9-21-2011

Employers Mut. Cas. Co. v. Donnelly Appellant's Brief Dckt. 38623

BEFORE THE
SUPREME COURT
OF THE STATE OF IDAHO

Docket No. 38623-2011
Case No. CV-2007-885 (Bonner County, Idaho)

EMPLOYERS MUTUAL CASUALTY COMPANY,
PLAINTIFF / APPELLANT / CROSS-RESPONDENT;

vs.

DAVID and **KATHY DONNELLY,**
DEFENDANTS / RESPONDENTS / CROSS-APPELLANTS.

On appeal from the
First Judicial District of the State of Idaho,
in and for the County of Bonner

Honorable Steve Verby, District Judge, presiding

BRIEF FOR THE APPELLANT

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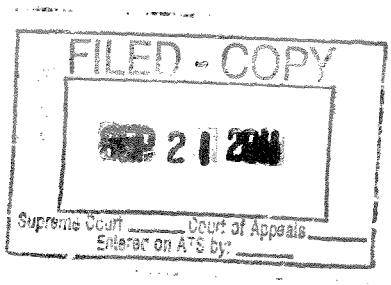

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STATEMENT OF THE CASE

Nature of the Case

This is a civil action for declaratory relief between an insurance company and a claimant to potential insurance proceeds concerning the interpretation and application of a commercial general liability insurance policy with respect to the duty of the insurance company to pay certain damages, court costs and attorney fees awarded to the claimant in a lawsuit against the insurance company's insured.

Proceedings Below

The parties to this appeal include Plaintiff / Appellant / Cross-Respondent Employers Mutual Casualty Company (herein "EMC") and Defendants / Respondents / Cross-Appellants David and Kathy Donnelly (herein "Donnelly"). R Vol. 1, p. 194-195. Parties to the district court proceedings, but not parties on appeal, include district court defendants Rimar Construction, Inc. (herein "RCI") and Ivan Rimar (herein "Ivan"). *Id.*

On May 24, 2007, EMC instituted a declaratory judgment action against Donnelly and RCI to establish that under its policy of insurance EMC had no duty or responsibility to pay all, or any portion, of the damages then claimed by, and later awarded to, Donnelly in litigation between Donnelly and RCI/Ivan (herein referred to as the "Declaratory Judgment Action"). R Vol. 1, p. 17-24. In the Declaratory Judgment Action, RCI made a counterclaim against EMC alleging bad faith, violation of the Consumer Protection Act and breach of contract. R Vol. 1, p. 35-44. However, Donnelly initially made a simple denial of EMC's claim for declaratory relief. R Vol. 1, p. 27-30.

On December 12, 2007, the district court entered an order staying the Declaratory

Judgment Action until such time as the litigation between Donnelly and RCI/Ivan was concluded. R Vol. 1, p. 111-113. Once the Underlying Litigation was concluded, the district court lifted its stay of the Declaratory Judgment Action, which was effective on July 17, 2009. R Vol. 1, p. 156-158. Thereafter, a Settlement Agreement was entered into between EMC, RCI and Ivan, the terms of which effectuated the following: (a) EMC had no duty, responsibility or legal liability to satisfy the judgments entered against RCI/Ivan payable to Donnelly and that EMC had no duty to indemnify RCI from the same; (b) RCI and Ivan agreed that their counterclaims alleged in the Declaratory Judgment Action would be dismissed with prejudice; (c) RCI and Ivan released and discharged EMC for and from all liability whatsoever that EMC may have to RCI or Ivan in relation to the defense of the Donnelly claims and related to the Declaratory Judgment Action; and (d) RCI and Ivan would not contest the Declaratory Judgment Action and they admitted all of the allegations made by EMC in the Declaratory Judgment Action. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. J, filed Nov. 12, 2009).

EMC and Donnelly then moved for summary judgment, and essentially stipulated to the existence of the material facts, none of which were in dispute. R Vol. 1, p. 194-201; Vol. 2, p. 249-282; Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, and Exhibits, filed Nov. 12, 2009). The district court denied the cross-motions for summary judgment by *Order* entered April 7, 2010. R Vol. 2, p. 317-324. The district court reasoned there was a question of fact as to whether the damages awarded to Donnelly in the litigation with RCI/Ivan were property damage or contract based damages, the resolution of which would resolve the insurance coverage question in the Declaratory Judgment Action. R Vol. 2, p. 322.

While the summary judgment proceedings were ongoing, Donnelly amended its answer to

EMC's petition and alleged a counterclaim against EMC, not seeking any award of damages on a claim, but rather asserting a counter-petition for a declaratory judgment on the insurance coverage issues. R Vol. 2, p. 283-288. Thereafter, Donnelly again amended its answer and counterclaim, continuing pursuit of the counter-petition for a declaration of insurance coverage, and still not seeking an award of money damages against EMC, but rather the avoidance of EMC's settlement agreement with RCI based upon a theory of fraudulent conveyance. R Vol. 3, p. 398-430.

Following the district court's decision to deny cross-motions for summary judgment, EMC and Donnelly sought reconsideration. R Vol. 2, p. 375-377; Vol. 3, p. 457-459. On reconsideration, the district court determined that there was no insurance coverage for $126,611.55 in actual damages received by Donnelly against RCI, but that there was insurance coverage for costs and attorney fees in the sum of $296,933.89 awarded to Donnelly against RCI as a result of its judgment in the underlying litigation. R Vol. 3, p. 473-491. The parties then entered into a *Stipulation* filed with the district court on February 18, 2011, which had the effect of - (1) dismissing, with prejudice, all of RCI's claims against EMC; (2) dismissing, with prejudice, Donnelly's fraudulent conveyance claims against EMC and RCI, with each party to bear its own fees and costs on the issue; and (3) waiving EMC's right to contest Donnelly's standing in this action, including upon appeal. R Vol. 3, p. 504-509. The district court accepted the stipulation of the parties by an adopting order. R Vol. 3, p. 510-513. The district court then entered a final *Judgment* consistent with the *Stipulation* and the Court's ruling on the cross-motions for reconsideration. R Vol. 3, p. 514-517.

After the district court entered the *Judgment*, Donnelly requested an award of costs and

attorney fees. R Vol. 3, Clerk's Exhibits (*Memorandum of Costs and Attorney Fees*, filed Mar. 8, 2011). Donnelly further requested that the district court amend the *Judgment*. R Vol. 3, p. 524-525. EMC timely objected to both requests for post-*Judgment* relief. R Vol. 3, p. 526-527; Vol. 3, Clerk's Exhibits (*Memorandum in Opposition to Motion to Amend Judgment*, filed Apr. 8, 2011). On May 20, 2011, the district court entered its order denying Donnelly any award of court costs or attorney fees. R Vol. 3, p. 541-545.

Disposition Below

In the proceedings below, the district court granted in part, and denied in part, the declaratory relief requested of EMC as against Donnelly. As such, by contrast, the district court granted in part, and denied in part, the declaratory relief requested of Donnelly as against EMC. The district court also denied Donnelly's request for an award of court costs and attorney fees.

EMC appeals as to the district court's *Judgment* with respect to that portion declaring that there is insurance coverage for costs and attorney fees in the sum of $296,933.89 awarded to Donnelly against RCI as a result of its judgment in the underlying litigation. R Vol. 3, p. 531-535. Donnelly appeals as to the district court's *Judgment* with respect to that portion declaring that there was no insurance coverage for $126,611.55 in actual damages received by Donnelly against RCI as a result of its judgment in the underlying litigation, and further appeals as to the district court's *Order* denying Donnelly an award of costs and fees. R Vol. 3, p. 547-549.

Statement of Facts

THE APPLICABLE INSURANCE POLICY. On September 14, 2004, EMC and RCI entered in to an agreement of insurance known as a Commercial General Liability policy, identified as Policy No. 2D1-32-95-05, whereunder EMC was the insurer and RCI was the insured (herein

"the Applicable Policy"). R Vol. 2, p. 202-203; Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. A, filed Nov. 12, 2009).[1] The effective dates of coverage under the Applicable Policy began October 1, 2004 and ended October 1, 2005. *Id.* The coverage limits under the Applicable Policy are $1,000,000 per occurrence. *Id.* The pertinent **coverage portions** of the Applicable Policy provide as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.[2]
> . . .
> This insurance applies to "bodily injury" and "property damage" only if:
> (1) The "bodily injury" or property damage" is caused by an "occurrence" that takes place in the "coverage territory"; [and]
> (2) The "bodily injury" or "property damage" occurs during the policy period[.][3]

The Applicable Policy defines a **bodily injury** as follows:

> "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.[4]

The Applicable Policy defines **property damage** as follows:

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

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[1]Relevant excerpts to the Applicable Policy are attached hereto at Addendum A.

