# INSURANCE ISSUES IN REAL PROPERTY MATTERS

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# THE BASICS

- Two most encountered forms of coverage:
    1. General Liability Coverage (CGL);
    2. Property Insurance

# THE CGL COVERAGE

- Designed to protect a property owner (and its tenants and lenders) from claims and lawsuits resulting from accidents on the property.

- Will respond to losses involving bodily injury, property damage and **personal and advertising injury** to third parties.

# THE CGL

- There is no such thing as a comprehensive liability policy.

- Common Exclusions:
  - Contractual Liability/Your Work
  - Expected or Intended Injury
  - Liquor Liability
  - Injury to workers (worker’s compensation)
  - Pollution
  - Emerging: Cyber Loss/Data Breach

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# PROPERTY DAMAGE COVERAGE

- Property Insurance will respond to protect an owner of property from the cost of loss or damage to that property.

# PROPERTY DAMAGE COVERAGE

- Like with liability coverage, there is no such thing as “all risk” coverage in property Insurance.

# PROPERTY DAMAGE COVERAGE

There are several basic types of policies providing different levels of protection:

1. **Basic/Named Perils**: Fire, windstorm, hail, aircraft, riot, vandalism, smoke, explosion.

2. **Special Perils**: Insuring agreement covers all risks unless specifically excluded.

Also known as basic, broad, and special form coverage

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# COMMON PROPERTY COVERAGE EXCLUSIONS

- War, Terrorism, and Nuclear
- Earthquakes/Earth Movement
- Mold
- Water: Mudslides, Sewer Backup, Flood (but not sprinklers).
- Pollution
- Ordinance or Law
- Vermin
- Fraud/Dishonest Acts
- Foundation Settling/Cracking/Expanding

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# PROPERTY DAMAGE COVERAGE

- Some risks that are excluded can be “bought back” under an endorsement or a separate policy.

# INDEMNIFICATION

- A premise liability based duty of care is owed by the owner and occupiers of land and their agents. *Forbush v. Sagecrest Multi Family Owners' Association, Inc*., 162 Idaho 317, 396 P.3d 1199 (2017).

- **Indemnification**: Where one party (often through their insurance carrier) agrees to pay the defense costs and damages of the other party if a claim is asserted by a third party, and often regardless of who was at fault.

# INDEMNIFICATION

- **Goal**: Consistency between the lease or agreement and insurance and applicable laws.

- **Idaho**: Parties are permitted to contract for indemnification in most circumstances. However, indemnity provisions will be strictly and narrowly construed, and will be construed against the drafting party.

- Most states have statutes which limit or restrict the ability to indemnify.

- Limited, intermediate, and broad level indemnification.

# INDEMNIFICATION

- Idaho Code § 29-114:

- A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, highway, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, his agents or employees, or indemnitees, is against public policy and is void and unenforceable.

# ADDITIONAL INSURED ENDORSEMENT

- Provides status to a party not otherwise named in an insurance policy, and will provide that party with certain defense and indemnity protection.

# ADDITIONAL INSURED ENDORSEMENT

- Historically, additional insured endorsements provided coverage to an additional insured with respect to liability “arising out of the ownership, maintenance, or use of the premise.”

# ADDITIONAL INSURED ENDORSEMENTS

- However, carriers have begun modifying additional insured endorsements to limited coverage in instances where the additional insured is merely vicariously liable or faces exposure through “pass through” liability.

# ADDITIONAL INSURED ENDORSEMENTS

- Endorsements also commonly limit coverage to the extent permitted by law and the extent provided by contract.

- **Best Practice**: Reference specific ISO endorsement in the agreement.

# SUBROGATION WAIVERS

- Agreement by one party not to look to the other party for reimbursement for damages, even if the other party would otherwise be legally liable for the lose.

- **Landlord's Goal**: To have tenant's insurance cover the risk and loss associated with the property and business. Thus, tenant assumes liability even for the landlord's negligence.

