OCCURRENCE AND COVERAGE TRIGGERS FOR HIDDEN DAMAGES UNDER GGL POLICIES

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Many construction defects cases are concerned, at least in part, with hidden damages that progress for unknown periods of time before coming to light. What policy(ies) are triggered in these instances? The answer to this question is of great importance to all parties involved in the underlying litigation and in many cases will largely determine the course of that litigation. This is particularly so when one considers that most construction defects cases are settled before trial and many of these settlements are influenced by cost of defense and enforcement issues. The North Carolina Supreme Court has not published any decisions that are directly on point on trigger of coverage for latent construction defects. *Gaston County Dying Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 524 S.E.2d 558 (2000) is the closest the Court has come to ruling on this issue. In *Gaston County Dying*, the Court applied an injury-in-fact trigger where damages continued to accrue before being discovered but the damages commenced as a result of a specific event that could be pin pointed in time. In *Harleysville v. Hartford*, 90 F.Supp. 3d 526 (E.D.N.C. 2015) Judge Louise Flanagan concluded that the decisions of the North Carolina Court of Appeals concerning trigger of coverage in cases of ongoing, hidden damages that do not commence on a date certain could not be reconciled with the logic enunciated in *Gaston County Dying*. Judge Flanagan concluded that the reasoning of *Gaston County Dyeing Machine* was consistent with a continuous trigger of coverage and applied such a trigger to the dispute before her. The *Harleysville v.*

Hartford decision underscores the uncertainty that exists in this area of the law. Does *Harleysville v. Hartford* point in the direction that the North Carolina Court will eventually take? How will the North Carolina courts rule, pending further guidance from the North Carolina Supreme Court?

Only losses that occur within the policy period are covered under form GC 00 01, the most commonly used primary coverage form in general liability policies. The relevant language varies little, if any, between various policy editions. The December 2004 edition (copy included as appendix to this paper) states:

> b. This insurance applies to "bodily injury" and "property damage" only if:
> …
> (2) **The "bodily injury" or "property damage" occurs during the policy period**; and
>
> (3) Prior to the policy period no … (listed insured or authorized "employee") … knew that the "bodily injury": or "property damage" had occurred.
>
> 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 an insured listed in 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.**

(emphasis supplied)[1]

The trigger of coverage issue is easily resolved in cases where the damages or injury are immediately visible and occur contemporaneously with the offending event. This issue can be problematic where damages occur over time as a result of latent defects. In these cases it is difficult to say exactly when the damages began and over what period they continued to accrue. What

[1] Form GC 00 01 is published by the Insurance Service Office, Inc. (ISO). This form appears in the vast majority of general liability policies. The language of form CG 00 01 was at issue in all of the trigger of coverage cases discussed in this paper, with the exception of *Nelson v. Hartford*, 177 N.C.App. 595, 630 S.E.2d 221 (2006), which was concerned with a homeowner's policy.

policy is triggered? Is it the policy during which the damages were first noticed (manifestation trigger)? Is it the period during which the damages began (injury-in-fact) or is it all periods during which damages accrued (continuous trigger)?

In *Gaston County Dyeing Machine Company v. Northfield Insurance Company*, 301 N.C. 293, 524 S.E.2d 448 (2000), the North Carolina Supreme Court adopted an injury-in-fact trigger of coverage in a case in which the date of the event causing the injuries could be identified with certainty, even though the damages continued to accrue and were not discovered until after a new policy inception date. Before *Gaston County Dyeing*, it was generally assumed that the North Carolina courts would apply a manifestation trigger of coverage, based upon the North Carolina Court of Appeals decision *West American Insurance Co. v. Tufco Flooring East, Inc.*, 104 N.C.App. 312, 409 S.E.2d 692 (1991) and several other North Carolina Court of Appeals decisions applying *Tufco*. *See, Bruce-Terminix Company v. Zurich Insurance Company,* 130 N.C.App. 729, 504 S.E.2d 574 (1998); *The Home Indemnity Company v. Hoechst Celanese Corporation,* 128 N.C.App. 259, 494 S.E.2d 764 (1998).