[2]See Section I.1.a. of the Applicable Policy.

[3]See Section I.1.b. of the Applicable Policy.

[4]See Section V.3. of the Applicable Policy.

caused it.[5]

The Applicable Policy defines an **occurrence** as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.[6]

The **Expected or Intended Injury Exclusion** of the Applicable Policy provides as follows:

> This insurance does not apply to:
> . . .
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.[7]

The **Contractual Liability Exclusion** of the Applicable Policy provides as follows:

> This insurance does not apply to:
> . . .
> "Bodily injury or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
> (1) That the insured would have in the absence of the contract or agreement[.][8]

Additionally, the Applicable Policy contains a **Supplementary Payments Provision** which provides as follows:

> **SUPPLEMENTARY PAYMENTS –COVERAGES A AND B**
> 1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
> a. All expenses we incur.
> . . .

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[5]See Section V.17. of the Applicable Policy.

[6]See Section V.13. of the Applicable Policy.

[7]See Section I.2.a. of the Applicable Policy.

[8]See Section I.2.b. of the Applicable Policy.

e. All costs taxed against the insured in the "suit."[9]

Relative thereto, the Applicable Policy defines "**suit**" as "a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged."[10]

THE UNDERLYING LITIGATION. Relevant to the district court proceedings was certain underlying litigation between Donnelly, as Plaintiff, and RCI and Ivan, as Defendants, in Case No. CV-06-00445 (Bonner County, Idaho), the proceedings of which were conducted before the same district court (herein "the Underlying Litigation"). R Vol. 1, p. 195. The Underlying Litigation was commenced on March 7, 2006. *Id.* In the Underlying Litigation, Donnelly alleged damages were owed to it from RCI and Ivan based upon remodeling construction work performed on the Donnelly home in 2005. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. B, p. 2, filed Nov. 12, 2009). The legal theories of liability alleged by Donnelly included breach of contract, misrepresentation, fraud, nondisclosure, professional malpractice, negligence, breach of warranties, violation of the Idaho Consumer Protection Act, quiet title, and for a declaratory judgment. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. B, filed Nov. 12, 2009).

Part of Donnelly's claim was one allegation that bodily injuries had been suffered by reason of carbon monoxide poisoning from the improper installation of a propane stove. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. B, p. 5, filed Nov. 12, 2009). Before trial in the Underlying Litigation, the Court ruled that Donnelly's claim regarding bodily

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[9]See Section I.Supp. Pmt. of the Applicable Policy.

[10]See Section V.18. of the Applicable Policy.

injuries (i.e. the carbon monoxide poisoning) could not be presented to the jury at trial. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. C, p. 2-3, filed Nov. 12, 2009). It was because of this allegation that EMC had provided a defense to RCI in the Underlying Litigation under a **complete reservation of rights**. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. I, filed Nov. 12, 2009). As early as September 5, 2006, EMC advised its insured, RCI, that -

> There is no coverage for allegation of construction defects and/or contract breach alleged in the complaint because they do not involve property damage. Moreover, Exclusions a. and m. and Endorsement 2280 apply to bar coverage for intentional injury, damage to your work, loss of use expense caused by delay and damage caused by professional engineering or architectural work respectively. **However, because there is a potential for coverage of bodily injury caused by carbon monoxide EMC is providing a defense**.

R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. I, p. 7, filed Nov. 12, 2009) (emphasis added).

At trial in the Underlying Litigation, the Court instructed the jury on applicable law, including the following notable instructions -

- That Donnelly's claim that RCI failed to perform in a workmanlike manner is a claim implied by operation of law; and
- That a necessary element of proof of the implied warranty claim included **proof of the existence of a contract** between RCI and Donnelly.

R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. D, Instr. 48, 49, 51, filed Nov. 12, 2009). The trial in the Underlying Litigation concluded with entry by the jury of a *Special Verdict* on July 9, 2008. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. E, filed Nov. 12, 2009). Based on the *Special Verdict*, it was determined that RCI

breached its contract with Donnelly, including breach of the implied warranty of workmanship, and also violated the Idaho Consumer Protection Act. *Id.* Based on the *Special Verdict*, it was determined that RCI and Ivan did not breach any warranties, did not commit fraud, and did not engage in professional negligence. *Id.* The jury awarded Donnelly the sum of $126,611.55 for breach of the implied warranty of workmanship and an additional $2,000.00 for violation of the Idaho Consumer Protection Act. *Id.*

As a result of the foregoing, a judgment was entered in the Underlying Litigation on August 14, 2008 requiring RCI to pay the sum of $128,611.55 to Donnelly for breach of the implied warranty of workmanship ($126,611.55) and for violation of the Idaho Consumer Protection Act ($2,000.00). R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. F, filed Nov. 12, 2009). Post-verdict, the district court in the Underlying Litigation awarded Donnelly costs as a matter of right, and attorney fees, and in so holding did so on the basis that -

- $126,611.55 in damages accounted for compensation to Donnelly for construction defects on their home, and an additional $2,000.00 for Consumer Protection Act violations;
- The basic issue litigated in the Underlying Litigation was whether or not the construction was completed in a workmanlike manner;
- Donnelly prevailed by proving RCI failed to substantially perform the work **it contracted to perform**;
- The **contract** between Donnelly and RCI constituted a commercial transaction;
- The **construction contract was breached** by RCI by not completing the work it

contracted to perform in accordance with its agreement with Donnelly, or pursuant to sound construction practices in a workmanlike manner; and

- The gravamen of the action involved construction defects.

R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. G, filed Nov. 12, 2009). An Amended Judgment was consequently entered on March 20, 2009 awarding Donnelly an additional $277,062.00 for attorney fees and $19,871.89 for court costs as a result of a **contract-based commercial transaction**, for a total recovery by Donnelly of $425,545.44. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. H, filed Nov. 12, 2009). In the Underlying Litigation, EMC provided a defense against the suit, throughout its entirety, under express and complete reservation of rights, which was reflected in a letter to RCI on September 5, 2006 and in a letter to Ivan on September 7, 2007. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. I, filed Nov. 12, 2009).

STATEMENT OF ISSUES PRESENTED

1. Did the district court err in determining that, under a policy of general liability insurance, the insurer had a duty to pay attorney fees and court costs taxed against the insured in a suit brought by the policy claimant for which defense was provided by the insurer, but where no part of the damages awarded to the policy claimant were subject to policy coverage?
2. Was the district court correct in determining that, under a policy of general liability insurance, the insurer had no duty to indemnify with respect to contract-based damages awarded to the policy claimant in a suit with the insured where the policy included an exclusion for liability due to contract?

3. Was the district court correct in determining that attorney fees may not be awarded pursuant to IDAHO CODE § 41-1839 where the suit was not between the insurer and insured, and where the claimant made no demand by proof of loss upon the insurer?

4. Was the district court correct in determining that attorney fees may not be awarded pursuant to IDAHO CODE § 12-120(3) where no contract exists between the parties and where the parties were not engaged directly in a commercial transaction?

STANDARD OF REVIEW

This Court applies the same standard as that applied by the district court when reviewing orders granting summary judgment. Goodman v. Lothrop, 143 Idaho 622, 626 (2007). Summary judgment is governed by Rule 56, IDAHO RULES OF CIVIL PROCEDURE. The standard of review for a summary judgment motion, as articulated by this Court, is as follows -

> Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .. [The] Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact ... [t]he nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue.

Willie v. Board of Trustees, 138 Idaho 131, 133 (2002) (internal citations omitted). As to issues of law implicated by a summary judgment ruling, this Court exercises free review. McColm-Traska v. Valley View, Inc., 138 Idaho 497, 500 (2003).

SUMMARY OF ARGUMENT

EMC insured RCI under a commercial general liability policy. This policy was not a performance bond and insured only RCI's liability for resulting property damage or bodily injury caused by RCI. RCI undertook home renovations and remodeling for Donnelly. Donnelly was dissatisfied with the work performed and brought suit against Donnelly. Donnelly also alleged bodily injury due to carbon monoxide poisoning. As a result of the bodily injury allegation, EMC defended RCI in the action with Donnelly. By the time that action went to jury trial, the bodily injury claim was dismissed. After jury trial, Donnelly was awarded actual contract-based damages for breach of the implied warranty of workmanship, and statutory damages for violation of the *Idaho Consumer Protection Act*. Donnelly also received an award of attorney fees and court costs.

In this action, EMC sought a declaratory judgment that the damages awarded to Donnelly were not covered by the insurance policy, Donnelly counter-claimed for declaratory relief that the damages were covered. The district court properly determined that the actual contract-based damages were not covered because the insurance policy excluded from coverage losses arising from contract liability. The district court properly determined that the statutory damages were not covered by insurance because they did not represent "property damage," and because they were an expected or intended injury.

