not include 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 pollution. It also does not include any claim or suit by a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, or neutralizing, or responding to or assessing the effects of pollutants.

### **Product Recall**

Damages that are claimed for the loss of use, withdrawal, recall, inspection, repair or replacement of “your product” or “your work,” or of impaired property if such product, work or property is recalled because of a known or suspected defect, deficiency, inadequacy or dangerous condition, are excluded.

### **Professional Services**

“Bodily injury,” “property damage,” “personal injury,” or “advertising injury” due to rendering or failure to render any professional service is excluded. These services include, but are not limited to legal, accounting, advertising, supervisory, inspection, engineering, medical, surgical, dental, x-ray or nursing services treatment, advice or instruction, health or therapeutic service, treatment, advice or instruction, service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming, optometry and optical or hearing aid services, ear piercing services, and services in the practice of pharmacy. The excluded services do not include an insured whose operations include those of a retail druggist or drugstore. The businessowners form can be endorsed by professional liability forms that remove this exclusion and add protection for many different types of professions, as will be demonstrated by the Veterinarians Professional Liability Endorsement.

### **Damage to Property**

“Property damage” is excluded to:

- property owned, rented or occupied by the insured;
- premises sold, given away or abandoned, if the “property damage” arises out of any part of such premises, unless the premises are “your work” and the premises was never occupied, rented or held for rental by the insured (such as might occur if the insured were a home builder,)
- unless liability is assumed under a sidetrack agreement:
  - ◇ property loaned to the insured;
  - ◇ personal property in the care, custody or control of the insured;
  - ◇ the part of real property on which the insured or any contractor or subcontractor who is working directly or indirectly on the insured’s behalf if performing operations, if the “property damage” arises out of those operations; or
  - ◇ the particular part of any property that must be restored, repaired or replaced because the insured’s work was incorrectly performed on it, unless such property damage is covered under the “products-completed operations hazard.”

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## **War**

Liability assumed under a contract or an agreement is excluded for “bodily injury” or “property damage” due to war or acts of war. War is defined to include civil war, insurrection, rebellion or revolution.

## **Workers Compensation and Similar Laws**

The insurance does not apply to any obligation the insured may be liable for under workers compensation, unemployment compensation, disability benefits or similar law.

## ***Medical Expenses Coverage***

The insuring agreement of the medical expenses coverage of the businessowners liability form states that the company will pay for “medical expenses” that are incurred for “bodily injury” caused by an accident on premises owned or rented by the insured, on ways next to such a premises, or because of the insured’s operations, as long as:

- the accident takes place in the “coverage territory” and during the policy period;
- the expenses are incurred and reported to the insurer within one year of the date of the accident; and
- the injured person submits to examination by physicians chosen by the insurer, and for which the insurer pays.

The medical expense payments are made regardless of fault. The insurer will also pay for first aid administered at the time of an accident, necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services.

## **Exclusions**

- “Bodily injury” excluded under the business liability coverage is excluded.
- “Bodily injury” included within the “products-completed operations hazard” or the “products hazard” is excluded.
- “Bodily injury” to a person hired to do work for or on behalf of any insured or a tenant of any insured is excluded.
- “Bodily injury” to a person injured on the part of premises owned or rented by the insured that the person normally occupies is excluded.
- “Bodily injury” to a person, whether or not an “employee” of any insured, if benefits for the injury are covered by a workers’ compensation or disability benefits law or a similar law is excluded.
- “Bodily injury” to a person injured while taking part in athletics is excluded.
- “Bodily injury” due to war is excluded.

## ***Exclusions Which Apply to the Business Liability and the Medical Payments Coverage***

### **Nuclear Energy Liability Exclusion**

As mentioned, the nuclear energy liability exclusion is part of broad form liability policies. The businessowners liability coverage form is a broad form. Under the form, “bodily injury” or “property damage” is excluded with respect to which an “insured” under the

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policy is also an “insured” under a nuclear energy liability policy issued by the Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under such a policy except for its termination because the limits of liability under the policy had been reached.

Also excluded is “bodily injury” or “property damage” resulting from the hazardous properties of nuclear material and with respect to which any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act or any law amendatory thereof, or the “insured” is, or outside of this coverage, be entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

Additionally, regarding medical payments coverage or supplementary payments provisions relating to first aid, coverage for expenses incurred related to “bodily injury” that results from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization are excluded.

“Bodily injury” or “property damage” under the liability coverage is excluded if it results from the hazardous properties of nuclear material and if:

- the nuclear material is at any nuclear facility owned by, or operated by or on behalf of, an insured or that has been discharged or dispersed from such a facility;
- the nuclear material is contained in spent fuel or waste that was at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an “insured;” or
- the “bodily injury” or “property damage” arises out of the furnishing by an “insured” of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any “nuclear facility.” If the facility is located within the United States of America, its territories or possessions, or in Canada, this exclusion applies only to “property damage” to such “nuclear facility” and any property at the facility.

For the purposes of this exclusion, the following definitions apply:

*Hazardous properties:* radioactive, toxic or explosive properties.

*Nuclear material:* source material, special nuclear material, or by-product material.

*Source material, special nuclear material, by-product material:* Each of these terms have the same meaning as was given them in the Atomic Energy Act of 1954 and amendatory laws of the Act.

*Spent fuel:* any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor.

*Waste:* any waste material containing by-product material and resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility.

*Nuclear facility:* any nuclear reactor; any equipment or device designed or used for separating the isotopes of uranium or plutonium, processing or utilizing spent fuel or handling, processing or packaging waste; any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235; any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste. The site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations are included.

*Nuclear reactor:* any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material

*Property damage:* all forms of radioactive contamination of property.

### **General Conditions**

Some of these conditions are found in the common policy conditions of the Businessowners Package Policy.

### **Concealment or Fraud**

If the insured intentionally conceals or misrepresents any material fact or circumstance, the insurance will be cancelled.

### **Assignment**

The insurer must consent to any assignment of interest under the policy.

### **Subrogation**

The insurer is subrogated to all the insured's rights of recovery against any person or organization. The insured must execute and deliver instruments and papers and must do anything else is necessary to secure the insurer's rights and must do nothing to impede the insurer from exercising these rights.

### **Liberalization Clause**

If a filing is submitted to the insurance supervisory authorities by the insurer that has the result of extending or broadening the insurance either by endorsement or by substitution of form without requiring additional premium, and the filing is approved while the policy has been in force, or within 45 days prior to its inception, the benefit of the extended or broadened insurance will apply to the insured as though the endorsement or substitution were a part of the policy.

### **Other Insurance**

The businessowners liability coverage applies as **excess** over any other valid and collectible insurance which would apply in the absence of this policy. Any insurance written specifically to cover as excess over the limits of liability under the businessowners liability coverage will apply only as excess, however.

### **Insurance Under More Than One Coverage, Part Or Endorsement**

If the businessowners liability form is part of a package policy, this condition will apply. Under this condition, if more than one coverage, part or endorsement of the

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businessowners policy insures the same loss, damage or claim, the insurer is not liable for more than the actual loss or damage sustained by the insured.

### **Replacement of Forms and Endorsements**

If the policy is issued on a continuous basis, the insurer may substitute or add forms and endorsements upon any anniversary date in accordance with rules of the insurer's manuals.

### **Waiver or Change of Provisions**

The terms of the insurance may not be waived, changed or modified except by endorsement issued to form a part of this policy.

### **Liability and Medical Expenses Conditions**

#### **Legal Action Against Us**

No person or organization has a right under the policy to join the insurer as a party or otherwise bring the insurer into a suit or to sue the insurer under the policy unless all of the policy's terms have been fully complied with. A person or organization can sue the insurer to recover on an agreed settlement or on a final judgment against an insured, but the insurer is not liable for damages that are not payable under the terms of the policy or that are in excess of the applicable limit of insurance.

#### **Bankruptcy**

Bankruptcy or insolvency on the part of the insured or the insured's estate does not relieve the insurer of its obligations under the policy.

#### **Financial Responsibility Laws**

If the policy is certified as proof of financial responsibility under the provisions of any motor vehicle financial responsibility law, the provisions of the policy for "bodily injury" liability and "property damage" liability will comply with the provisions of the law to the extent of the coverage and limits of insurance required by that law.

Regarding "mobile equipment," the insurer will provide any liability, uninsured motorists, underinsured motorists, no-fault or other coverages required by any motor vehicle law. The insurer will provide the required limits for those coverages.

#### **Insured's Duties in the Event of Occurrence, Claim or Suit**

In the event of an "occurrence:"

- The insured must notify the insurer as soon as practicable of an "occurrence" or an offense which may result in a claim. The notice should include:
  - ◇ *how, when and where the "occurrence" or offense took place;*
  - ◇ *the names and addresses of any injured persons and witnesses; and*
  - ◇ *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 of the claim or suit as soon as practicable.
- The insured must see to it that the insurer receives written notice of the claim or "suit" as soon as practicable.