The *Gaston County Dyeing* case arose from a product liability action. Sterling Winthrop, Inc. filed an action to recover damages exceeding $20 million from Gaston County Dyeing Machine Company. Sterling alleged design defects in a pressure vessel manufactured by Gaston County Dyeing Machine Company. The evidence showed that the pressure vessel began leaking on June 21, 1992, allowing contaminant to migrate into a dye material from June 21 until August 31, 1992. There was no dispute that the leak began on June 21. The contamination continued for approximately two months before it was discovered. During this two-month period, certain of Gaston County Dyeing Machine Company's insurance policies expired and other policies became effective. The question of whether coverage under the various general liability and umbrella

policies was triggered based upon injury-in-fact, date of manifestation or a continuous trigger was of great importance to the insurers.

The *Gaston County Dyeing* Court examined the various policy languages and found the coverage was triggered as of June 21, 1992, when the initial injury was sustained, and that only one policy period was triggered, notwithstanding the fact that the injury continued through the expiration of one policy period and into another.

> Although our Court of Appeals has addressed the trigger of coverage issue, it is an issue of first impression for this Court. We conclude that **where the date of the injury-in-fact can be known with certainty**, the insurance policy or policies on the risk on that date are triggered. This interpretation is logical and true to the policy language. Further, although other jurisdictions have adopted varied approaches in determining the appropriate trigger of coverage, the injury-in-fact approach is widely accepted.

351 N.C. at 303, 524 S.E.2d at 564. (emphasis supplied) The Court went on to state that: "To the extent that *Tufco* purports to establish a bright-line rule that property damage occurs 'for insurance purposes' at the time of manifestation or on the date of discovery, that decision is overruled." 351 N.C. at 303, 524 S.E.2d at 565. *Gaston County Dyeing* clearly overruled *Tufco* where the date of the injury-in-fact can be known with certainty. The North Carolina Court of Appeals has since construed *Gaston County Dyeing* as overruling *Tufco* where the date of injury cannot be ascertained.

The North Carolina Court of Appeals has repeatedly cited *Gaston County Dyeing Machine Company v. Northfield Insurance Company*, 351 N.C. 293, 524 S.E.2d 558 (2000) for the proposition that in cases of latent damages of unknown start date an injury-in-fact trigger coverage analysis applies and that only one policy period is triggered, regardless of whether a date of injury can be pinpointed and regardless how long the damages accrued before being discovered. *See*, *Hutchinson v. Nationwide*, 163 N.C.App. 601, 594 S.E.2d 61 (2004); *Miller v. Owens*, 166

N.C.App. 280, 603 S.E.2d 168 (2004) (UNPUBLISHED); *Harleysville Mutual Insurance Company v. Berkley Insurance Company*, 169 N.C.App. 556, 610 S.E.2d 215 (2005); *Nelson v. Hartford Underwriters, Ins. Co*., 177 N.C.App. 595, 630 S.E.2d 221 (2006). Because *Gaston County Dyeing* involved a situation in which the date of loss could be known with certainty, it is not assured that *Hutchinson*, *Harleysville v. Berkley* and *Nelson* accurately reflect the Supreme Court's intentions with regard to trigger of coverage for ongoing, hidden damages. These opinions of the North Carolina Court of Appeals opinions interpreted *Gaston County Dyeing* to mean that, with respect to claims for damages resulting from latent defects, the damages are deemed to have occurred when the insured completed its last act or the insured's work was completed. However, this rule was difficult to reconcile with the language of the standard CGL policy. To be covered, the damages must occur during the policy period. The policy does not specify the date of the insured's actions as the relevant inquiry. In *Erie Insurance Exchange v. Builders Mutual Insurance Company*, 227 N.C.App. 238, 742 S.E.2d 803 (2013), the Court called attention to this logical anomaly. Even so, *Hutchinson*, *Harleysville v. Berkley* and *Nelson* remain good law. Moreover, while these cases may have relied upon reasoning that has been discredited, there is reason to believe that the same results could have been reached based on reasoning that would be consistent with *Gaston County Dyeing*. Given the current status of the law, one cannot make a trigger of coverage analysis without considering these opinions.