The district court erred in its determination that the fees and costs taxed against RCI were covered by insurance. Under the plain language of the insurance policy, fees and costs taxed against an insured related to non-covered claims are not covered. Moreover, payment of fees and costs taxed against an insured are a supplemental payment provided only when coverage applies.

Where there is no coverage, EMC has no duty to make a supplemental payment. A supplemental payment provision does not create additional coverages. EMC provided a defense to RCI under a complete reservation of rights, and the district court's determination ignores that circumstance. As a matter of public policy, an insurer defending under a reservation of rights ought not be required to bear the taxation of fees and costs where the claimant only recovers on non-covered claims. The better rule is to encourage vigorous and robust defense of insureds by only requiring an insurer to bear the taxation of fees and costs as to covered claims. In doubtful cases, this will encourage insurers to provide their insured with a defense.

Post-judgment, the district court properly determined that Donnelly was not entitled to an award of fees and costs related to this declaratory judgment action. Donnelly had no direct insurance relationship with EMC and made no proof of loss demand upon EMC. Moreover, Donnelly and EMC had no contractual relationship with one another, and there was never any commercial transaction between them.

The district court ought to be reversed inasmuch as it determined that fees and costs taxed against RCI in the litigation with Donnelly is subject to insurance coverage. As to all other aspects of the district court's Judgment, it ought to be affirmed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DETERMINING THAT EMC HAD A DUTY TO PAY ATTORNEY FEES AND COURT COSTS TAXED AGAINST ITS INSURED IN LITIGATION IN WHICH EMC PROVIDED A DEFENSE, UNDER A RESERVATION OF RIGHTS, BUT WHERE THERE WAS NO COVERAGE FOR THE SUBSTANTIVE DAMAGES AWARDED TO THE POLICY CLAIMANT.

Donnelly obtained a verdict against EMC's insured, RCI, only on claims alleged against RCI which were non-covered claims. Specifically, in the declaratory judgment action, from

which this appeal is taken, the district court held on summary judgment that neither the damages on the warranty of workmanship claim nor the damages awarded on the Idaho Consumer Protection Act claim were covered under the EMC Policy. R Vol. 3, p. 482-484. Thus, the district court held that EMC was not obligated to pay the judgment on those claims under its policy with RCI. *Id.*

EMC had defended the case under a complete reservation of rights based solely upon the initial claim for bodily injury contained in the original complaint:

> There is no coverage for allegation of construction defects and/or contract breach alleged in the complaint because they do not involve property damage. Moreover, Exclusions a. and m. and Endorsement 2280 apply to bar coverage for intentional injury, damage to your work, loss of use expense caused by delay and damage caused by professional engineering or architectural work respectively. **However, because there is a potential for coverage of bodily injury caused by carbon monoxide EMC is providing a defense.**

R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. I, p. 7, filed Nov. 12, 2009) (emphasis added). Before trial in the Underlying Litigation, the Court ruled that Donnelly's claim regarding bodily injuries (i.e. the carbon monoxide poisoning) could not be presented to the jury at trial. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. C, p. 2-3, filed Nov. 12, 2009). Additionally, Donnelly admitted that they did not present any evidence of bodily injury at the trial of the Underlying Litigation. R Vol. 2, p. 238. Thus, the underlying trial proceeded on claims consisting of breach of contract, misrepresentation, fraud, nondisclosure, professional malpractice, negligence, breach of warranties, violation of the Idaho Consumer Protection Act, quiet title, and for a declaratory judgment.

At the underlying trial, Donnelly prevailed on the claims that RCI breached its contract

with Donnelly, including breach of the implied warranty of workmanship, and also violated the Idaho Consumer Protection Act. Attorney fees were then awarded, based entirely upon the Donnelly's success on non-covered claims.

Donnelly demanded that EMC pay the attorney fees assessed against RCI pursuant to the "Supplemental Payments" provision of the EMC policy, despite the fact that the underlying claims which gave rise to the fee award were not covered. The district court granted Donnelly summary judgment on the declaratory judgment claim, ordering that the Applicable Policy did in fact require the payment of fees under the "Supplemental Payments" provision. The district court erred in reaching this conclusion.

A. The plain and unambiguous language of the Applicable Policy indicates that EMC has no duty to pay costs and fees taxed against its insured with respect to non-covered claims.

The supplementary payments provision only requires payment of attorney fees awarded against the insured on covered claims because the language - "supplementary payments" - indicates that payments will only be made *in addition to* payments on the underlying claim, and because of the limiting language that the supplementary payments only apply in suits where damages "to which this insurance applies are alleged".[11]

In Idaho, when interpreting insurance policies, courts apply the general rules of contract law subject to certain special rules of construction. Arreguin v. Farmers Ins. Co. of Idaho, 145 Idaho 459, 461 (2008). In Farm Bureau of Ins. Co. of Idaho v. Kinsey, this court expanded on

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[11] Courts have interpreted this language to mean "in cases where the insurance applies", as will be discussed in Section I.C. herein. See State Farm General Ins. Co. v. Mintarsih, 175 Cal. App. 4th 274, 95 Cal. Rptr. 3d 845 (Cal. App. 2009); Burlington Ins. Co. v. Devdhara, 2010 U.S. Dist. LEXIS 99955 (N.D. Calif. 2010).

this holding, setting forth those special rules of construction -

> Because insurance policies are contracts of adhesion that are not usually subject to negotiation between the parties, any ambiguity in a policy is construed strongly against the insurer. Where the language used in an insurance policy is clear and unambiguous, the language must be given its plain, ordinary meaning. Coverage will be determined according to the plain meaning of the words in the policy. "A provision in an insurance policy is ambiguous if it is reasonably subject to conflicting interpretations." **If confronted with ambiguous language, the reviewing court must determine what a reasonable person would understand the language to mean.**

149 Idaho 415, 419 (2010) (quoting Allstate Ins. Co. v. Mocaby, 133 Idaho 593, 597 (1999)) (emphasis added).

In this case, the policy language clearly provides that the payments of attorney fees and costs are "supplemental" to coverages A and B. Under the rules of construction as set forth by this Court, where language is clear, it "must be given its plain, ordinary meaning." Id. Black's Law Dictionary defines "supplemental" as "[t]hat which is added to a thing or act to complete it." BLACK'S LAW DICTIONARY (6th ed.). Webster's defines "supplemental" as "[a]dded to supply what is wanted; **additional**; being, or serving as, a supplement . . . ." WEBSTER'S 1913 DICTIONARY (emphasis added). Thus, the plain meaning of the supplementary payment section is to provide payment which is "additional" or "added to" the underlying payment of covered claims. If there is no underlying coverage for the underlying claims, there can be no "supplemental" payments.

To the extent that the language is ambiguous, the Court must determine what a reasonable person would expect the language to mean. Under the circumstances present in this case, it is not reasonable to expect that, while there is no coverage for the claims brought at trial and from which damages were awarded, there is coverage for attorney fees stemming from the non-

covered claims. See State Farm General Ins. Co. v. Mintarsih, 175 Cal. App. 4th 274, 95 Cal.Rptr. 3d 845 (Cal. App. 2009) ("just as an insured could not reasonably expect an insurer to pay defense costs in a suit in which there was no potential for coverage, an insured could not reasonably expect an insurer to pay costs awarded against an insured in such a suit.").

The district court erred in finding that the Applicable Policy language unambiguously provided coverage because it did not consider all of the policy language in reaching its decision. Specifically, the district court ignored the definition of "suit" set forth in the Applicable Policy. In its analysis on pages 13-15 of its Order, the district court does not address the Applicable Policy language defining "suit." R Vol. 3, p. 485-487. The district court held that "the policy does not plainly state that payment of assessed costs may be made only if there is coverage." R Vol. 3, p. 486. However, the clear language of the Policy does provide a "supplemental payment" only for "costs taxed against the insured in the 'suit'", which is in turn defined as "a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal advertising injury' *to which this insurance applies* are alleged."[12] By ignoring the additional language found in the definition of "suit" the district court erred in determining that the clear language of the Applicable Policy required payment of costs and fees awarded against the insured.

B. The district court misapplied Idaho authority with respect to coverage for fees and costs taxed relative to non-covered claims.

In reaching its decision, the district court relied upon authority of this Court from 1989 which held that attorney fees assessed against an insured were to be paid as costs under a

[12]See Section V.18., and Section I.Supp. Pmt. of the Applicable Policy (emphasis added).

homeowner's policy, even when the underlying claims were not covered. See Mutual of Enumclaw v. Harvey, 115 Idaho 1009 (1989). However, the policy language in that case differs substantially from the language in the policy between EMC and RCI, and thus the holding in that case should not be applied to this case. Rather, the better analysis is found in a 2009 case out of California, wherein the court determined that under a policy with language virtually identical to that in the Applicable Policy, attorney fees were not payable under a "Supplemental Payments" provision when the underlying claims were not covered.