- The named insured and any other involved insured must immediately send the insurer copies of any demands, notices, summonses or legal papers received in connection with the “suit,” authorize the insurer to obtain records and other information and cooperate with the insurer in the investigation or settlement of the claim or defense against the “suit.” The insured(s) must assist the insurer in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage covered by the insurance.
- The insured, except at that insured’s own cost, is not to voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without the insurer’s consent.

### **Separation of Insureds**

The insurance applies as if each named insured were the only named insured and separately to each insured against whom a claim or suit is brought, up to the limits of insurance in the policy.

### **Veterinarians Professional Liability Endorsement**

The Veterinarians Professional Liability endorsement amends the Business Liability Coverage in the businessowners form to apply also to bodily injury, property damage, personal injury, advertising injury or other injury that arises out of the *rendering of or failure to render professional services in connection with the insured’s practice as a veterinarian, including serving as a member of a formal accreditation, standards review or equivalent professional board or committee.*

The endorsement removes coverage of contractual liability under an insured contract. It replaces the exclusion from the businessowners policy which allows for coverage of contractual liability assumed under an insured contract with an exclusion that states that the insurance does not apply to damage and injury for which the insured is obligated to pay damages *by reason of assumption of liability in a contract or agreement.* The exclusion does not apply to liability for damages the insured would have in the absence of the contract or agreement.

The endorsement has three exclusions not found in the businessowners liability form. First, the endorsement excludes bodily injury, property damage, personal injury, advertising injury or other injury that arises out of a criminal act including but not limited to fraud committed by the insured or any person for whom the insured is legally responsible. Secondly it excludes liability that results from the theft of any animal, and thirdly, it excludes bodily injury, property damage or other injury due to fire.

Regarding the definition of an insured, the Veterinarians Professional Liability form considers employees who are veterinarians “insureds” with respect to their providing or failing to provide professional veterinary services in connection with the insured’s practice.

The endorsement includes in the limit of liability for each occurrence *other injury arising out of any one occurrence* in addition to the damages due to bodily injury, property damage, medical expenses, personal injury and advertising injury included in the businessowners liability form.

Finally, the Veterinarians form replaces the definition of occurrence in the businessowners liability form to *include any act or omission arising out of the rendering of or failure to render professional veterinary services.*

These changes to the Businessowners Liability Form found in the endorsement make the policy suitable to the coverage needs of veterinarians. In a similar manner, the other ISO professional liability forms amend, exclude and add coverages to the businessowners form for many other professions. Similar endorsements are available for the Commercial General Liability form. These forms, with some state required or insurer modifications, are available in almost every state.

## **Summary**

E&O and Professional Liability policies all include an insuring agreement, definitions, conditions, and exclusions. They may also provide extended coverages or be attached by endorsements. The policies may offer many coverages, including employer liability, licensing board protection, contractual liability and more, or they may provide more limited coverages. Some insurers offer many additional benefits, such as premium discounts and special risk management tools.

## Chapter Five: Types of Errors & Omissions Forms

There are many types of E&O and Professional Liability coverage forms. This chapter will briefly discuss some of them along with the special features within them.

### Accountants



Accountants professional liability insurance provides protection against liability that arises from the rendering or failure to render professional services as an accountant. The insurance can cover accountants, accounting firms, partners and employees. Accountants have exposure to risks in all the duties they perform including bookkeeping, tax preparation, acting as a trustee, business valuation and various other accounting functions.

Accountant liability forms generally cover disciplinary proceedings before state boards and other agencies to which the accountant's activities may be subject. Accountants may also give specific investment advice, so such advice may be covered under accountants forms. Other special coverages can include business valuation coverage, and coverage for acting as a trustee.

Some accountants liability insurers will reimburse premium for the cost of peer reviews. Also available are premium discounts for taking part in loss prevention programs.

Accountants may need employment practices liability coverage. Generally, such coverage may be attached via endorsement if it is not included in the basic policy.

### Barbers and Beauticians

Barbers and beauticians liability forms protect against liability arising out of the rendering or failure to render professional services in connection with the operation of a barber shop or beauty salon and may include services such as treatment, advice or instruction for the purpose of appearance, skin enhancement, personal grooming and therapy.

Exclusions from a barbers and beauticians form may be liability for damage or injury arising out of equipment or processes used to tan skin, hair removal by electrolysis, hair implanting or hair transplanting, body massage other than facial massage, body piercing, tattooing, removal of warts, moles or other growths, face lifting and chiropody or podiatry.

### Computer Professionals

There are a variety of professional liability forms available for computer professionals today. Some computer professionals have exposure to risks related to intellectual property if they design software. Coverage is available for such exposure.

Computer professionals are often independent contractors. Those who employ them may require that they carry professional liability insurance for acts, errors, omissions and negligence that may occur while they are working for the employer.

## **Construction Managers**

Construction managers are commonly considered to be professionals today because of the responsibilities they undertake on a construction project. They are now exposed to liability risks similar to those of architects and engineers. Construction managers make decisions at the building site that can affect the building being constructed and the surrounding environment. Construction managers also supervise workers, both contractors and employees, and so are subject to both employer's liability and employment practices liability exposures. Safety of the workers and those around the work site is also an issue.

Construction manager forms which provide protection for these risks are a relatively newly developed type of professional liability form. Construction managers typically were covered through general liability forms, which exclude liability for errors and omissions in the rendering or failure to render professional services. As their exposures to professional liability risks became apparent in the courts, professional liability insurance forms were created.

## **Dentists**

Dentists are subject to the risk of litigation for the work they perform, advice they give, failure to act, errors in their work and for negligence. Dentists liability insurance provides coverage for dentists and dental practices, including employees.

One of the benefits available in dental policies and in policies for doctors and other medical professionals is *locum tenens*. Locum tenens is a doctor who takes the place of the insured doctor while the insured is on vacation, at a medical seminar, or is taking a day of vacation. Locum tenens coverage covers the insured and the locum tenens for a specified number of days per policy period. A locum tenens generally must be approved by the insurer.

Medical waste coverage is another special form of coverage for dentists and other health professionals. This coverage protects against errors, omissions or neglect in the handling of medical waste materials. Dentists coverage forms generally include licensing board coverage as well.

Dental practices may need premises liability, employers liability and employment practices liability coverage, which can generally be added to forms if such coverage is not part of them.

## **Directors & Officers**

Directors and officers of corporations can face litigation by stockholders, employees, regulators, competitors, creditors and other directors or officers for acts, errors, omissions or negligence in performing their duties. Directors and officers are responsible for making decisions regarding business practices, strategies, public offerings, mergers and more. Directors and officers liability coverage provides coverage for these liability exposures.

Directors & officers forms can include employment practices liability coverage, securities offering entity coverage, and entity coverage for open market securities claims. High limits of liability are available in such policies. Special forms for financial institution directors and officers can include additional coverage for IRA/KEOGH responsibilities, trust department indemnity and fiduciary liability.

## **Engineers and Architects**

Engineers, architects and other design professionals can purchase professional liability insurance to cover errors, omissions and negligent acts.

Insurers who specialize in this market may provide loss prevention programs for insureds. Insureds who participate in the programs may be subject to a premium reduction. Reimbursement for peer review may also be available.

Excluded from such policies, besides the exclusions found in most liability forms, may be the cost to repair or replace materials or workmanship due to faulty construction. Pollution liability may be included in these liability forms or can be purchased as additional coverage for engineers, architects and other design professionals.

## **Fiduciaries**

Fiduciary liability insurance provides coverage for trustees and administrators of employee benefit plans. These fiduciaries are subject to many liability exposures, including improper advice, imprudent investment decisions, errors in plan administration, lack of due diligence, conflicts of interest, and improper plan termination. Fiduciary liability insurance includes coverage as a trustee and for negligent acts and omissions as an administrator.

Under the Employees Retirement Income Securities Act, or ERISA, a fiduciary can be held personally liable by a participant, beneficiary or another fiduciary for a breach of duty. The liability encompasses losses to the plan resulting from the breach of duty. Among the activities that can be considered a breach of duty are failure to prudently select securities and other instruments within the plan, failure to provide for actual participant control, failure to provide sufficient investment information, improperly representing investments as guaranteed, failure to monitor performance, and the failure to monitor volatility. A fiduciary is also held legally responsible if he or she becomes aware of another fiduciary's breach and does not make a reasonable effort to remedy it.

Generally, a fiduciary under ERISA is considered to be anyone who:

- exercises any discretionary authority or control over plan management;
- gives investment advice regarding the plan for a fee, commission or other form of compensation; or
- possesses any discretionary authority or responsibility over the administration of the plan.

Examples of fiduciaries associated with a retirement plan can include investment committee members, plan trustees, benefit managers and directors and officers if they exercise any discretionary authority over the plan.