In *Hutchinson v. Nationwide*, 163 N.C.App. 601, 594 S.E.2d 61 (2004), the Court of Appeals considered a situation involving the faulty construction of a retaining wall. Nationwide's insured allowed coverage to lapse during an 11-month period that included the period during which the wall was constructed. Nationwide's insured reinstated coverage within a month after the retaining wall was completed. The damage to the wall was alleged to have occurred either due to

the insured's "failure to install a drainage system in the retaining wall and/or use proper soil under the retaining wall or … the continual entry over water into the soil from the compacted surface area." 163 N.C.App. at 605, 594 S.E.2d at 63. The damage to the wall arguably continued after coverage was in effect, even if it began while the coverage was lapsed. The Court found that the "injury-in-fact" occurred when the wall was completed, a time during which no coverage was in effect.

> In *Gaston*, our Supreme Court held that even in situations where damage continues over time, **if the court can determine when the defect occurred from which all subsequent damages flow, the court must use the date of the defect and trigger the coverage applicable on that date**. … Assuming *arguendo* that the damage was caused by the continual entry of water, if it can be determined with certainty that the entry of water was caused by faulty construction pre-dating insurance coverage, defendants are not liable for plaintiffs' damages.

163 N.C.App. at 605, 594 S.E.2d at 64 (emphasis supplied)[2].

The *Hutchinson* opinion appears to implement a bright line rule that hidden damages resulting from the insured's actions are always deemed to have occurred when the insured completed its work. The Court stated that "without any additional information suggesting the damage was caused during the three days of coverage prior to discovery", it was clear that the damage occurred outside of the coverage period. 163 N.C.App. at 605, 606, 594 S.E.2d at 64. However, the opinion, taken as a whole, left little room for the possibility that additional information would have altered the coverage analysis. It appears that the only information that could have affected the outcome would have been evidence that the insured performed additional work on the wall at a later date.

[2] The insured in *Gaston County Dyeing* manufactured and installed a defective pressure tank. The *Gaston County Dyeing* Court determined that the date on which the tank ruptured, due to an increase in pressure caused by the customer, was the date of loss. The Court did not discuss the date on which the insured completed its work.

A subsequent, unpublished decision of the North Carolina Court of Appeals again indicated that for claims involving hidden damages resulting from defects, coverage will be triggered as of the date of the insured's last act. *See, Miller v. Owens*, 166 N.C.App. 280, 603 S.E.2d 168 (2004) (UNPUBLISHED). The plaintiff was a homeowner who sued her contractor for defects resulting from the use of synthetic stucco on her house. The contractor sold the house to the plaintiff in February of 1994 but did not obtain liability insurance until July 1994. The insurance expired in July 1996. The plaintiff claimed that the damage first manifested approximately July 16, 1999. Coverage was neither in effect when the house was completed and sold nor when the damages manifested.

After obtaining a judgment against her contractor, the plaintiff sued for coverage. On motion for summary judgment, the trial court determined that a manifestation trigger applied and that no coverage was in effect when the damages manifested. The Court of Appeals affirmed this decision, albeit for different reasons. The Court noted that coverage was not in effect when the allegedly defective construction was completed. The Court of Appeals discussed *Gaston County Dyeing* case and *Hutchinson v. Nationwide*. It quoted the statement from *Hutchinson* that, "if this court can determine when the injury in fact occurred, the insurance policy available at the time of the injury controls." It also quoted *Hutchinson* as stating, "even in situations where damage continues over time, if the Court can determine when the defect occurred from which all subsequent damages flow, the Court must use the date of the defect and trigger coverage applicable on that date." These statements are hard to reconcile. Coverage is triggered when the injury occurs vs. coverage is triggered when the last damaging act occurs. These are different dates where the injury occurs after the insured's last act that contributed to the damages. Applying the maxim that coverage is triggered when the injury occurs, it appears that it would have been appropriate to

remand the case for a factual determination as to when rot resulting from the improper application of the synthetic stucco actually occurred. Without so stating, the Court seems to have concluded that in cases of hidden damages, the date of injury cannot be determined by circumstantial evidence and/or opinion testimony. Instead, the Court appears to have employed a bright line rule that in cases of hidden damages caused by latent construction defects (most commonly moisture intrusion), the date on which the damages commence cannot be determined. Therefore, the date on which the insured created the latent defect controls for coverage purposes.[3]