In Mutual of Enumclaw v. Harvey, this Court held, based upon language in a "Supplementary Coverages" section in a homeowner's policy which provided that the company would pay "all costs taxed against the insured in any suit defended by the Company", the company was liable to pay attorney fees assessed against its insured even though the underlying claims were not covered under the policy. In reaching its conclusion, the Court specifically noted that "**[t]he results in the cases depend 'upon the language employed by the parties in their contract,**" and concluded that the "language in the policy *of this case* does not indicate that the payment of costs is conditioned upon a final determination that the policy covers the insured's conduct." Id. at 1012 (emphasis added). Even the Mutual of Enumclaw court recognized that its holding was dependent upon the policy language in each case. Thus, the holding in Mutual of Enumclaw must be limited to that case alone and should not be extended to this case, because the EMC policy differs from the Mutual of Enumclaw policy in significant respects.

In interpreting the policy language in Mutual of Enumclaw, the Court found that the language that the company would pay "all costs taxed against the insured in any suit defended by Company" **as well as the placement of the language** "under a heading named 'Supplementary

Coverages' implies that the provisions therein are separate from and in addition to the basic policy coverage." Id. at 1012. Based upon the placement of the language, the Court concluded that the obligation to pay such costs was not affected by the fact that the policy did not cover the underlying claim for intentionally tortious conduct. Id.

The Applicable Policy language providing for payment of costs taxed against the insured is not contained in a separate heading entitled "Supplemental Coverage" and, thus, the placement issue significant to the Court in Mutual of Enumclaw **is not** present in the Applicable Policy. Rather, the language in the Applicable Policy is included under a heading entitled "Supplemental Payments– Coverages A and B." This heading implies that when coverages A or B apply, EMC will make the following supplemental payments. It does not state that it is a "supplemental coverage", separate from the underlying coverage. The language providing for payment of costs in Mutual of Enumclaw stood on its own, whereas the language in the Applicable Policy is tied to Coverages A and B. This placement *and* language are distinguishable from the language and placement in Mutual of Enumclaw.

Additionally, the Applicable Policy contains language limiting the coverage for attorney fees to those "suits" wherein damages "because of 'bodily injury', 'property damage' or 'personal advertising injury' *to which this insurance applies* are alleged."[13] The policy in Mutual of Enumclaw **did not contain such limiting language** and can also be distinguished on that fact. Because the language and placement of language differs from the Applicable Policy, and because the Mutual of Enumclaw policy did not contain limiting language found in the Applicable Policy, it is not clear that the payment of such costs in the Applicable Policy is "separate from or in

[13]See Section V.18., and Section I.Supp. Pmt. of the Applicable Policy (emphasis added).

addition to the basic policy coverage" as the Court concluded it was in Mutual of Enumclaw. In fact, based upon the placement of the language, and the limiting language found in the definition of "suit," the holding in Mutual of Enumclaw should not be extended to this case.

Interestingly, the district court in Mutual of Enumclaw noted that it "found no authority directly on the issue of whether an insurer must pay costs when none of the judgment attributable to the insured's conduct was covered by the basic policy." See Record in Idaho Supreme Court Case No. 17449, at 342.[14] EMC has found no Idaho authority on point since. Thus, it appears that Mutual of Enumclaw is the only Idaho case arguably on point, and, as discussed above, should not be extended to the facts of this case.

C. *The district court erred in not considering and adopting persuasive authority indicating that there is no insurance coverage for fees and costs taxed relative to non-covered claims.*

In its motion for summary judgement, EMC directed the district court to a 2009 case out of California, in which the California Court of Appeals held that under a "supplemental payments" provision in its policy, State Farm was not obligated to pay attorney fees taxed against its insured that arose solely out of non-covered claims. See State Farm General Ins. Co. v. Mintarsih, 175 Cal. App. 4th 274, 95 Cal. Rptr. 3d 845 (Cal. App. 2009). The district court did not even discuss this case, or the rationale of the California court in its decision, despite the fact that the case interpreted a nearly identical policy and provided a sound rationale and public policy reasons for its decision.

Mintarsih involved an underlying case wherein the plaintiff brought claims for false

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[14] The Supreme Court found that the district court opinion "explained the facts and the law in this case extremely well" and for that reason, it "adopt[ed] his opinion, in substantial part, as [its] own." Mutual of Enumclaw v. Harvey, 115 Idaho at 1010.

imprisonment, negligence, fraud and wage and hour violations under the Labor Code. State Farm defended this "mixed" coverage case under a reservation of rights. Plaintiffs prevailed and were awarded attorney fees and costs as the prevailing party on the wage and hour claims. These were not covered claims.

There were two State Farm policies at issue in Mintarsih. The first was a homeowner's policy that provided State Farm would pay "certain 'claim expenses' over and above the limits of liability, including (1) 'expenses we incur and costs taxed against the Insured in suits we defend' . . . ." State Farm, 175 Cal.App. 4th at 279. The Mintarsih court characterized this provision as a "supplemental payments" provision. Id. This language is nearly identical to the language in the Applicable Policy, which provides coverage in addition to the limits of insurance for "costs taxed against the insured" in "any 'suit' against an insured we defend".[15] The second State Farm policy was an umbrella policy which provided coverage: "'When the claim or suit is covered by this policy, but not covered by any other policy available to you: [¶] ... [¶] ... we will pay the expenses we incur and costs taxed against you in suits we defend;'. . . ." State Farm, 175 Cal.App. 4th at 280. Again, this policy has language like the Applicable Policy and hinges on suits in which the company defends the insured.

In analyzing the coverage issue, the Mintarsih court explained that in earlier California cases, the court had "rejected a literal interpretation" of policy language providing coverage for expenses in "any suit against the insured we defend" and had "concluded that the obligation to pay a cost award could arise only if the insurer had a duty to defend the insured. [The court] stated that just as an insured could not reasonably expect an insurer to pay defense costs in a suit in which

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[15]See Section V.18. of the Applicable Policy.

there was no potential for coverage, an insured could not reasonably expect an insurer to pay costs awarded against an insured in such a suit." Id. at 285 (emphasis added). **The rationale behind these rulings was that, if every time a company defended under a reservation of rights and was later found not to have a duty to defend the company still had to pay costs taxed to the insured, it would discourage insurers from providing a defense when coverage was in doubt.** Thus, the California court held that if no contractual duty to defend arose, a company would not have to pay costs taxed against an insured, even if the company did defend under a reservation of rights. This rationale encourages insurance companies to provide a defense to their insureds in cases involving mixed claims.

The decision in Mintarsih was followed recently by a California Federal District Court. In Burlington Ins. Co. v. Devdhara, 2010 U.S. Dist. LEXIS 99955 (N.D. Calif. 2010), the plaintiff insurance company had defended a class action case against its insured under a reservation of rights. Id. at 7. The case was ultimately settled, and the court order approving the class action settlement approved attorney fees for the opposing parties, which it deemed were reasonable. Id. at 22. Burlington paid $276,080.52 of those fees. Id. Burlington then filed its action seeking reimbursement from its insured for the amounts paid in settlement of the claims, which it argued were non-covered claims, the amounts paid in defense of the underlying action and the amounts paid to the opposing party as costs and fees.

Burlington argued that it was entitled to all fees paid on behalf of its insured because the attorney fees and costs awarded to the plaintiffs in the underlying action were only covered by the policy "if those fees and costs stem from potentially covered causes of action." Id. at 23 (citing State Farm General Ins. Co. v. Mintarsih, 175 Cal. App. 4th 274, 284-84, 95 Cal Rptr. 3d 845

(2009)). Like in this case, the underlying case had involved the allegations of potentially covered claims: a habitability tort claim. The court found that any fees paid which arose from non-covered claims were not covered by the policy and should be reimbursed. In this case, all the fees awarded stemmed from non-covered claims. Thus, under the reasoning and holding in Burlington, payment of those fees would not be covered.

The holding and rationale set forth in Mintarsih, *supra*, and affirmed in Burlington Ins. Co. v. Devdhara, *supra*, should be applied in this case; wherein EMC has defended a "mixed" case, under a reservation of rights; wherein some claims were covered and others were not, and wherein damages and costs were awarded based solely on contract claims that were not covered. To hold otherwise would create a chilling effect on insurance carriers' willingness to defend cases under a reservation of rights.