- **Tenant's Goal**: Limit its indemnification obligations to matters arising from its business and its own acts (rather than the landlord's negligence).

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# COMMON ISSUES

## Replacement Cost versus Actual Cash Value

# COMMON ISSUES

**The Co-Insurance Trap:**

Coinsurance Percentage: 80 percent
Time Of Loss Value: $100,000
Policy Limits: $50,000
Loss: $30,000
Deductible: $5,000

$100,000 x .80 = $80,000
$50,000/$80,000= .625
$30,000 x .625 = $18,750 - $5,000 = $13,750

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# COMMON ISSUES

- To avoid the Coinsurance trap, the limits must be more than the coinsurance percentage x value. So here, $80,000.

- As property values fluctuate, to avoid this potential trap, negotiate an “agreed amount” in the policy, and if you maintain limits for that amount, the coinsurance provision will not apply.

# COMMON ISSUES

- Proof of Insurance and Certificates of Insurance:
  - Certificates of Insurance are informational only and confer no rights upon the certificate holder.
  - Also only requires the carrier to “endeavor to give notice to the holder if insurance is modified or cancelled.”

# THE "POLLUTION EXCLUSION" IN COMMERCIAL GENERAL LIABILITY POLICIES

## a. Brief History of the Pollution Exclusion

i. In the 1970s and 1980s, the federal government and many state governments started enacting laws creating potentially *huge* liability for environmental contamination claims. *See e.g.*, Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") of 1980.

ii. Companies with newfound exposure started tendering these claims to their CGL insurers.

iii. "We, Company X, 'accidentally' spilled toxic substances into the environment, soil, ground water, etc. You, insurance company, should defend us from the lawsuit and pay for any indemnity obligations."

# THE "POLLUTION EXCLUSION" IN COMMERCIAL GENERAL LIABILITY POLICIES

**b. Older Policies *May* Still Cover "Sudden and Accidental" Pollution Events in *Some* Jurisdictions.**

i. By the early 1970s, CGL carriers had at least wised-up enough to put an exclusion into their policies. However, that exclusion often contained an exception (i.e., there *would* be coverage) *if* the pollution was "sudden and accidental."

ii. Jurisdictions vary *widely* on what constitutes sudden and accidental. However, many policy-holder friendly jurisdictions simply read-out the "sudden" language and find coverage if the pollution was legitimately an accident (i.e., it was not intentional dumping.)

1. Idaho: "Sudden and accidental" is unambiguous clause. "It is not reasonable to interpret 'sudden' to include an event that occurs over anything other than a short period of time." *N. Pac. Ins. Co. v. Mai*, 130 Idaho 251, 253, 939 P.2d 570, 572 (1997). "Accidental . . . is an unintentional happening, an event that is unusual and not expected." *Id*. (citing *Mut. of Enumclaw v. Wilcox*, 123 Idaho 4, 8, 843 P.2d 154, 158 (1992))

**2. So, in Idaho, unless someone takes a run at overturning *Mai*, there probably will not be coverage for *cumulative* exposures (i.e., slow leaking USTs, slow leaking drainage pipes) or intentional dumping. *Might* be coverage for catastrophic tank failures, single leak accidents, etc.**

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# THE "POLLUTION EXCLUSION" IN COMMERCIAL GENERAL LIABILITY POLICIES

**c. The "Absolute Pollution" Pollution Exclusion is Now Commonly Enforced BUT . . .**

i. By the mid-1980s, CGL carriers had started putting in "absolute" pollution exclusions into their policies. In other words, these policies did away with the "sudden and accidental" exception and barred pollution claims *even if they were accidental*.

ii. "Liberal" jurisdictions *still* often find ways to avoid applying it. *See* e.g.*, Zhaoyun Xia v. ProBuilders Specialty Ins. Co. RRG*, 393 P.3d 748, 750 (Wash. 2017) (Washington Supreme Court holding that under the "efficient proximate cause" rule, the negligent installation of a water heater was a "covered peril" even though that negligence caused a release of carbon monoxide that would otherwise be barred by the absolute pollution exclusion).