## **Funeral Directors**

There is also coverage available for funeral directors which provides protection against liability for damage or injury that arises out of the rendering or failure to render professional services in connection with the insured's business as a funeral director. A funeral director can be at risk of liability for not following the instructions of the purchaser of a funeral regarding the plot, the service, the casket, maintenance of the burial site and other details.

## **Healthcare Providers**

Healthcare providers or medical professional liability policies cover allegations of negligence in rendering or failing to render professional medical care. A healthcare provider may be a hospital, a large group of physicians, surgeons, or dentists, nursing homes, or a group of nurses, midwives or other allied healthcare professionals.

Healthcare provider coverage may include locum tenens coverage, premises liability coverage, licensing board protection and workplace liability coverages. Additional coverage for employment practices liability and employers liability may be available as well.

## **Lawyers**

Lawyers have many exposures to the risk of lawsuits. Lawyers act as attorneys, trustees, notaries public, administrators, conservators, executors, guardians, title insurance agents, arbitrators, mediators, and they perform various fiduciary services. Lawyers can be sued for acts, errors or omissions related to any of the functions they perform.

Lawyers forms generally include alternative dispute resolution coverage and vicarious liability coverage, including employer's liability. Activities as a fiduciary are generally included in the definition of covered professional services. Lawyers forms may also provide a no-cost unlimited extended reporting period if the insured becomes totally and permanently disabled. The lawyer may have the option to purchase an unlimited extended reporting period upon retirement at a reduced cost under available forms. Coverage for premises liability and employment practices may generally be added to lawyers policies.

## **Partial List of Professional Liability and E&O Forms**

***There are professional liability and E&O forms for just about any profession.***

***Here's a list of a few:***

*Accountants*

*Architects*

*Authors*

*Bankers*

*Barbers and Beauticians*

*Blood Banks*

*Computer Consultants*

*Cosmologists*

*CPAs*

*Dentists*

*Design Professionals*

*Directors and Officers of Corporations*

*Directors and Officers of Non-Profit Organizations*

*Druggists*

*Emergency Medical Teams*

*Engineers*

*Fiduciaries*

*Financial Institutions Directors and Officers*

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*Hearing Aid Establishments*  
*Insurance Agents and Brokers*  
*Lawyers*  
*Medical or X-Ray Lab Technician*  
*Nurses*  
*Opticians*  
*Optometrists*  
*Paramedics*  
*Pathologists*  
*Physicians*  
*Psychologists*  
*Printers*  
*Radiologists*  
*Real Estate Agents and Brokers*  
*Real Estate Appraisers*  
*School Leaders*  
*Soil Scientists*  
*Software Designers*  
*Stockbrokers*  
*Surveyors*  
*Trainers*  
*Surveyors*  
*Veterinarians*

Special exclusions which may be included in a lawyers form are exclusions related to providing securities investment advice, claims arising from defects in title if the insured had knowledge of the defect when title insurance was issued, claims that arise out of the handling or disbursement of funds, and claims that arise from activities that are not related to the practice of law.

### **Optometrists**

Like other health professionals, optometrists can be the target of lawsuits for acts, omissions or negligence in rendering professional services. Forms are available which provide coverage for liability assumed by contract with HMO's and other entities, professional corporation coverage, and with severability of limits.

### **Paramedics**

Paramedics work for various emergency service organizations, such as ambulance services and fire stations. These organizations may carry malpractice insurance for their employees. Paramedics may want to purchase individual malpractice insurance, however, to cover their emergency management services. Paramedics may need individual coverage to ensure that they have sufficient coverage should a claim occur. The paramedic could be sued by their employer under certain circumstances. Personal malpractice insurance could provide protection against such claims.

### **Physicians**

Physicians who work in private practices can also purchase liability or malpractice insurance. Locum tenens coverage is generally included in such coverage. Licensing board coverage is also commonly included with physicians liability insurance.

*On-call coverage* is a coverage available in physicians liability insurance. On-call coverage allows a physician to use a relief physician after normal business hours. Additional premium is generally required for this coverage. Another coverage available to physicians is *temporary physician coverage*. Temporary physician coverage gives the physician coverage for a physician who is brought in to the practice temporarily when the volume of patients is increased or to see patients on a day the insured does not normally schedule patients. Additional premium is normally required for this coverage as well.

An important feature of physicians liability or malpractice insurance is the issuance of a certificate of insurance. The certificate of insurance is used by the physician as proof of insurance for hospitals, HMOs, PPOs and other entities that require such proof.

Special premium discounts may apply to physicians coverage. If a physician is not in a surgical specialty, or is primarily in a non-surgical specialty, the physician is generally subject to a premium discount. Physicians who are on leave in order to pursue full-time research or postgraduate training may also qualify for reduced premium charges.

### **Real Estate Agents**

Real estate agents or brokers are also considered fiduciaries. Real estate agents can be sued for disloyalty to a client, not following the instructions of a client, not disclosing material and relevant information, breaking a confidence, not exercising reasonable care and diligence or not providing sufficient accounting of the transactions handled. Liability insurance for real estate agents provides protection against these risks.

### **Real Estate Appraisers**

Appraisers can also purchase liability insurance coverage. Some lenders or mortgage companies require the appraisers they employ to hold errors and omissions insurance. Liability exposures of appraisers include making errors in reports or for negligently omitting information in reports.

### **School Leaders**

School leaders have several functions which can expose them to the risk of a lawsuit. They have a professional relationship with employees, students, parents, other school leaders and vendors. School leaders professional liability forms provide coverage which protects against alleged or actual breach of duty, neglect, errors, misstatements, misleading statements or omissions. Coverage can include employer's practices liability risks such as discrimination, sexual harassment and wrongful termination, as well as coverage related to the student-teacher relationship, such as failure to promote, wrongful suspension and failure to provide special education. Breach of contract coverage can also be included to cover the risks involved with employing teachers.

### **Insurance Agents and Brokers**

Errors and omissions insurance is available for insurance agents and brokers as well. This coverage will be discussed in the next chapter.

## ***Doing Business With Professionals***

To work well with professionals, the insurance agent should keep in mind some of the characteristics of the successful professional and consider them when working with such a customer. A successful professional takes pride in the services and products provided to his customers. A successful professional puts a lot of effort into doing his or

her job well. A successful professional places emphasis on providing excellent customer service. A successful professional will not be impressed by an agent who does not appear to have the best interests of the professional in mind or does not provide the high level of service the professional gives to his or her own clientele.

## **Busy**

One of the common characteristics of any professional is that they are busy. Because the professional is busy, the agent has to make time to visit when it is most convenient for the professional. A cup of coffee early in the morning or after business hours at a restaurant may be the best time to set up an appointment. Some professions have busy seasons when it just may not be possible to meet with an agent. CPAs are busy from January to April, for example. Beauticians and cosmetologists are busiest before holidays. Other professionals have busy times of the day. Stockbrokers, for example, are busy during the hours the stock market is open. Understanding the busy times of the professional will help the agent be more likely to suggest a time to meet that the professional will be able to agree to.

Another aspect of the busy schedule of professionals is that they generally appreciate an agent who is able to make a clear, concise presentation. They want the information they need in the shortest amount of time possible. The agent should go into a meeting well-prepared and planning to get business done rapidly. If the professional indicates by his or her demeanor that more information is desired or that getting to know the agent on a personal level is important, the agent can change to a more relaxed presentation style. But an agent who plans on a concise, direct presentation of the facts will find that busy professionals respond positively.

## **Knowledgeable**

Professionals are knowledgeable about their field. They respect other professionals who demonstrate a depth of knowledge about their own products and services. Before any meeting with a professional, the agent should be proficient in all aspects of the products which may be offered, and should have an understanding of the needs and risks of the occupation in which the professional practices.

The agent should also know or gather early in the conversation the basic facts about the professional's specific business. Methods of gathering information before a face-to-face meeting include asking the professional some basic questions over the phone when setting up an appointment or, if the professional has an office manager, to ask for permission to speak to the office manager to gain some information about the business before meeting with the professional. Knowledge about a particular professional's business may take time to collect. The agent may need to conduct more than one meeting with the professional or the office staff in order to make sure that all insurance needs are uncovered and understood correctly. The professional will respect a careful assessment of needs prior to a suggestion of specific insurance coverage.

## **Service-Oriented**

Professionals tend to be service-oriented individuals. They understand the importance of good customer service and expect it when they are the customer. Being on time to appointments, answering phone messages promptly, responding to questions thoroughly and demonstrating an overall high level of care is important to all customers, but especially to a professional.

Because professional liability and E&O insurance is normally renewed annually, the agent may have to re-sell the product and his or her own services to a professional on a yearly basis. An agent who provides a high level of service will have more customers renewing policies than will an agent who is careless in this area.