Based upon the foregoing, it is evident that the only Idaho precedent close to the facts is not controlling because the Court limited its holding to the policy language in that case, which language and placement differs from that in the Applicable Policy. The most persuasive authority addressing the issue in this case are Mintarsih and Devdhara, recent cases out of California, which support the conclusion that costs and fees awarded against RCI are not covered by the Applicable Policy.

II. THE DISTRICT COURT PROPERLY DETERMINED THAT EMC HAD NO DUTY TO INDEMNIFY THE CONTRACT-BASED DAMAGES AWARDED TO DONNELLY DUE TO EXCLUSIONS IN THE INSURANCE POLICY.

The district court determined that the Applicable Policy did not provide coverage for the contract and statutory based damages awarded to Donnelly in the Underlying Litigation with RCI and Ivan. R Vol. 3, p. 473. As to the non-coverage of the contract-based damages, the district

court recognized that the damages awarded to Donnelly were based on a claim of breach of the implied warranty of workmanship, which under the facts and circumstances of the Underlying Litigation sounded in contract. R Vol. 3, p. 482-483. The district court properly recognized that "EMC's Commercial General Liability insurance policy does not act as a performance bond; and it does not provide for payment of damages resulting from a breach of contract." R Vol. 3, p. 483. The district court further recognized that statutory-based damages were not subject to insurance coverage because those damages were not "property damage" and because they were subject to the Expected or Intended Injury Exclusion. R Vol. 3, p. 483-484. The decision of the district court that the substantive losses of Donnelly were not subject to coverage is soundly supported by the factual record below and the law applicable thereto. The reasoning of the district court is well articulated in its Order and should be affirmed. R Vol. 3, p. 473-484, 489.

A. The jury's verdict in the Underlying Litigation allocated findings of fact as to the claims of liability and the district court's judgment then allocated damages based upon those findings.

An unallocated general verdict was not entered by the jury in the Underlying Litigation. Rather, the jury returned a special verdict, from which the district court applied the law toward entry of a judgment. This is important because "general verdicts do not involve factual findings but rather ultimate legal conclusions." Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1031 (9th Cir. 2003). On the other hand, a "special verdict" is one in which "the jury makes findings only on factual issues submitted to them by the judge, who then decides the legal effect of the verdict." BLACK'S LAW DICTIONARY, at 1697 (9th ed. 2009). This meaning is confirmed by the Supreme Court, which has stated that a "special verdict is . . . [w]here the jury states the naked facts as they find them to be proved, and pray the advice of the court thereon." Statler v. United

States, 157 U.S. 277, 279 (1895).

It is clear that the verdict rendered by the jury in the Underlying Litigation is a special verdict. The verdict does not contain any generalized findings in favor of one party or the other followed by a general award of damages. Rather, the verdict contains the jury's response to a number of factual questions posed to it concerning whether certain facts were proven. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. E, filed Nov. 12, 2009). For instance, the jury answers "yes" to a question of whether there was a contract between Donnelly and RCI. *Id.* The jury also answers "yes" to a question as to whether RCI materially breached the contract with Donnelly. *Id.* The jury goes on to answer 39 questions posed to them requiring them to make factual determinations. From this, it is clear the role of the jury was to make factual determinations to assist the district court in its entry of an appropriate judgment based on application of law to the facts determined by the jury. As such, the jury returned an allocated "special verdict" and not an unallocated "general verdict." The special verdict was allocative in that it made an actual determination of the facts that were a prerequisite to the claims of the parties, and on those claims which formed a basis for relief, it allocated the proper award of damages.

As a result of the jury's allocated special verdict in the Underlying Litigation, the district court applied the jury's findings to the claims and entered an appropriate judgment. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. F, filed Nov. 12, 2009). The judgment allocated liability among the various claims involved in the Underlying Litigation. The judgment actually goes through each claim for relief asserted by the parties in the Underlying Litigation and makes a determination of liability. For instance, the judgment recites that Donnelly

prevailed on its breach of contract claim against RCI, as well as on its breach of the implied warranty of workmanship. *Id.* However, it recites that RCI prevailed on Donnelly's claim of breach of express warranty. *Id.*

In addition, the judgment entered in the Underlying Litigation also allocated damages among the claims upon which relief was found to be appropriate. For instance, damages were only awarded on three distinct and separate claims. The judgment awarded $126,611.55 for breach of the implied warranty of workmanship, and $1,000.00 each on two separate claims for violation of consumer protection statutes. *Id.* Such finite and discreet recitals, findings and conclusions represent an allocated verdict - it is known with precision and exactness the claims upon which relief was granted and the damages awarded upon each claim.

Since it is specifically known upon which claims in the Underlying Litigation relief was granted, and the precise amount of damages awarded on each claim, it is not difficult to apply the required facts and law on those matters to the Applicable Policy to determine whether coverage applies. All the district court had to do was apply the legal meaning of the provisions of the Applicable Policy to the known facts and law governing the claims upon which relief was granted to Donnelly in the Underlying Litigation. The district court properly proceeded in that regard and made the right decision with respect to Donnelly's substantive awards of damage in the Underlying Litigation, to wit -

1. An award of $126,611.55 in actual damages for RCI's breach of the implied warranty of workmanship; and
2. An award of $2,000.00 in statutory damages for RCI's violation of the Idaho Consumer Protection Act.

B. The actual damages awarded to Donnelly in the Underlying Litigation are excluded from coverage because the liability for the damages was the result of a contract, not tortious conduct.

All of the actual damages allocated in the judgment in the Underlying Litigation due to RCI's breach of the implied warranty of workmanship, in the sum of $126,611.55, are a liability of RCI assumed by obligation of contact that is excepted from coverage under the Applicable Policy. The most telling evidence of the same is the instructions provided by the district court to the jury in the Underlying Litigation because, as the word implies, **instructions are instructive**.

In Magic Valley Potato Shippers v. Continental Insurance, 112 Idaho 1073 (1987), like here, the trial court was called upon to determine whether damages awarded in an underlying lawsuit were based in tort or contract because damages based on contract would not be covered by insurance, while damages based on tort *may* be covered by insurance. Magic Valley, 112 Idaho at 1075-1077. This Court determined that the damages were based in contract and therefore excluded from coverage based on the contract liability exclusion. Id. at 1076-77. In so doing, this Court relied upon the claims as alleged in the complaint, and upon the **district court's instructions to the jury**. Id. at 1076. Because the instructions to the jury made it clear that the jury had to find the existence of a contract to assess liability and damages, the action was found to be in contract. Id. As a natural result thereof, the damages were contract based and excepted from coverage. Id. at 1077. The circumstances of this action are no different.

Because the **instructions are instructive**, it is appropriate to examine how the district court instructed the jury in the Underlying Litigation. With respect to the implied warranty of workmanship, the district court made the following notable instructions to the jury in the Underlying Litigation -

- "The Donnellys' allege that [RCI] breached implied warranties by failing to perform the agreed upon construction in a workmanlike manner" - placement of the phrase "agreed upon" implies the existence of a contract; and
- "In a construction contract, there is an implied warranty that the work is to be completed in a workmanlike manner" - use of the phrase "construction contract" expresses that the claim sounds in contract; and
- "With regard to the claim of the implied warranty of workmanship, the Donnellys have the burden of proving . . . [a] contract existed between [RCI] and the Donnellys" - the fact that the existence of a contract is a necessary element of the claim demonstrates that it sounds in contract; and
- In assessing damages for breach of the implied warranty of workmanship the jury was to award damages for "those losses and expenses which may reasonably have been in contemplation of both parties as a probable result of such breach when the contract was made" - the district court's use, yet again, of the word "contract" indicates that the damages to be awarded are in the nature of contract.

R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. D, filed Nov. 12, 2009). The instructions provided by the district court unequivocally indicate that the claim upon which relief was granted to Donnelly (breach of the implied warranty of workmanship) was a claim that sounded in contract. There is no other explanation for the repetitive use of the words "contract" and "agreed." There is no other explanation for the fact that the district court instructed the jury that it must find the existence of a contract to find for Donnelly. Just as in Magic Valley, the instructions to the jury exemplify the fact that the district court, and the parties, understood

that the claim sounded in contract.

There is no coverage under the Applicable Policy for bodily injury or property damage which the insured is obligated to pay because of liability imposed by contract. The Applicable Policy specifically provides that "[t]his insurance does not apply to . . . '**property damage**' for which the insured is obligated to pay damages by reason of the **assumption of liability in a contract or agreement**."[16] The distinction here is not whether the damages are "property damage" or contract type damages, as originally argued by Donnelly, but rather whether the damages are based in contract or tort - the express terms of the Applicable Policy already require that the damages be in the nature of "property damage" to be covered, but if property damages are awarded based on a contract theory they are excluded from coverage. This is the obvious and plain meaning of the contract liability exclusion. This is why this Court, in Magic Valley, explained that damages were not payable by an insurer due to a contract liability exclusion where the damages sought by and awarded to the claimant were based in contract, not in tort. Magic Valley, 112 Idaho at 1076-1077.