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# THE "POLLUTION EXCLUSION" IN COMMERCIAL GENERAL LIABILITY POLICIES

**d. Other Common Problems in Environmental Contamination Claims.**

**i. Potentially Responsible Party ("PRP") Letters by Federal EPA or State Equivalent (e.g., Idaho Department of Environmental Quality) as "suits" or not under CGL policies.**

1. A majority of states hold that "PRP" letters trigger an insurance company's duty to defend.
2. A minority of states hold that the insurance company's duty to defend only applies to "suits" and interpret "suits" to mean *only* a formal proceeding in a court of law. In those jurisdictions, the carrier does *not* have a duty to defend because of a PRP letter (or other pre-lawsuit proceedings by the EPA/state agencies).
3. Idaho appears to follow the majority rule. *See Monarch Greenback, LLC v. Monticello Ins. Co.*, 118 F. Supp. 2d 1068, 1076 (D. Idaho 1999) (Lodge, J.) (citing *See N. Pac. Ins. Co. v. Mai*, No. 42256-C, 1995 WL 854735, at *5 (Idaho Dist. June 28, 1995), aff'd on other grounds, 130 Idaho 251, 939 P.2d 570 (1997); *See also Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1512 (9th Cir. 1991) (holding PRP letters trigger duty to defend).

# THE "POLLUTION EXCLUSION" IN COMMERCIAL GENERAL LIABILITY POLICIES

**d. Other Common Problems in Environmental Contamination Claims (cont.)**

**i. Investigation Expenses as Defense Costs**

1. Generally, a CGL covers both damages and defense costs. "Damages" are capped by the policy limits. In most policies, defense costs are unlimited.
2. Some policyholders have tried to frame their "investigation" costs (Phase I and other pre-remediation expenses) as "defense costs" (and thus avoid application of policy limits). For example, some courts have held that Remediation Investigation/Feasibility Study ("RI/FS") costs are "defense costs." *See discussion at* § 13:80.Site investigation costs: indemnity or defense?, 2 Envtl. Ins. Litig.: L. and Prac. § 13:80 (2017)
3. Policyholders: Don't just assume your cleanup costs must be applied to the policy limits. You might be able to argue pre-remediation investigation expenses are defense costs.

**ii. Clean-Up Costs as Damages?**

1. Most courts hold that government-mandated clean-up (or remediation pursuant to government or third-party threats of litigation) are covered damages. However, *some* courts have held that they are not covered damages (under a variety of theories, including the owned-property exclusion, known-loss exclusions, or the voluntary payment doctrine).
2. Idaho: No published state court decisions. *But see Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1512 (9th Cir. 1991) (reversing U.S. Dist. Court for the Dist. of Idaho and holding: "The term 'as damages' as used in the insurance policies must logically be held to include response or cleanup costs[.]")

# MODERN SPECIALTY POLLUTION LIABILITY INSURANCE

a. With the advent of the "Absolute Pollution Exclusion," some insurers have sought to fill the market gap with specialty policies covering pollution exclusion. A few things to keep in mind when negotiating and purchasing these policies with your broker.

**b. Won't Cover Known-Losses/Known Risks** – If you know (or arguably should have known) about a contamination issue, the carrier might have a basis to deny coverage. Important to consider when purchasing real property. Do your Phase I and don't hide the results on your insurance application. In other words, don't commit insurance fraud. ☺

**c. Almost always "Claims Made" Policies –** Only covers claims made in the reporting period! Unlike CGL's with occurrence periods, "expired" claims made policies have virtually no coverage value. Late notice on a claims made policy can be the whole ballgame.

**d. Some Interesting Creative Ways of Covering Risk – e.g., "Cleanup Cap Insurance".** Cleanup cap insurance has a BIG self-insured retention and essentially can help increase the market for legacy sites. In essence, it functions as a sort of long-term excess insurance for contaminated properties.

# THANK YOU!


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