### **Professionalism**

Finally, the professional respects professionalism in those who offer services to him or her. Professionalism in every area should be demonstrated, from the way the agent greets the staff at the professional's office, to the organization of the information presented by the agent, to the response the agent gives should the insured experience any problems while the policy is in force. In order to be successful working with professionals, the agent must show the knowledge, experience, care, and expertise of a professional insurance agent.

### ***Taking an Errors & Omissions or Professional Liability Insurance Application***

An important responsibility of the agent who offers liability policies for the professional is taking and submitting the insurance application. Applications for these types of insurance can require very detailed, complete information. They may require specific descriptions of functions performed and the amount of time dedicated to each function. Past employment may have to be documented carefully. The reason for the thoroughness of the applications, especially for certain occupations, is the high amount of risk the insurer may be underwriting. The insurer wants to fully understand the scope of the risk being insured in order to charge appropriate premium, or in some cases, in order to refuse certain cases.

### **Name and Address**

Each application includes the name and address of the applicant for the policy.

### **Type of Business Entity**

The application also asks for the type of business entity - sole proprietorship, partnership, corporation and so on.

### **Limit of Liability**

The amount of coverage requested is listed. The applicant may be able to choose from a wide range of coverage amounts, from \$100,000 or \$500,000 in coverage to \$1,000,000 or \$5,000,000 or more.

### **Deductible**

Deductibles may range from zero for lower limit policies to as much as \$100,000 or more. Generally, the higher the deductible, the lower the premium charges will be. It is not uncommon for professionals who must carry high levels of expensive insurance, such as surgeons, to have a deductible of \$100,000.

### **Professional Services Description**

Each application will ask for some form of description related to the professional services involved. The application may include several possible functions involved in the occupation and ask the applicant to indicate which functions apply and what percentage of time is spent in or percentage of income results from each function. For some

occupations this portion of the application can be quite lengthy. An application for a lawyer may include fifty or more different types of law practices to which the applicant must assign a percentage.

### **Other Business Activity**

If the applicant is involved in functions or activities not listed, these activities must also be disclosed and a percentage of time or income assigned.

### **Controlling Interest**

The application may ask if the insured or other party has a controlling interest in the business.

### **Gross Revenue/ Projected Revenue**

The application may ask for the amount of gross revenue which the professional or practice has earned. This helps the insurer and the agent to determine the appropriate amount of coverage. The insurer does not want the applicant to be covered by either too little or too much insurance.

### **Special Risks**

If there are special areas of risk involved in an occupation, the application will include questions related to them. For example, computer professionals liability coverage may include questions regarding Y2K compliance and the work the computer specialist is doing with clients related to this issue. An application for a lawyer may ask about work related to securities transactions and whether the lawyer has any outside director or officer responsibilities. A physician's malpractice form may ask about certain types of surgeries or medical procedures.

Questions related to special risks and about important procedures in the firm or practice may also be included in the application. For example, record keeping is essential in many professions. The application may ask for details of the record keeping process within the business. If fees are collected and money disbursed, the internal controls surrounding collection and disbursement may be inquired about. If a computer software risk is being underwritten, backup and other data safeguarding procedures may have to be explained on the application. The applicant should be as complete and accurate as possible when answering these items.

### **Years in Business**

The insurer is interested in the stability of a business. The application asks for the number of years the business has existed. If the business is a new business, it may qualify for premium discounts. If it has been in existence for some time, the insurer is interested in knowing whether there has been continuous liability coverage in force.

### **Professional Qualifications**

Another way in which the insurer assesses the risk of underwriting the professional or firm is by asking about the qualifications of the professionals being insured. Education, continuing education and any special credentials may be asked about.

## **Professional Associations**

The insurer may be interested in knowing whether the insured belongs to any professional associations. Professional associations generally provide education and may require special standards of conduct in order to belong.

## **Use of Written Contract**

If the applicant uses contracts to transact business, the insurer may ask questions related to limiting liability through contract language. As has been mentioned, some insurers reduce premium if liability is limited contractually.

## **Employees**

The application will ask for information regarding the type and number of employees to be covered. This information may be used to determine the risk and related premium for employers liability and employment practices liability.

## **Contractors or Subcontractors**

Certain forms may ask for information regarding the use of contractors and subcontractors. Forms for engineering firms, for example, may include questions related to subcontractors. The insurer may want to know whether contractors and subcontractors are required to carry their own liability policies.

## **Other Insurance**

Other insurance currently in force which covers the liability of the professional is of interest to the insurer. Remember that the insurer wants to reduce the risk of moral hazard. The applicant should not have more insurance than is necessary for the risk to be appropriately covered.

## **Prior Insurance**

Types and amounts of prior insurance are important information for the insurer. The insurer is interested in knowing if the insurance was occurrence based or claims based and if any extended reporting periods are in force.

## **Prior Claims**

The insurer also wants details on prior claims. The insurer needs to be aware of any known exposures. If there is still exposure related to a prior occurrence, the insurer may attach an endorsement to the policy, specifically excluding claims related to that occurrence. The insurer will also ask whether the insured has knowledge of any act, omission or error that could result in a professional liability claim.

## **Legal or Disciplinary Action Against Applicant**

If any applicant has had any legal or disciplinary action made against him or her the details of the action must generally be disclosed to the insurer. If there are documents, such as copies of court orders or of a complaint, these are normally sent to the insurer along with the application.

## **Notice to the Applicant**

Finally, the application will generally include a notice to the applicant. The notice requires the applicant to read the information and sign the application only if the applicant agrees to the representations made. The representations generally include that:

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- the applicant declares that the answers in the application are true and that no material fact has been omitted;
- the applicant has disclosed any matters which could result in a claim; and
- the form is an application and not a guarantee of insurance.

The notice also includes the important statement that any person who knowingly and with intent to defraud any insurance company files an application with false information or conceals information regarding a material fact commits a fraudulent insurance act.

### **Special Coverages**

If any additional coverages or endorsements are to be included, questions related to these coverages must also be completed on the application.

### **Submitting Claims**

Besides obtaining a complete and fully documented application and submitting it to the insurer, the agent also may have the responsibility of submitting claims to the insurer or in assisting insureds in the completion and submission of claim documents.

The agent has four areas of responsibility related to claims processing: timeliness, complete documentation, thoroughness and responsiveness.

#### **Timeliness**

If an insured contacts an agent regarding a claim or potential claim, the agent must respond in a timely manner. The policy language instructs the insured to give the insurer notice of claims or possible claims “as soon as possible” and to forward legal documents and other documents related to the claim “immediately” to the insurer. If the insured contacts the agent about these matters, the agent should respond as rapidly as possible so that the insured is able to fulfill his or her duties to provide claim information. Depending on company policy, the agent’s responsibility may be to simply refer the insured to a claims department in the home office. This too should be done in a timely manner. If a trip to the insured’s site is necessary to the claims process, the agent should make that trip or arrange for the applicable personnel to visit the site as soon as practicable.

#### **Complete Documentation**

The submission of a claim may require the inclusion of many pieces of documentation. Typically, the insurer provides the insured with a claim form which serves as the basis for this documentation. If the insured contacts the agent’s office for a claim form or related forms, the agent should have them provided to the insured as rapidly as possible. If the insured needs assistance in understanding what information must be provided, the agent should courteously and efficiently have these questions answered for the insured. The agent should do whatever is necessary to assist the insured in providing all required documentation for a claim.

#### **Thoroughness**

The claims process can be held up because of errors or omissions in completing and submitting the necessary documents. The agent should take sufficient time to make sure all documents are fully and accurately completed. He or she should also take sufficient time to answer questions from the insured or others involved in the claim carefully and completely.

The agent or those in the agent's office may have the responsibility of documenting the time and other information regarding the notification of a claim. If so, this and any other record keeping the insurer requires should be done consistently and thoroughly.

### **Responsiveness**

The agent must be responsive to those involved in making a claim. The agent should not behave in a dismissive manner toward the insured or claimant or indicate that a claim will be denied without following the insurer's procedures regarding the claim.

### **Bad Faith and Handling Claims**

One of the concerns of the insurer and agent is the issue of exercising *bad faith* toward an insured or beneficiary of a policy. Bad faith is the basis of finding a breach of contract or a tort on the part of an insurer. An insurer is required to act in *good faith* in handling liability claims.

Bad faith is found to exist if the insurer intentionally, willfully or maliciously breaches its contract or if a breach of contract is accompanied by such gross and wanton negligence that the negligence is found to be commensurate with intentional, willful or malicious conduct. If an insurer is found to have acted in bad faith, not only will the insurer be liable for payment under the contract in question, but is subject to punitive damages in some states. Regulators may also impose fines and sanctions against the insurer.

Of importance in determining whether an insurer acted in good faith is whether a claim is denied based on the facts of the claim, or whether the claim is denied based on malicious or outrageous conduct. Malicious or outrageous conduct could include denying the claim based on race, religion, sex or creed. Bad faith can also be found if the insurer or a representative of the insurer says something that can be construed as bad faith. This is one reason all claims should be handled as courteously as possible.