Additional support for the fact that the implied warranty claim is a claim sounding in contract is found in the post-trial decisions of the district court in the Underlying Litigation. The district court, in awarding attorney fees to Donnelly in the Underlying Litigation, recognized that an award of fees was proper because RCI failed to substantially perform the work it contracted to perform. the contract between Donnelly and RCI constituted a commercial transaction, and the gravamen of the action involved construction defects. R Vol. 3, Clerk's Exhibits (*Plaintiff's Motion for Summary Judgment*, Ex. G, filed Nov. 12, 2009). This reflects the district court's

[16]See Section I.2.b. of the Applicable Policy (emphasis added).

understanding that contract claims were the gravamen of the Underlying Litigation, as opposed to any tort claims. The Court determined that the implied warranty claim sounded in contract and therefore awarded attorney fees to the prevailing party. *Id.* This further demonstrates that the implied warranty claim was one in contract for which coverage is not afforded under the Applicable Policy due to the Contractual Liability Exclusion. The district court correctly determined that the actual damages arose from a liability assumed by contract, and that therefore they were not subject to coverage under the Applicable Policy.

C. *The statutory damages awarded to Donnelly in the Underlying Litigation are excluded from coverage because the damages are not property damage.*

The statutory damages of $2,000.00 awarded to Donnelly in the Underlying Litigation are not covered by the Applicable Policy because the damage award does not reflect "property damage." The Applicable Policy only provides coverage for "property damage," which requires physical injury to tangible property, which can include resulting loss of use of the tangible property, in which event the loss of use is deemed to have occurred at the time of the physical injury that caused the loss of use. Property damage also includes loss of use of tangible property that is not physically injured, in which event the loss of use is deemed to have occurred at the time of the occurrence that caused it. Tangible property is "property that has physical form and characteristics." BLACK'S LAW DICTIONARY, at 1254 (8th ed. 2004).

A physical injury does not include pure economic loss. As such "property damage" does not include pure economic loss, which is a loss not recoverable under tort law, but recoverable only under contract law. Tusch Enterprises v. Coffin, 113 Idaho 37, 41 (1987). The cost to repair or replace defective property that is the subject of a transaction is pure economic loss, not property

damage. Id. Further, correlative claims for lost value or loss of profits or use are not property damage, but are pure economic losses. Id. In essence, for "property damage" to occur there must be some damage to property other than that which is the subject of the transaction. Ramerth v. Hart, 133 Idaho 194, 196 (1999). Where there is no accident, and no physical damage to property, there is no property damage for which recovery can be had under tort law, as opposed to contract law. Clark v. International Harvester Co., 99 Idaho 326, 333 (1978). So, it is clear that a physical injury to property requires that there is an actual physical change or alteration of property, whether it be altered in appearance, shape, odor or some other material dimension. See Traveler's Ins. Co. v. Eljer Mfg., Inc., 757 N.E.2d 481, 496 (Ill. 2001).

Donnelly was awarded $2,000 in damages for RCI's violation of the Consumer Protection Act. These damages are a category of damages that are purely statutory in nature and not associated with the loss of use of property or of physical injury to tangible property. As such, there is no coverage for damages resulting from Rimar's failure to follow the Consumer Protection Act. The district court properly recognized that the statutory damages were not "property damage."

D. The statutory damages awarded to Donnelly in the Underlying Litigation are excluded from coverage because they were expected or intended by RCI.

As an independent and alternative grounds of determination, the district court also determined that the statutory damages allocated in the judgment in the Underlying Litigation due to RCI's violation of consumer protection statutes, in the sum of $2,000.00, were a liability of RCI that was expected or intended from the standpoint of RCI. As such, the district court determined, quite properly, that the statutory damages were excepted from coverage under the

Applicable Policy.

The Applicable Policy contains a typical Expected or Intended Injury Exclusion that explains there is no coverage for any bodily injury or property damage that is expected or intended from the standpoint of the insured. This Court has held that the language of limitation contained in many policies to the effect that damages expected or intended from the standpoint of the insured are not covered is clear, concise and unambiguous. Western Heritage Ins. Co. v. Green, 137 Idaho 832, 837 (2002). As such, this exclusion is applicable to this action, and is not subject to construction in favor of coverage.

To establish violation of the *Idaho Consumer Protection Act*, Donnelly had to establish that RCI engaged in some conduct prohibited by the Act with actual knowledge or under circumstances where the exercise of due care would impose such knowledge. See IDAHO CODE § 48-603. The significant portions of the Act under which Donnelly argued liability against RCI related to those portions that involve deception, falsity, failure to perform promises, misleading conduct and failure to follow statutory requirements (e.g., nondisclosures). R Vol. 3, p. 484. All of these are of a nature that RCI would need to have knowledge or intent in its conduct. The Expected or Intended Injury Exclusion absolutely bars coverage for any bodily injury or property damage that is expected or intended from the standpoint of the insured or any of its employees. For Donnelly to prevail on its claim of violation of the *Idaho Consumer Protection Act*, it had to establish that RCI knowingly violated the provisions of the Act. This means that RCI would reasonably have expected damage to occur if it violated the Act. As such, the statutory damages for which RCI is legally obligated to pay to Donnelly on account of violation of the *Idaho Consumer Protection Act* are **not** covered under the Applicable Policy. The district court

correctly made this determination.

III. THE DISTRICT COURT PROPERLY DETERMINED THAT ATTORNEY FEES COULD NOT BE AWARDED, PURSUANT TO IDAHO CODE § 41-1839, TO DONNELLY BECAUSE DONNELLY HAD NO INSURANCE RELATIONSHIP WITH EMC AND HAD NOT SUBMITTED A PROOF OF LOSS.

The district court correctly determined that Donnelly was not entitled to an award of attorney fees in the present declaratory judgment litigation because Donnelly was not an insured of EMC, and even if Donnelly had that status, Donnelly had failed to show evidence of the submission of a proof of loss as required by IDAHO CODE § 41-1839. R Vol. 3, p. 544. IDAHO CODE § 41-1839, in relevant part, provides as follows -

> (1) Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state or in any arbitration for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action or arbitration.
>
> . . .
>
> (4) Notwithstanding any other provision of statute to the contrary, this section and section 12-123, Idaho Code, shall provide the exclusive remedy for the award of statutory attorney's fees in all actions or arbitrations between insureds and insurers involving disputes arising under policies of insurance. . . . Section 12-120, Idaho Code, shall not apply to any actions or arbitrations between insureds and insurers involving disputes arising under any policy of insurance.

IDAHO CODE § 41-1839.

On its face, IDAHO CODE § 41-1839 provides that a party is not entitled to an award of fees unless the insurer fails for a period of 30 days after a proof of loss is furnished pursuant to the policy to pay to the person entitled the amount justly due under the policy. IDAHO CODE § 41-1839(1). Incident to its request for an award of fees, Donnelly provided no evidence of the

submission of a proof of loss as required by the Applicable Policy, nor did Donnelly provide any evidence that EMC failed and/or refused to pay the amount justly due Donnelly under the Applicable Policy. R Vol. 3, Clerk's Exhibits (*Affidavit of Counsel in Support of Motion to Disallow Costs and Fees*, p. 2, filed Mar. 21, 2011).

In Carter v. Cascade Insurance Co., 92 Idaho 136 (1968), the Court explained that in order to obtain a right to fees there must be a failure of the insurer to pay an amount justly due under a policy, and there must be an action against the insurer for recovery of that sum. Id. at 139. The Court held that an insurer could not be held liable for fees until the insurer failed to pay a sum certain under a policy after it is judicially declared that the insurer had a duty to pay. Id. As long as the insurer acts reasonably in its refusal to pay a claim, fees ought not be assessed against the insurer. Id. In Carter, the Court determined it was reasonable for the insurer to refuse to pay a claim since the fault of its insured was reasonably at issue. Id. Similarly, EMC rightfully contested its duty to pay the claim of Donnelly for actual damages against its insured, RCI. Its refusal was not only reasonable, but EMC was determined to be correct in its assertion that there was no insurance coverage for the actual damages of Donnelly. Throughout this action there was no determination that EMC had a duty to pay the actual damages, there was no sum certain justly due Donnelly from EMC, and EMC's refusal to pay was reasonable.