The Court's syllabus in *Harleysville Mutual Insurance Company v. Berkley Insurance Company of the Carolinas*, 169 N.C.App. 556, 610 S.E.2d (2005) indicates that the trigger of coverage dispute was resolved by consideration of the fact that the insured's acts and omissions occurred before the effective date of the defendant's policy – another application of the bright line rule from *Hutchinson*. However, a reading of the entire opinion indicates that the case need not have been resolved on that consideration alone. In *Harleysville v. Berkley*, not only did the insured complete its work before the effective date of the Berkley policy but it was also clear that the damages began occurring before the Berkley policy was effective. Harleysville and Berkley's mutual insured, RGS Builders, Inc., constructed a house clad in synthetic stucco. It completed the house in 1994. It performed repairs to address moisture intrusion in 1996. Berkley first insured RGS effective May 1, 1997. Harleysville insured RGS before that. The homeowner sued RGS for damages relating to the installation of the synthetic stucco. RGS tendered its defense to Harleysville and Berkley. Harleysville provided a defense and settled the case. Berkley declined

[3] If, in *Miller v. Owens*, the trigger of coverage analysis had led to a conclusion that the loss occurred during the coverage period, the Court might have also questioned whether damages flowing from latent defects can even constitute "property damage". It does not appear that the property would have ever existed in an undamaged condition. *See, Prod. Sys., Inc. v. Amerisure Ins. Co*., 167 N.C.App 601, 605 S.E.2d 663 (2004), *rev. denied*, 359 N.C. 322, 611 S.E.2d 416 (2005).

to participate. Harleysville sued Berkley for reimbursement. Harleysville argued that a manifestation trigger applied and that the problem first manifested in 2000, when an inspection report stated that the installation of the synthetic stucco was defective and that the synthetic stucco should be removed and replaced.[4] Moisture intrusion problems had previously been noted but this was the first indication that the cladding was not salvageable. The *Harleysville* Court stated that it was clear that the damage "was caused by RGS's actions or inactions prior to the effective date of its policy with defendant. Therefore, without any additional information suggesting that the damage was caused during the dates of its coverage, we conclude that the defendant bears no general commercial liability for the damages." 169 N.C.App. at 562, 610 S.E.2d at 218, 219.

The *Harleysville* decision could be cited as affirming the rule that in cases of hidden damages the trigger of coverage is determined by the date on which the insured completed its work. However, the case could be reconciled with a rule that for trigger of coverage the date on which the damages actually occurred controls. In *Harleysville*, assuming a trigger of only one policy period, as opposed to a continuous trigger, it was clear that the damages commenced before the Berkley policy was in effect, regardless of whether one could determine the actual date on which those damages commenced.[5]

Nelson v. Hartford, 177 N.C.App. 595, 630 S.E.2d 221 (2006), involved a first party claim under a homeowner's policy. Even so, it applied the reasoning of *Hutchinson v. Nationwide.* Two homeowners asserted a claim for mold damage caused by an oversized HVAC system, a leaking Jacuzzi or a leaking shower. Their homeowners' policy provided coverage for a loss that occurs

[4] This coverage dispute was resolved at the trial level before *Hutchinson v. Nationwide* was reported. Arguably, *Gaston County Dyeing* had not overruled Tufco in cases where it not be determined when the damages began and no appellate courts had attempted to apply *Gaston County Dying* to this scenario.

[5] Because Harleysville had already paid the claim, the Court was not required to determine whether, if the damages occurred contemporaneously with the completion of the work, the property ever existed in an undamaged condition.

during the policy period. The defects giving rise to the mold damage were all created before the inception of the Hartford policy, while the mold damage continued after the policy was in effect. *Nelson* cited *Hutchinson* in support of its decision that the Hartford policy did not provide coverage: "[E]ven though the mold damage continued over time, we can determine when the defects occurred from which all subsequent damages flowed, and we must use the dates of these defects and trigger coverage available on that date." 177 N.C.App. at 607, 630 S.E.2d at 230 (citing, *Hutchinson*).