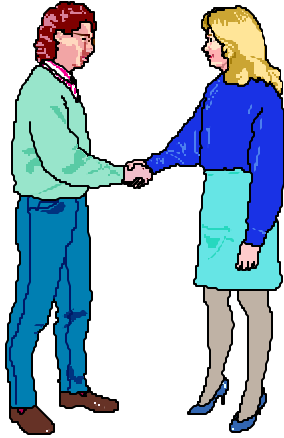
The type of negligence which occurs is also important in determining whether bad faith exists. Simple negligence is not bad faith. Gross negligence may be. If an agent does not respond to phone calls from an insured or claimant, if the agent loses claim documentation, if the agent does not carefully document those items he or she is required to document, if the agent somehow discontinues the claims process, gross negligence could be found. The agent must take seriously the role played in representing the insurer and take proper care in any claims processing procedure.

### **Summary**

E&O and professional liability applications can be complicated, especially when an occupation which has a high risk of litigation is being insured. The agent must study the applications he or she is responsible to submit and make sure the requirements for completing the application are understood. The agent should assist the applicant by accurately answering any questions the applicant may have about completing the application and assembling required documentation.

The agent plays another important role during the claims process. The agent has the responsibilities of timeliness, completeness, thoroughness and responsiveness in handling claims. The agent must be careful to act in good faith toward any insured or claimant whenever a claim is made.

## Chapter Six: Agents & Brokers E&O Insurance



Insurance agents perform many duties which can expose them to lawsuits for acts, errors, omissions or negligence in performing professional services. Agents advise clients on types and amounts of coverages needed, provide explanations regarding policy features, benefits and contractual terms, respond to client communications, process requests for changes in coverage, and process renewals among other duties. Each of these functions can result in a liability claim.

Insurance Agents and Brokers Errors & Omissions insurance generally covers the activities of insurance agents, insurance brokers, insurance consultants, managing general agents and notaries public. Most available forms are claims made. A common each-claim limit of liability for these policies is \$1,000,000. Some forms base limits of liability on the amount of annual revenue the agent earns.

Exclusions which may be included in Insurance Agents and Brokers E&O are:

- insurer insolvency, receivership, bankruptcy, liquidation or financial inability to pay;
- promises or guarantees as to interest rates or fluctuation of interest rates, the market value of any product sold, economic forecasts, or the level of future premium payments;
- acting as a fiduciary as defined under ERISA;
- acting as a trustee;
- violation of rules and regulation of securities regulators;
- violation of the provisions of COBRA;
- discrimination or unfair competition;
- licensing board coverage;
- violations of RICO; and
- structured settlement placements.

Coverages which may be important to an agent to add to an E&O policy are prior-acts coverage, licensing board coverage, carrier solvency coverage and first dollar defense coverage (which pays for the attorney's fees from the first dollar, after any applicable deductible). Another important feature to consider is whether the insurance covers defense expenses within the limits of the policy liability, or if defense is paid for in addition to the limits of liability, as a supplementary payment. If defense is paid for as a supplementary payment, the limit of liability on the policy can be used for paying damage awards. If not, the amount available for paying damage awards may be significantly eroded by the paying for defense costs. Another important feature of the form is whether the insurer has the "right and duty to defend" the insured under the policy, or has the

“option to defend” the insured. If the policy states that the insurer has the “right and duty to defend,” the insurer will defend insured against any covered claim.

## **Agent Liability Risks**

Lawsuits against agents generally involve inadequate coverage and accusations of agent misrepresentation. These areas represent the two greatest liability risks for the agent. Other related risks include errors or omissions during the application process, slow response time, mishandling of customer complaints, lack of documentation, and insolvency on the part of the insurer.

### **Application Errors and Omissions**

The application provides the basis for the insurer to decide to accept or deny a case and to determine the amount of premium to charge for the policy. The agent can cause gaps in coverage or inappropriate coverage to be issued by not taking care to obtain complete information on the application. For example, suppose a psychologist performed services once a month at a free clinic and was not fully covered by the liability insurance purchased by the clinic. The psychologist mentions to the agent that she works at the free clinic, the agent jots down a note to remind herself to pull and fill out the appropriate attachments to the application, but forgets to do so and omits this information from the application package. Later, the psychologist is sued by a patient from the clinic and sues the agent because the agent sold her inadequate coverage. Whenever the application is not completed to disclose the risk associated with the applicant appropriately, the potential for a lawsuit exists.

### **Lack of Documentation**

If a claim is made or suit is filed against an agent, the agent will need documentation to make a defense against the claim. Information in a customer file may show that the client was offered adequate coverage, was properly informed of policy features and was responded to promptly. If such documentation is not kept, the agent may not be able to demonstrate his or her lack of liability.

### **Mishandling Customer Complaints**

No customer call or communication can be ignored or not responded to without incurring a liability risk. Not returning calls from a time-consuming, “pesky” customer can cause problems for the agent, and may result in the agent not taking care of a legitimate need or concern of the customer. Each call, whether a complaint or inquiry, must be handled in a professional, timely manner.

Other mistakes in handling customer complaints may be not taking them seriously, not taking steps to remedy them, not informing the managing agent and insurer of the problem, or promising to follow-up with the customer and not doing so. Complaints can escalate into lawsuits if not handled carefully.

### **Slow Response Time**

In addition to providing a timely response to complaints, the agent must respond to other customer needs such as change requests, additions to coverage and claims, in a timely fashion. Slow responses can cause an agent to be susceptible to liability for harm that comes from the delay. For example, assume a customer is going to take an extended trip around the world and requires special property insurance for certain valuables that will be going with him. If the agent delays in processing required forms, the customer

may leave the country without the needed coverage. If anything happens to the property and it is not covered, the customer would have reason to bring suit against the agent.

### **Insurer Insolvency**

The agent may be litigated against if an insurer he or she represents becomes insolvent. The customer may argue the agent should have performed more due diligence regarding the insurer's solvency before placing business with it, or should have been aware that the insurer was having financial problems and should have replaced the client's coverage before the insolvency occurred.

### **Inadequate Coverage**

As mentioned, inadequate coverage is the basis of many of the lawsuits filed against agents. Inadequate coverage can occur due to omissions in the application or not responding to or being slow to respond to customer communications. Lack of knowledge and expertise on the part of the agent can also result in inadequate coverage. If the agent cannot recognize risks and loss exposures, the agent will not be able to offer appropriate insurance products to cover them. If the agent does not fully understand the coverages in the insurance offered, the agent cannot be sure the customer has all the protection the customer needs.

Lack of follow-up and insurance reviews can also cause inadequate coverage. Agents must regularly review their customer's coverages to make sure appropriate types and amounts of insurance are in force.

### **Misrepresentation**

Misrepresentation of a policy's coverage is the other leading cause of liability suits brought against agents. Misrepresentations can occur during prospecting, during a sales presentation, during the application process, while responding to questions over the phone -- virtually anytime there is communication between the client and the agent. Remember that courts are recognizing oral statements made, not just the written contract, as grounds for tort action.

### ***Reducing Liability Risks***

By concentrating on reducing liability risks, the agent not only protects himself or herself, but also can increase customer satisfaction and develop positive organizational and professional skills. Purchasing insurance will transfer risk to the insurer, but reducing exposure is the best approach to liability risks.

### **Client Information Forms**

One of the methods used to reduce liability exposure is the use of client information forms. Such a form includes a thorough questionnaire which can be used to determine insurance needs. Agents can complete the forms for each new customer and for existing clients at policy renewal. Client information forms are available through software programs, some of which do not allow for altering information, which can be helpful when creating a document trail for each customer.

Using standardized client information forms rather than just taking notes about the customer can help to ensure that all important questions are asked before any coverage is suggested. By using the form with every customer, the agent may be able to establish that reasonable care was taken should a claim or suit arise.

A benefit to using a client information form at policy renewal is that changes in coverage are usually made by the insurer at renewal. The insured may be subject to more limited coverage terms at this time and may need to purchase additional coverage. Or, new coverages may have been added. Faithfully reviewing coverage at policy renewal will help keep a customer from being surprised and angry when a claim arises that the customer thought would be covered.

## **Documentation**

Implementing and maintaining procedures for compiling and keeping critical documentation can also reduce liability risks. One type of documentation which should be kept is that surrounding coverage discussions. In addition to any completed client information forms, the agent should make notes regarding coverage inquiries made by an insured or applicant, coverage suggestions made by the agent and notes regarding any action taken or to be taken as a result of the discussion. If any decisions were reached during the conversation, the agent should follow up with written correspondence confirming the decision.