In Hansen v. State Farm Mutual Automobile Ins. Co., 112 Idaho 663 (1987), the Court explained that a party had no right to fees under the Insurance Code if it failed to provide a proof of loss to the insurer prior to commencing action against the insurer. Id. at 671. The proof of loss has to be furnished at least 30 days prior to the action commencing. Id. In Hansen, the claimant was denied attorney fees because it did not submit any evidence of serving a proof of loss on the

insurer **before** the action commenced. Id. The facts of this case are similar. Donnelly has submitted no evidence that it served a proof of loss upon EMC for payment of the actual damages awarded, or even for payment of the fees and costs awarded, in their litigation with RCI. Having failed to present a proof of loss to EMC 30 days before the action, Donnelly is not entitled to an award of fees.

In Reynolds v. American Hardware Mutual Ins. Co., 115 Idaho 362 (1988), the Court explained that a party had no right to fees under the Insurance Code where the issue of the suit was not for recovery of a sum certain under the policy, but rather related to the insured's conduct in the settlement of the claim. Where the suit is not for recovery of a sum certain under the policy, but rather for some other issue, the prevailing party is not entitled to an award of fees. Id. at 366. In this case, Donnelly's claim against EMC was not for recovery of a sum certain under the policy, but rather for a judicial determination as to whether parts of a judgment they received against EMC's insured, RCI, were covered under the policy.

In Union Warehouse and Supply Co., Inc. v. Illinois R.B. Jones, Inc., 128 Idaho 660 (1996), the Court held that a party is not entitled to an award of fees under the Insurance Code where the purpose of the action was not for recovery of "a specific amount 'justly due' under the . . . policy." Id. at 669. If the action is not for the recovery of "any specific amount claimed to be due" IDAHO CODE § 41-1839 is not applicable. Id. Specifically, the Court explained that where the purpose of the action is to determine insurance coverage for "general type[s] of damage[s] alleged" by a claimant, and not to recover a specific and quantified loss, the prevailing party is not entitled to an award of fees under IDAHO CODE § 41-1839. Id. at 669, n. 1. This case was commenced to determine whether general types of damages alleged by Donnelly were subject to

coverage. This case has never been one to determine whether Donnelly is entitled to recovery of a specific and quantified sum from EMC - that is, this case has never been postured as one for the recovery of money damages. This case has always been one to obtain a judicial declaration as to whether certain claimed damages were subject to coverage. Under these circumstances, no party has a right to fees under the Insurance Code.

In Northland Insurance Co. v. Boise's Best Autos & Repairs, 131 Idaho 432 (1998), the Court held that a policy claimant was not entitled to fees under the Insurance Code where the insurer brought the declaratory action to determine coverage, while at the same time providing a defense to the insured on the underlying litigation with the claimant. The Court held likewise one year later in Allstate Ins. Co. v. Mocaby, 133 Idaho 593, 602 (1999) (it was reasonable and justified for an insurer to seek declaratory relief as to coverage while defending its insured, and the insurer was therefore not required to pay fees under the Insurance Code). The circumstances of this case are similar to Northland and Allstate. EMC initiated this declaratory action to determine a coverage dispute, but still defended RCI in the Underlying Litigation with Donnelly.

The weight of the authority demonstrates that in a case such as this no party is entitled to an award of fees under IDAHO CODE § 41-1839 because (1) Donnelly submitted no proof of loss to EMC 30 days before the action began; (2) the action was not for the recovery of an amount justly due; and (3) the action was for the determination of rights and obligations, not for the recovery of a specific and quantified amount. There is no evidence that EMC acted unreasonably in its pursuit of this action, while at the same time defending RCI in the Underlying Litigation.

IV. THE DISTRICT COURT PROPERLY DETERMINED THAT ATTORNEY FEES COULD NOT BE AWARDED, PURSUANT TO IDAHO CODE § 12-120(3), TO DONNELLY BECAUSE THERE WAS NO COMMERCIAL TRANSACTION BETWEEN EMC AND DONNELLY.

The district court correctly determined that EMC and Donnelly had no commercial transaction or relationship with one another, and that therefore an attorney fee award could not be made under IDAHO CODE § 12-120(3). R Vol. 3, p. 544-545. IDAHO CODE § 12-120(3), in relevant part, provides as follows -

> In any civil action to recover on [a] . . . contract relating to the purchase or sale of goods, wares, merchandise, or services and **in any commercial transaction** unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.
> The term "commercial transaction" is defined to mean all **transactions** except transactions for personal or household purposes.

IDAHO CODE § 12-120(3) (emphasis added). This statute requires that, in the absence of the existence of a contract, there must be a transaction, commercial in nature, for a party to be entitled to fees. This reasoning is supported by In re: University Place / University of Idaho Foundation, Inc. v. Civic Partners, Inc., 146 Idaho 527 (2008), where this Court indicated that while the statute does not require a contract "between the parties," it does require"there be a commercial transaction." Id. at 541.

Here, there is no indication whatsoever that this action was brought to recover on a commercial transaction between EMC and Donnelly. This action was brought to determine rights and obligations under an insurance policy between EMC and RCI. Donnelly was included in this action not because of a contractual or commercial relationship with EMC, but rather as a proper party as the claimant to potential policy proceeds. There being no commercial transaction between EMC and Donnelly, Donnelly has no rights to an award of fees under IDAHO CODE § 12-

120(3). The district court correctly perceived the foregoing and incorporated it in the denial of Donnelly's requested fee award.

ATTORNEY FEES ON APPEAL

EMC makes no request for an award of attorney fees on appeal.

CONCLUSION

For the foregoing reasons, EMC respectfully requests that this Court **REVERSE** the district court's determination that EMC has a duty to indemnify its insured with respect to the fees and costs taxed against its insured in the litigation with Donnelly. EMC respectfully requests that this Court **AFFIRM** all other aspects of the district court's determination.

RESPECTFULLY SUBMITTED this 21st day of September, 2011.

RINGERT LAW CHARTERED

James G. Reid

David P. Claiborne

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing brief were served on the following on this 21st day of September, 2011 by the following method:

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P.O. Box 388
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[_X_] Hand Delivery
[__] Facsimile
[__] Electronic Mail or CM/ECF

James G. Reid
David P. Claiborne

ADDENDUM A

Attached are relevant excerpts from the Applicable Policy, which may be found in the Clerk's Record at Volume 3, Clerk's Exhibit, Exhibit A to *Plaintiff's Motion for Summary Judgment*, filed November 12, 2009. That exhibit to the Clerk's Record inadvertently omitted some pages of the policy, which are submitted for augmentation relative to the *Stipulated Motion to Augment* filed with this Court on September 19, 2011.

Box 1897
Bismarck, ND 58502-1897
Phone 701.223.8636
WATS 800.472.2317
Office FAX 701.258.1526
Claims FAX 701.223.1763
Underwriting FAX 701.250.7502
www.emcinsurance.com

April 20, 2007

James G. Reid
Ringert & Clark
PO Box 2773
Boise ID 83701

This will acknowledge that the attached is a certified copy of our insured, Rimar Construction, Policy No.: 3D1-32-95.

Charles E. Doppler, Adjuster

Subscribed and sworn to before me a notary public this 20th day of April, 2007.

Notary

[illegible]
[illegible]
[illegible] of North Dakota
My Commission Expires Feb. 16, 2009

/bb

EMC Insurance Companies

EMPLOYERS MUTUAL CASUALTY COMPANY — PRIOR POLICY: 2D1-32-95

GENERAL LIABILITY DECLARATIONS

POLICY PERIOD: FROM 10/01/04 TO 10/01/05

POLICY NUMBER: 2D1-32-95--05

NAMED INSURED:	PRODUCER:
RIMAR CONSTRUCTION INC PO BOX 692 SANDPOINT ID 83864-0692	HARRIS/DEAN INSURANCE 1205 HIGHWAY 2 STE 202 SANDPOINT ID 83864-2716
DIRECT BILL	AGENT: AP-5043 5 AGENT PHONE: 208-265-9690

INSURED IS: CORPORATION — BUSINESS DESC: CONTRACTORS NOC

LIMITS OF INSURANCE

EACH OCCURRENCE LIMIT	$ 1,000,000	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	$ 100,000	ANY ONE PREMISES
MEDICAL EXPENSE LIMIT	$ 5,000	ANY ONE PERSON
PERSONAL AND ADVERTISING INJURY LIMIT	$ 1,000,000	ANY ONE PERSON OR ORGANIZATION
GENERAL AGGREGATE LIMIT	$ 2,000,000	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	$ 2,000,000	

COVERAGES PROVIDED	PREMIUM
PRODUCTS/COMPLETED OPERATIONS	$ 14,079.00
OTHER THAN PRODUCTS/COMPLETED OPERATIONS	$ 18,355.00
TOTAL ESTIMATED POLICY PREMIUM	$ 32,434.00

SEE ATTACHED SCHEDULE FOR LOCATION
OF ALL PREMISES OWNED, RENTED OR OCCUPIED.