In *Auto-Owners, Ins. Co. v. Northwestern Housing Enterprises, Inc*., 2008 WL 901176 (W.D.N.C. 2008) (UNREPORTED), the Court cited *Hutchinson v. Nationwide* and *Nelson v. Hartford Underwriters Ins. Co*., 177 N.C.App. 595 (2006) (involving a homeowner's policy) for the proposition that in a faulty workmanship case "as a matter of law … the damage must exist from the time the faulty work is performed." The insured, or those acting under its control, developed a residential community in the mountains. As part of that development, it prepared lots, including grading and the adding of fill dirt to those lots. It then moved pre-existing homes to those lots. Years later, following a heavy rainfall, ten houses in the community were damaged by debris movement on the slope of the mountain. Auto-Owners cited *Hutchinson v. Nationwide* in support of its argument. Northwestern Housing Enterprises, Inc. argued that the injury-in-fact occurred on September 8, 2004, when one house was destroyed and others were badly damaged in a landslide that followed unusually heavy rains. It cited the testimony of a real estate appraiser that none of the properties were devalued before the events of September 8. The Court sided with Auto-Owners, holding that the policy in effect when the work was completed was triggered, as opposed to the policy that was in effect when the landslide occurred.[6]

[6] The Court also held that the loss was not covered, for reasons including the fact that the property never existed in an undamaged condition.

One can easily see how another court might have sided with Northwestern on this issue.[7] Northwestern analogized the facts of its case to those of *Gaston County Dyeing*. The defect in *Auto Owners* occurred when the land was prepared. The damages occurred on a later date that was known with certainty. In *Gaston County Dyeing* the defective pressure vessel was installed on one date and the leak occurred later. The *Gaston County Dyeing* Court differentiated between the date on which the leak was discovered and the date on which it occurred. The *Gaston County Dyeing* Court did not consider the date that the pressure vessel was installed as a possible coverage trigger. The date on which the leak occurred in *Gaston County Dyeing* appears to be the functional equivalent of the landslide in *Auto Owners*. In both cases, the date on which the property was damaged could be known with certainty. One difference between *Auto Owners* and *Gaston County Dyeing* is that in *Gaston County Dyeing* the insured's product (a pressure vessel) damaged another's property (the dye), while in *Auto Owners* the insured's work (grading) damaged other property sold by the insured (the houses). The *Auto Owners* Court took the position that the grading and the houses both constituted the insured's work and that the work never existed in an undamaged condition.

The North Carolina Court of Appeal's decision in *Alliance Mutual Insurance Company v. Guilford Insurance Company*, 711 S.E.2d 207 (N.C.App. 2011) (UNPUBLISHED), suggested that the Court of Appeals would have reached a different decision on the trigger of coverage issue under the circumstances before the Federal Court in *Auto Owners*. Alliance Mutual Insurance Company and Guilford Insurance Company both wrote policies to a plumbing company. Guilford insured the plumbing company when it improperly installed a water supply line in a home under construction. Alliance insured the plumbing company when the water supply line separated and

[7] If this case had been decided after *Erie v. Builders Mutual*, discussed below, it likely would have been decided differently.

damaged the house several years after the plumbing company had completed its work. Alliance defended a suit against the insured for damages caused by the pipe. Guilford refused to participate. Alliance filed a declaratory judgment action against Guilford, contending that the damage actually occurred when the plumbing company improperly installed the water supply line. Alliance cited *Gaston County* and *Hutchinson* for the proposition that the injury-in-fact occurred when the insured completed its work. The Court held that there was no property damage until the line leaked. Therefore, only the Alliance policy was triggered and Guilford did not owe a duty of defense.

> [T]he PEX water supply line was improperly installed in 2004, and this improper installation ultimately caused the leak which caused the property damage. However, this is not a case of a continual leak which began in 2004 and was not discovered until December 2006; the leak began in 2006. The "property damage" thus did not occur, or begin to occur, until December 2006. Therefore, no portion of the property damage caused by the leak "occur[ed] during the policy period" as required by Defendant's policy which had ended on 21 February 2005.

p. 4 of unreported opinion.

In *Builders Mutual Insurance Company v. Mitchell*, 210 N.C.App. 657, 709 S.E.2d 528 (N.C.App. 2011), the Court remanded the case for a factual determination of whether the date of loss could be "known with certainty." This case points toward an application of *Gaston County Dyeing* that implements an injury-in-fact trigger without engaging in the strained logic of equating the date a defect was created with the date(s) that damages resulted from that defect. The insured in *Builders Mutual v. Mitchell* was kicked off the job. Its work was never completed. Strictly speaking, it may not have been an option to apply the rule from *Hutchinson v. Nationwide*, *Miller v. Owens*, or *Harleysville v. Berkley Insurance Company*.