Another documentation-related safeguard is the requiring of clients to sign a statement if they opt to decline suggested coverage. These declination statements should be kept on file. By having the signed statement on hand, the agent will be able to demonstrate that the insurance was offered to the client if the client alleges inadequate coverage was the fault of the agent.

Documentation of client communications should also be kept. Customer mail, telephone calls, faxes, e-mail and voice mail should all be documented and kept in the customer file. E-mails should be printed from the computer and placed in the file. Written correspondence should follow verbal or digital client communications.

## **Education and Training**

Education and training regarding liability risks of the agent as well as on products and programs offered is critical in reducing exposure to lawsuits. Misrepresentation can be significantly reduced when agents understand all features of the products they sell. Misrepresentation also declines when agents understand the importance of clear communication, both in terms of providing the best service to a client and from the perspective of reducing liability exposure. Following office procedures and taking special care to complete and keep all important documentation is also more likely to occur when agents understand the potential negative repercussions of not doing so.

## **Complaint Resolution**

Complaint resolution is an especially important area on which to focus in order to reduce liability exposure. Typically, a customer will complain to the agent, agency or insurer before taking a complaint to the state insurance department or procuring an attorney. By resolving the complaint at the agency or insurer level, the agent may be protected from further action on the part of the client.

## **Responding to Liability Claims**

If a claim or lawsuit against the agent or agency is made or is likely, the E&O insurer should be notified immediately. The agent should not speak to the plaintiff's attorney, but should funnel all communication through the defense attorney and the E&O insurer. Other important tips for anyone who is facing legal action include:

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- Discuss the claim with the defense attorney only. Any other conversations are not considered privileged information;
- Follow the attorney's advice;
- Do not destroy any documents related to the case and provide all documents the defense attorney requests; and
- Keep calm and keep doing a good job. Remember that many claims are frivolous or without merit.

## **Response Times**

The agent should respond to client requests and communications within a reasonable time frame. Maximum time frames to respond to correspondence, phone calls and other customer communications should be established and followed. For example, an agency may establish a maximum time frame of 48 hours to process mail and require same day or next morning response to phone calls, e-mails and voice mail.

## **Due Diligence**

The agent should investigate all insurers he or she will represent in terms of financial stability and reliability and keep documentation related to that investigation. The agent should also pay attention to the memorandums and press releases issued by the insurer since they may deal with the financial ratings and other financial information related to the insurer's solvency. If the insurer does encounter financial problems that may be significant to clients, the agent should inform the clients and allow them the choice to replace coverage if the client so desires.

## **Professionalism**

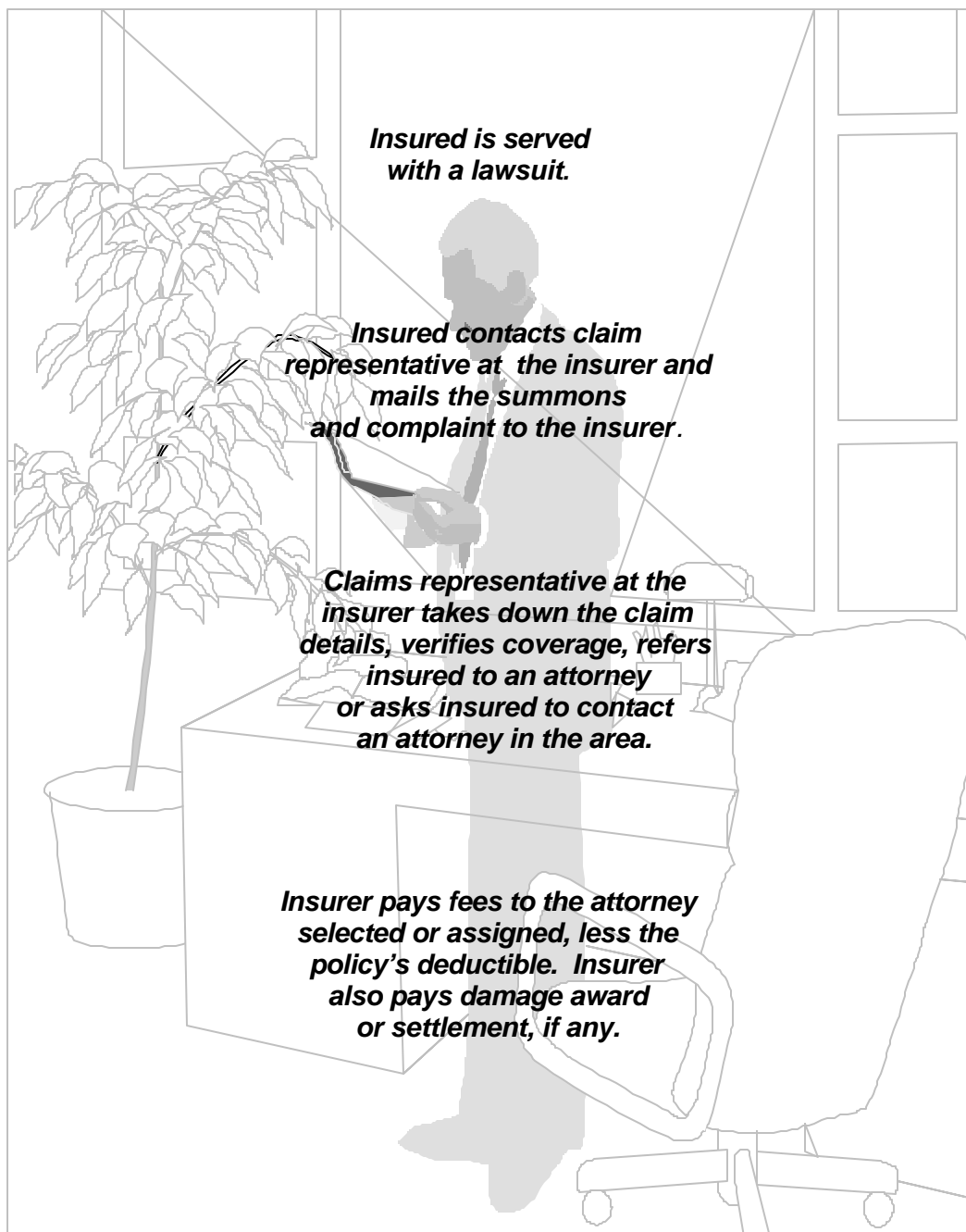
As a professional, the agent is required to act in the best interest of clients and appropriately represent the insurer. One of the important responsibilities of the agent is to provide information and offer products which he or she is competent to offer. If a client has a need for a program

or product that the agent is unfamiliar with, the agent should seek the assistance of an agent with experience in that product, or refer the client to that agent. Sometimes a customer should be referred to a tax or legal advisor. The agent should never try to offer products whose features he or she does not have sufficient experience or knowledge to communicate to customers .

Another mark of the professional is to serve the customer well. The agent can best do so by being careful in the explanations and information provided to them. Misrepresentations can be avoided by taking care to make sure, to the best of the agent's ability, that the customer understands the explanations given by the agent. The agent should avoid overly technical terms that are likely to be misunderstood by the customer.

The agent should also avoid generalities. The agent should not make statements such as "this policy provides all the property coverage you'll need," or "the insurer will never increase premiums by more than 3%." "Never" and "always" are two terms an agent should take care in using. Such general phrases have formed the basis of more than one lawsuit against an agent.

## **Process In Case of A Lawsuit When E&O Insurance Is In Force**



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## **Employer Purchased E&O Insurance**

Sometimes, an agent will be covered by an E&O insurance policy purchased by the agency or insurer. The agent may question whether a personal E&O policy is necessary.

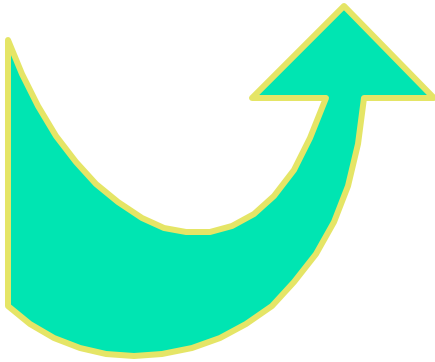
In order to answer this question, the agent should review the features of the policy in force. What are the limits of liability covering the agent? Does the policy cover defense expenses as a part of the limit of liability, or in addition to the limit of liability? Does the policy include insurer solvency coverage or other coverages important to the agent?

Even if all the answers to such questions indicate that the coverage is sufficient, the agent may still want to purchase a personal policy, for the following reasons: First, a policy purchased by the employer is not portable; the agent cannot take the policy along if the agent moves to another agency or insurer. The agent may have a gap in coverage if the move to the other agency is sudden or unplanned, or if the current employer goes out of business. Secondly, the agent may be sued by the employer who purchased the policy. The employer paid policy will not cover the agent in such a circumstance. Finally, the agent may want additional coverage to make sure that he or she will not suffer economic loss should a lawsuit occur. By having additional coverage, the agent is less likely to be the subject of a damage award that exceeds the limits of liability of the policies.