FORMS APPLICABLE:

CG0001(10/01), CG0062(12/02), CG0300(01/96), CG2147(07/98), CG2150(09/89), CG2167(04/02), CG2170(11/02), CG2176(11/02), CG2280(07/98), CG7001A(01/86)*, CG7003(10/01), CG7185(08/99), CG7191(10/01), CG7315(10/01), CG7422(08/00), CG7474(10/01), CG7480(10/00)*, CG7522.4(06/02), CG7523(03/02), CG8081(04/02)*, CG8089(03/03)*, IL0021(07/02), IL0204(07/02), IL7028(08/99), IL7131A(04/01)*, IL8383(03/03), IL8384A(03/03)

Refer to prior distribution(s) for any forms not attached

AUDIT PERIOD: ANNUAL

DATE OF ISSUE: 09/14/04 BPP

EMC Insurance Companies

EMPLOYERS MUTUAL CASUALTY COMPANY — POLICY NUMBER: 2D1-32-95-[illegible]-05

RIMAR CONSTRUCTION INC — EFF DATE: 10/01/04 EXP DATE: 10/01/05

GENERAL LIABILITY POLICY DECLARATIONS

ENDORSEMENT SCHEDULE

FORM	EDITION DATE	DESCRIPTION/ADDITIONAL INFORMATION	PREMIUM
CG0001	10-01	COMMERCIAL GEN LIABILITY COV FORM	
CG0062	12-02	WAR LIABILITY EXCLUSION	
CG0300	01-96	DEDUCTIBLE LIABILITY INSURANCE	
		APPLICATION OF ENDORSEMENT (LIMITATIONS):	
		NONE	
CG2147	07-98	EXCL-EMPLOYMENT RELATED PRACTICES	
CG2150	09-89	AMENDMENT/LIQUOR LIABILITY EXCLUSION	
CG2167	04-02	FUNGI OR BACTERIA EXCLUSION	
CG2170	11-02	CAP/LOSSES FROM CERT ACTS/TERRORISM	$ 267
CG2176	11-02	EXCL PUNITIVE DMGS ACTS OF TERRORISM	
CG2280	07-98	LIMITED EXCL-CONTRACTOR PROF LIAB	
*CG7001A	01-86	GENERAL LIABILITY SCHEDULE	
CG7003	10-01	GL QUICK REFERENCE (OCCURRENCE)	
CG7185	08-99	EXCLUSION - LEAD	
CG7191	10-01	COMM'L GENERAL LIABILITY AMENDMENT	
CG7315	10-01	CONTINUOUS OR PROGRSS INJ/DMG EXCL	
CG7422	08-00	EXCL INJ/DAMAGE FROM EARTH MOVEMENT	
CG7474	10-01	TRANSFER RIGHTS/RECOVERY AGAINST OTH	
*CG7480	10-00	AT-OWN,LESSEE,CONTRACTOR/VICAR LIAB	
		NAME OF PERSON OR ORGANIZATION,	
		PROJECT AND LOCATION OF PROJECT.	
CG7522.4	06-02	EXCLUSION - DESIGNATED WORK	
CG7523	03-02	EXCLUSION - DESIGNATED WORK	
*CG8081	04-02	FUNGI/BACTERIA NOTICE/TO POLICYHOLDR	
*CG8089	03-03	NOTICE TO POLICYHOLDERS - WAR LIAB	
IL0021	07-02	NUCLEAR ENERGY LIAB EXCL/BROAD FORM	
IL0204	07-02	ID CHANGES - CANCELLATION/NONRENEWAL	
IL7028	08-99	ASBESTOS EXCLUSION	
*IL7131A	04-01	COMM'L POLICY ENDORSEMENT SCHEDULE	
IL8383	03-03	DISCLOSURE NOTICE OF TERRORISM COVG	WAIVED
IL8384A	03-03	TERRORISM NOTICE	

DATE OF ISSUE: 09/14/04

FORM: IL7131A (ED. 04-01) BPP 015 SH 2D13295 0501

A2

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

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

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

      (1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

      (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

      No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

   b. This insurance applies to "bodily injury" and "property damage" only if:

      (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

      (2) The "bodily injury" or "property damage" occurs during the policy period; and

      (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

   c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

   d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

      (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

      (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

      (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", 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", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

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

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

(a) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

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

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. *Aircraft, Auto Or Watercraft*

"Bodily injury" or "property damage" arising 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 any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of the operation of any of the equipment listed in Paragraph 7.(2) or 7.(3) of the definition of "mobile equipment"

h. *Mobile Equipment*

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. *War*

"Bodily injury" or "property damage" due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution. This exclusion applies only to liability assumed under a contract or agreement.

j. *Damage To Property*

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

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

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

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

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III – Limits Of Insurance.

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-Related

Any loss, cost or expense arising out of any:

(1) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

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

COVERAGE C MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations;

provided that:

(1) The accident takes place in the "coverage territory" and during the policy period;

(2) The expenses are incurred and reported to us within one year of the date of the accident; and

(3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while taking part in athletics.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage A.

h. War

Due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

e. All costs taxed against the insured in the "suit".

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I – Coverage A – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when:

a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or

b. The conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

SECTION II -- WHO IS AN INSURED

1. If you are designated in the Declarations as:
   a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
   b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
   c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
   d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
   e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.
2. Each of the following is also an insured:
   a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:
      (1) "Bodily injury" or "personal and advertising injury":
         (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
         (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;
         (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
         (d) Arising out of his or her providing or failing to provide professional health care services.
      (2) "Property damage" to property:
         (a) Owned, occupied or used by,
         (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by
         you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).
   b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
   c. Any person or organization having proper temporary custody of your property if you die, but only:
      (1) With respect to liability arising out of the maintenance or use of that property; and
      (2) Until your legal representative has been appointed.
   d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. With respect to "mobile equipment" registered in your name under any motor vehicle registration law, any person is an insured while driving such equipment along a public highway with your permission. Any other person or organization responsible for the conduct of such person is also an insured, but only with respect to liability arising out of the operation of the equipment, and only if no other insurance of any kind is available to that person or organization for this liability. However, no person or organization is an insured with respect to:
   a. "Bodily injury" to a co-"employee" of the person driving the equipment; or
   b. "Property damage" to property owned by, rented to, in the charge of or occupied by you or the employer of any person who is an insured under this provision.

4. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

   a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

   b. Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

   c. Coverage B does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

   a. Insureds;

   b. Claims made or "suits" brought; or

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

2. The General Aggregate Limit is the most we will pay for the sum of:

   a. Medical expenses under Coverage C;

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

   c. Damages under Coverage B.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard"

4. Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

   a. Damages under Coverage A; and

   b. Medical expenses under Coverage C

   because of all "bodily injury" and "property damage" arising out of any one "occurrence"

6. Subject to 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner

7. Subject to 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

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

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. **Bankruptcy**

   Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. **Duties In The Event Of Occurrence, Offense, Claim Or Suit**

   a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

      (1) How, when and where the "occurrence" or offense took place;

      (2) The names and addresses of any injured persons and witnesses; and

      (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. **Legal Action Against Us**

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

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

4. **Other Insurance**

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. **Primary Insurance**

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. **Excess Insurance**

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

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

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

   a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

   b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in a. above; or

   c. All other parts of the world if the injury or damage arises out of:

      (1) Goods or products made or sold by you in the territory described in a. above;

      (2) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; or

      (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

   provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

   a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

   b. You have failed to fulfill the terms of a contract or agreement;

   if such property can be restored to use by:

   a. The repair, replacement, adjustment or removal of "your product" or "your work"; or

   b. Your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

   a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

   b. A sidetrack agreement;

   c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

   d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

   e. An elevator maintenance agreement;

   f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

   Paragraph f. does not include that part of any contract or agreement:

   (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;

   (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

      (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

      (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

   (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

    a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

    b. While it is in or on an aircraft, watercraft or "auto"; or

    c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

    but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

    a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

    b. Vehicles maintained for use solely on or next to premises you own or rent;

    c. Vehicles that travel on crawler treads;

    d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

        (1) Power cranes, shovels, loaders, diggers or drills; or

        (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

    e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

        (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

        (2) Cherry pickers and similar devices used to raise or lower workers;

    f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

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

        (1) Equipment designed primarily for:

            (a) Snow removal;

            (b) Road maintenance, but not construction or resurfacing; or

            (c) Street cleaning;

        (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

        (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

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

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

    a. False arrest, detention or imprisonment;

    b. Malicious prosecution;

    c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

    d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

    e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

    f. The use of another's advertising idea in your "advertisement"; or

    g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

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

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

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

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

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

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

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

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.