The *Mitchell* case was actually a battle between two insurance companies. Maryland Casualty insured Umstead Construction from March 1, 2000 to March 1, 2003. Builders Mutual

insured Umstead from March 1, 2003 to March 1, 2006. Umstead performed repairs on an existing home from February 2000 until December 2005. The repairs were not satisfactorily completed and there was evidence that Umstead had overbilled. The homeowner sued Umstead for breach of contract, breach of warranties, negligence, misrepresentation, unfair trade practices and fraud. Facts ascertained outside of the complaint further indicated that the defective repairs had caused additional damage to the existing structure, primarily consisting of water damage.

Builders Mutual provided Umstead with a defense. Maryland Casualty refused to participate in the defense. Builders Mutual filed a declaratory judgment action, naming numerous interested parties as defendants. The underlying case settled at mediation, with Builders Mutual contributing to the settlement. Builders Mutual sought reimbursement from Maryland Casualty for defense and settlement costs. On cross motions for summary judgment the trial court dismissed the claims against Maryland Casualty. The Court of Appeals reversed.

As to the trigger of coverage, the Court noted an affidavit from the repair contractor who took over after Umstead to the effect that most of the damage caused by water intrusion likely began before the last date of coverage under Maryland Casualty's policy. Maryland Casualty had cited *Gaston County Dyeing* for the proposition that, "where the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered." Maryland Casualty argued that because the injury-in-fact date could not be known with certainty, the injury-in-fact test was not the appropriate standard. The Court held that "[w]hether the date can be known with certainty is a genuine issue of material fact and should not have been resolved by summary judgment." 709 S.E.2d at 534. The *Builders Mutual* Court relied on *Gaston County Dyeing*, which stated that the injury-in-fact analysis applied where the date of the injury could be known with "substantial certainty." However, *Gaston County Dyeing* does not rule out the

possibility that the injury-in-fact analysis could be applied where the date of the injury-in-fact could be determined with less than substantial certainty. *Gaston County Dyeing* stated that, "where the date of the injury-in-fact can be known with substantial certainty, the insurance policy or policies on the risk on that date are triggered." This statement described the situation before the Court. It did not preclude the use of an injury-in-fact trigger where the date of the onset of the injury could be determined with less certainty. A practical reading of *Builders Mutual* suggests that the real issue to be determined on remand was whether the date could be proven by the standard applicable to most contractual disputes – a preponderance of the evidence. Builder's Mutual had supplied an affidavit from a contractor stating that "approximately two-thirds (2/3) to 70% of the damages would have more likely than not occurred between early 2000 and February 28, 2003 … ." 210 N.C.App. at 665, 709 S.E.2d at 534. The Court remanded the case for a determination whether "these statements establish a date that can be 'known with certainty'." *Id.* It is not clear that *Gaston County Dyeing* compelled the application of a "substantial certainty" standard in this instance. Moreover, the fact that the *Builders Mutual v. Mitchell* Court remanded the case, on the basis of the affidavit presented, suggested that the Court contemplated that "substantial certainty", as applied in this context, might not require that an exact date on which the damages began be identified.

In *Erie Insurance Exchange v. Builder Mutual Insurance Company*, 227 N.C. App. 238, 742 S.E. 2d 803 (2013), the Court of Appeals stated that came very close to stating that *Hutchinson,* misapplied the reasoning of *Gaston County Dye.*[8] Terrence P. Duffy Builder, Inc. ("TPD Builder") constructed a residence for R. Michael Hardison and his wife, Sara E. Hardison ("Hardison"). The

[8] "[W]e note that **to the extent** Hutchinson uses the term "defect" in summarizing out Supreme Court's holding in Gaston County Dyeing, such language mischaracterizes the holding in Gaston County Dyeing, as our Supreme Court did not use the term 'defect,' but rather, 'injury-in-fact'." 227 N.C. at 249, 742 S.E.2d at 812. (emphasis supplied)