## **Summary**

Insurance agents and brokers have significant liability exposures. The greatest exposure is to the risk of a lawsuit based on misrepresentation or inadequate coverage. The agent can purchase E&O coverage to help protect against the financial loss which may arise if a lawsuit occurs. The agent can also reduce the risk of liability exposure by the use of client information forms, keeping accurate documentation and records, taking ongoing training in both E&O exposures and products and programs sold, appropriately handling complaints, establishing and keeping reasonable response times, performing due diligence on the insurers represented, and acting as a professional by offering only those products and advice that the agent is competent to provide and by being careful in all explanations and information provided.

## **Chapter Seven : Trends in E&O and Professional Liability Insurance**



The liability insurance industry continues to change. Change occurs in part because liability insurers creatively respond to customer needs by adding innovative coverage options and developing products for emerging professions and occupations. Liability insurance also exists within the ever evolving legal environment and insurers must quickly react to new legal trends and decisions. It also is subject to regulation by the various states with the result that insurers must add and delete coverages as new regulation is enacted. The agent offering liability

insurance can expect that changes within this industry will go on occurring.

### ***Emphasis on Risk Management***

Because liability risk is high and insurance premiums expensive for many professions, more and more professionals will focus on risk management to reduce liability loss exposures. Many professionals are already relying on risk management as a key element of their liability risk response. Evidence of the emphasis on risk management is the now common practice of hiring a risk manager for an office or designating one of the professionals in a practice as the firm's risk manager.

Insurers will continue to focus on risk management as well. Insurers will go on providing education on risk management to policyholders and rewarding policyholders with premium reductions and credits for participation in education, loss control programs and peer reviews. Policyholders will look for insurers who provide these benefits, not just because of the reductions in premium that go with them, but also because they want the risk management services the insurers provide.

### ***New Coverages and Limitations***

Professional liability policies will continue to include coverages which were traditionally optional as standard coverages. For example, as alternative dispute resolution are used more and more commonly, more policy forms are covering the expenses related to the processes under ADR. Some coverages, like pollution liability coverage, have become more available as the professionals within industries affected by pollution liability have taken steps to reduce potential losses.

Exclusions and limitations will also be added. Some risks will be determined to be uninsurable or to be so expensive to insure that coverage for the risk will be limited to the few professionals who need it. An example of a limitation in coverage that is appearing in more and more policies is the change from offering defense expenses as an **addition** to damage award liability limits to making defense expenses **part of** the limits of liability. By changing this element of coverage, insurers are in effect reducing the limits of liability for many professionals. Unfortunately, because of the high damage awards and legal expenses involved in suits, insurers are under economic pressure to reduce coverage and/or increase premiums for professionals in the legal, CPA, medical and other high liability risk professions.

### ***Tort Reform***

One of the most important issues affecting liability insurance is tort reform. This course began by discussing the many changes in the legal liability environment in the past

several decades. Since the 1980's, a call has been made for reform in tort law. Members of the legal profession and education system, state legislatures, federal politicians and many of the general citizenry have sought to enact laws to remove some of the most troubling or controversial applications of current tort law.

Tort reform legislation which many states have passed include:

- placing a cap on punitive damages;
- eliminating the use of joint and several liability;
- requiring the filing of certificates of merit by expert witnesses;
- limiting non-economic damages;
- disallowing the use of “deceptive trade practices” as a basis for a suit toward certain professionals;
- shortening statutes of repose and limitations so that suits regarding certain acts from long ago cannot be brought;
- enacting standards regarding who can be considered an “expert” witness;
- mandating the use of alternative dispute resolution for certain cases; and
- reinstating the doctrines of comparative negligence and assumption of risk.

### **Changes to Punitive Damages Rules**

Approximately thirty-one states have enacted legislation regarding punitive damages. Legislation that has been passed in some states places caps on the amount of punitive damages which may be awarded. For example in Texas, the cap on the maximum punitive damages which can be awarded for “non-criminal” acts is \$200,000 or twice the amount of economic damages plus non-economic damages not to exceed \$750,000. In North Carolina, a cap of three times compensatory damages or \$250,000, whichever is greater, and in Wisconsin, a cap of \$350,000 was placed on non-economic damages in medical malpractice cases. Alaska, which passed many pieces of tort reform legislation in 1997, limits punitive damages to the greater of three times compensatory damages or \$500,000 in most cases and non-economic damages to the greater of \$400,000 or the injured person’s life expectancy in years multiplied by \$8000.

Some states have also passed legislation to require certain standards of evidence in order for punitive damages to be awarded. In Wisconsin, punitive damages may only be awarded if the defendant is judged to have acted “maliciously or in intentional disregard of the rights of the plaintiff.” In Texas, there must be “clear and convincing evidence” that malice was involved. In Montana, a unanimous jury must determine liability and establish the amount of punitive damages. In Pennsylvania, legislation affecting medical liability states that there must be willful or wanton misconduct or reckless indifference to the rights of others in order for punitive damages to be awarded.

### **Joint and Several Liability**

Another area of reform legislation has been the elimination of joint and several liability, although an exception for medical malpractice cases has been made by some states. Approximately thirty-four states have made some modifications to joint and several liability laws. One method used to limit its use is to set standards regarding the amount of responsibility a defendant must have in order to be held as liable under joint and several liability rules. For example a defendant’s liability may be limited to the percentage of the defendant’s responsibility for damages for certain types of cases. A plaintiff’s ability to recover damages was barred in some states if the plaintiff was found to be more than 50 percent at fault for the injury or damage. In some states, for example, Louisiana, joint liability has been abolished and proportionate liability is now used.

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## **Frivolous Lawsuits**

States also enacted statutes to limit the bringing of frivolous lawsuits. In some states, penalties may be charged against a plaintiff if a frivolous suit is brought. The party who brought the frivolous suit may also be required to pay the other party's reasonable expenses.

## **Expert Witnesses**

In some states, in order to be considered an "expert" witness in a medical malpractice case against a board-certified physician, the witness must now be certified in the same specialty and have practiced or taught in that specialty for at least one year before the incident. Another statute requires that a medical expert witness is not eligible to testify after ten years of retirement, and if the witness is retired when testifying must provide proof of completion of continuing medical education. In Alaska, an expert witness must be licensed and trained in the profession of the defendant and must be certified by a board recognized by the state.

## **Venue**

States have passed legislation regarding venue. Recall from an earlier discussion that venue is important because states laws and court interpretations differ regarding its establishment. If a plaintiff can choose from many possible venues, it is likely that the venue which is likely to be of most benefit to the plaintiff will be chosen. States have enacted legislation to limit possible venues for torts occurring within that state.

There has also been a call by some for a federal reform measure regarding venue. Currently, if a company does business in all states, the plaintiff could potentially select venue from one of many within those states. A suggested federal reform measure limits the venue of a wrong involving a multi-state business to the state in which the firm has the largest employment or the state through which the product is imported.

## **Statutes of Repose and Limitations**

Statutes of repose and statutes of limitations limit the ability to bring suit regarding alleged wrongs after specified periods of time. Several statutes have been passed in recent years which place limits on the time period suits may be brought for different types of wrongs. Some parties involved in tort reform favor a uniform statute of limitations, and are working to bring legislation in all states to enact a single statute of limitations for all types of alleged wrongs.

Examples of statutes of repose and statutes of limitations which have been enacted include, in Iowa, a 15 year statute of repose for product liability cases, unless fraud, concealment, latent diseases caused by harmful products is established or certain specified products are involved, in Mississippi, a 7 year statute of repose for medical malpractice actions, with exceptions for cases involving fraudulent concealment and foreign objects, and in Alabama, a statute of limitations for certain actions against public officials and municipalities.

## **Alternative Dispute Resolution**

Another way states have chosen to reform tort law is to require that alternative dispute resolution (ADR) methods be used to settle certain cases. Alternative dispute resolution techniques include negotiation, mediation and arbitration.

## Other State Legislation Regarding Tort Reform

Texas has been a state which has enacted some of the most aggressive legislation regarding tort reform. In addition to passing several tort reform laws, Texas also required that insurers doing business in the state reduce rates on liability insurance. The reasoning behind this was that the tort legislation should reduce the number and size of liability damage awards, and so the insurers will experience reduced costs. However, the Texas regulators reasoned, the insurers can not be trusted to reduce premium charges immediately to reflect the reduction in losses, so the Insurance Commissioner should mandate rate reductions. The rate reductions that were mandated beginning in April 1, 1995, and which are subject to change annually are listed in the table on the following page.

Many states have also enacted statutes to protect employers from liability arising from providing employee references. In Idaho, for example, liability against an employer can be found only if there is clear and convincing evidence that actual malice or a deliberate intent to mislead is present. Maryland has enacted a similar statute, requiring clear and convincing evidence that actual malice or false information was intentionally or recklessly disclosed.

### Mandated Liability Insurance Rate Reductions in Texas

LINE or SUBLINE	PERCENTAGE REDUCTION
(1) professional liability insurance for physician, other health care provider, or hospital:	30%
(2) commercial liability insurance for damages arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product or for completed operations coverage:	25%
(3) private passenger automobile liability insurance for bodily injury:	15%
(4) commercial automobile liability insurance for bodily injury:	20%
(5) private umbrella and excess liability insurance:	20%
(6) the liability portion of commercial multi-peril insurance:	10%
(7) the liability portion of homeowner's, farm and ranch owner's, and renter's insurance:	5%
(8) the employer's liability portion of workers' compensation insurance:	10%
(9) all lines and sublines of other commercial liability insurance:	15%

## Challenges to Tort Reform

The legislation enacted by the states has not occurred without opposition. In several states, the legislation was referred to the courts to determine their legality under the respective state's constitution. In some cases, legislation has been overturned or interpreted by the courts so as to undo essential elements related to reform. It is generally expected that tort reform legislation will continue to be enacted throughout the nation, and that court challenges will also continue. Agents who sell liability insurance should try to keep current on any tort reform rules in their state.

## **Summary**

Agents offering professional liability insurance are part of a dynamic field. Laws are changing and the professional marketplace is sophisticated and demanding. Currently, there are many insurance companies providing exciting, comprehensive liability coverages for professionals. Coverage for emerging professional fields becomes available regularly and coverage for existing professions is evolving as competition and customer demand require.

Agents in this field have the challenge of staying on top of new product features and new laws that can affect their customer base. They also have the privilege of knowing they are providing a true service to their customers by giving them the information and products they need to manage the risk of liability in their businesses. Errors and omissions and professional liability insurance are important business tools and will continue to be into the future.

## Glossary

**Absolute Liability:** A form of liability which does not require the establishment of negligence. A party conducting an indisputably hazardous activity is considered to have *absolute liability* for any damage or injury that arises from the activity.

**Assumption Of Risk:** A defense against negligence. Under the assumption of risk defense, the defendant must prove that the plaintiff understood the risks involved, including the possibility of the damage and injury in question, and yet allowed the act to occur.

**Boilers and Machinery Insurance:** A form of insurance that provides coverage for property damage from boilers, electric machinery and other higher risk types of machinery that are excluded by the commercial property and businessowners property forms.

**Broad Insurance Form:** An insurance form which has an insuring agreement that describes expansive coverage. The form will typically include many policy exclusions.

**Contracts of Adhesion.** A contract of adhesion is one where one party creates the terms of the contract, and the other party adheres to them.

**Contributory Negligence:** A defense in a liability suit that is based on the argument that if the plaintiff is found to have in any way contributed to the damage or loss, no damage award will be made.

**Commercial General Liability Form:** A liability insurance form for commercial risks which covers bodily injury and property damage liability, personal and advertising injury liability and medical expenses incurred for bodily injury caused by an accident on or by the premises owned or rented by the insured, or that arise from the insured's operations and excludes professional liability risks.

**Comparative Negligence:** A legal defense against the finding of total liability. Under comparative negligence rules, the proportionate amounts of negligence contributed by all parties in the damage suit are considered. If the plaintiff is found to have contributed to the damage or injury, the award to the plaintiff is reduced by the amount of his or her responsibility for the loss.

**Crime Insurance:** A form of insurance that protects a business against certain types of crimes. Forms include but are not limited to Employee Dishonesty, Theft, Disappearance and Destruction, Premises Burglary, Robbery and Safe Burglary and Computer Fraud.

**Damages:** A monetary judgment determined by a court of law or due under a settlement.

**Extended Reporting Period:** An optional benefit of claims made forms which extends the amount of time under which a claim may be made.

**Excess Policy:** A policy specifically designed to provide coverage on an excess basis over other insurance the insured owns.

**Following Form Policies:** Excess policies that offer additional coverage for the same kind of coverage as the underlying policies owned by the insured.

**Hazard:** An insurance term used to describe conditions that increase risk.

**Indemnity Policy:** An insurance policy which pays benefits to reimburse the insured for payments made for covered claims.

**Inland Marine Insurance:** Insurance that covers a wide variety of transportation risks.

**Insurable Loss:** A loss which is considered to be insurable has five elements: (1) the loss must arise from a pure risk, (2) the loss must be definable, (3) the loss must be calculable, (4) the loss must not occur to many people simultaneously, and (5) the loss may not be intentional.

**Intervening Cause:** A defense against negligence that is based on the argument that an intervening cause breaks the chain of events leading to the injury or damage. If an intervening cause creates a new chain of events that led to the injury or damage, proximate cause between the breach of duty and the damage may not exist, and therefore, negligence may not exist.

**Joint and Several Liability:** A method of assigning liability damages in a negligence case based on an ability to pay.

**Licensing Board Coverage:** A professional liability coverage which pays for the reimbursement of expenses related to disciplinary hearings, including defense expenses by a licensing board.

**Loss Exposure:** An insurance term which refers to conditions that include the possibility of loss.

**Last Clear Chance:** A defense against negligence that is based on the argument that the plaintiff had the last clear chance, or the final opportunity, to avoid the loss or damage. The plaintiff's failure to act, it is argued, caused the loss or damage, not the breach of duty on the part of the defendant.

**Moral Hazard:** A condition or conditions that increase the likelihood that an insured or a person in a position to be paid by an insurer will intentionally cause, overstate or increase a loss.

**Morale Hazard:** A condition or conditions that increase the likelihood that the attitude of the insured or a person who will be paid by the insurer will cause a loss.

**Negligence:** The failure to use due and reasonable care.

**Notary Public:** A public officer who is licensed and authorized to administer oaths and attest and certify documents.

**Occurrence:** As defined in professional liability or E&O form, an occurrence means an accident, including continuous or repeated exposure to substantially the same general harmful conditions and will include acts or omissions that arise out of the rendering of or failure to render services as a professional.

**Parol Evidence Rule:** A legal principle that states that a written contract is assumed to include all oral agreements.

**Peril:** An insurance term meaning a cause of loss.

**Physical Hazard:** A condition or conditions of property, people, or operations that can increase loss.

**Property Coverage:** Insurance which provides protection against the risk of financial loss due to property damage.

**Proximate Cause:** A legal doctrine that states that a breach of duty must launch an unbroken chain of events that result in the damage or injury in order for liability to be found.

**Pure Risk:** A risk which cannot result in the possibility of gain.

**Retroactive Date:** An optional feature of a claims made policy which applies the policy coverage to an earlier date. Injury or damage that occurs before the retroactive date is not covered. Any injury or damage that occurs from the retroactive date until the policy coverage ends is covered, assuming the claim is made during the policy period. The retroactive date is sometimes referred to as a *nose*.

**Risk:** The chance of loss.

**Risk Management Process:** A process with the objective of reducing loss. The process includes identifying risks, evaluating each risk for frequency, severity and type, determining the best risk response, implementing the response, monitoring the results and making changes as necessary.

**Speculative Risk:** A risk that includes the possibility of gain. Insurance policies do not cover speculative risks.

**Severability:** An insurance condition which provides each insured under the policy with his or her own liability limits.

**Statute of Limitations:** A legal principle that requires that certain lawsuits must be instituted within a stated period of time after the action which forms the basis of the lawsuit occurred. The applicable period of time can vary by state and by the type of lawsuit involved.

**Strict Liability:** A form of liability which does not require the establishment of negligence. Strict liability applies to manufacturers who make a product with a defect which causes damage or injury.

**Subrogation:** A legal term for the process through which an insurer is able to recover damages from the party liable for damages once the insurer has paid an insured or other claimant. To subrogate means “to substitute.” The insurer’s right to recover damages are substituted for the insured’s right to the damages since the insurer paid damages on behalf of the insured.

**Supplemental ERP:** A form of an extended reporting period benefit that provides an unlimited period of time to report claims for an occurrence reported during the policy period. A supplemental ERP is also known as *full tail coverage*.

**Tort:** An act that is committed by one party which causes injury or damage to another party or to another’s property. The word “tort” means wrong.

**Umbrella Liability Insurance:** Insurance which provides additional, high limit insurance that applies to liability for damages that arise from a suit. Umbrella liability policies generally provide broad coverage that encompasses many forms of liability and also provide additional insurance over other insurance policies the insured owns.

**Venue:** The location of the court that has proper jurisdiction over a trial or litigation.

**Vicarious Liability:** A form of liability that occurs when another party is held responsible for a negligent party’s actions. Employers are generally held to be liable for the actions of their employees under the concept of vicarious liability. Vicarious liability is also known as imputed liability.

**Workers Compensation Insurance:** A form of insurance that covers employer risks such as injury, disability or death that occurs to employees while on the job.