residence, which was substantially completed September 21, 2007, included landscaping and a retaining wall. On December 7, 2009, the retaining wall above the residence collapsed, causing extensive damage to the residence and the Hardison's personal property. Erie issued a policy of general liability insurance to TPD Builder that was in effect when the residence was completed. Builder's Mutual issued a policy of insurance that was in effect when the retaining wall collapsed. Builder's Mutual argued that in determining the trigger of coverage, the court was required to determine when the defect occurred from which all damages flowed, as had been the case in *Hutchinson*. The *Erie* Court noted that the facts before it were equivalent to those in *Gaston County Dye*. The collapse of the retaining wall, resulting in damages to the residents and contents within the residence, was analogous to the rupture of the pressure vessel in *Gaston County Dyeing*. In both cases, it could be determined with certainty, when the damages began. At first blush, the facts in *Erie* seemed similar to those in *Hutchinson*, as both cases were concerned with defective retaining walls. In *Hutchinson*, the damage to the retaining wall arguably occurred over time, due to water entry. The damage to the retaining wall was discovered at a later time, but the wall did not collapse on other property. In *Erie*, the retaining wall collapsed on a date certain, causing damage to other improvements on the property. The two cases were distinguishable on those grounds. The facts in *Erie* were functionally equivalent to those in *Gaston County Dying Company*. The facts in *Hutchinson* were distinguishable from those in *Gaston County Dying Company*. Even so, the *Erie* Court questioned the logic of *Hutchinson*:

> To the extent *Hutchinson* uses the term "defect" in summarizing our Supreme Court's holding in *Gaston County Dyeing*, such language mischaracterizes the holding in *Gaston County Dyeing*, as our Supreme Court did not use the term "defect" but rather "injury in fact." . . . Notably, in *Gaston County Dyeing*, had our Supreme Court looked to the date the "defect" occurred in the underlying action, i.e. when the faulty pressure vessel was fabricated by *Gaston*, the holding would have been markedly different…to the extent the language employed in Hutchinson is

> inconsistent with that employed by our Supreme Court in *Gaston County Dyeing*, we follow our Supreme Court's holding and analysis.

227 N.C. App. at 249, 742 S.E. 2d at 812. The *Erie* Court's criticism of *Hutchinson* was arguably *dicta*. This discussion was not necessary to the outcome in *Erie.* Regardless, the discussion in *Erie* concerning the difficulty in reconciling the reasoning articulated in *Hutchinson* with *Gaston County Dyeing Company* is persuasive.

The *Erie* opinion noted that in *Builders Mutual v. Mitchell*, Builder's Mutual argued that the date of injury could be resolved as a factual dispute but in *Erie* argued for the application of the rule from *Hutchinson*. 227 N.C.App. 238, 742 S.E.2d 803, footnote #5 (2013) ("We note that defendant's position in the present case is entirely contrary to and inconsistent with its position and argument in *Mitchell*). This suggests that the Court of Appeals might recognize *Mitchell*, in which the Court accepted Builders Mutual's argument, as pointing towards a better method of dealing with trigger of coverage in hidden defects cases than that stated in *Hutchinson, Harleysville v. Berkley* and *Nelson.*

The Court of Appeals' decision in *Erie v. Builder's Mutual* did not compel the decision in *Harleysville v. Hartford,* 90 F.Supp.3d 526 (EDNC 2015), but did point toward a change of course from *Hutchinson*. *Harleysville v. Hartford* was a declaratory judgment action among a number of insurers for G.R. Hammonds Roofing, Inc. Hammonds was also included as a party. Hammonds was a roofer on three large apartment complexes that ended up in litigation. One was in Florida and two were in South Carolina. The carriers insured Hammonds in this order: Hartford, Assurance, First Financial, Harleysville, and then First Mercury. Hartford insured Hammonds for three and a half years, Assurance for one year, First Financial for one year, Harleysville for three years, and First Mercury for three years. There was a six-month overlap between the issuance of the first policy by Assurance and the expiration of the last Hartford policy. With respect to each

of the apartment complexes, there was a gap between the date that Hammonds completed its work and the date that damages from moisture intrusion, allegedly resulting from defective roofing and/or flashing, was discovered. The carriers were of differing opinions as to which policies were triggered by these events. Assurance provided a defense in all three of the underlying cases. The other carriers participated in the defense of some of the cases but not all three cases. The declaratory judgment action involved claims for reallocation of defense costs and allocation of indemnity payments. All of the underlying cases were settled by the time the declaratory judgment action came to a head.

Harleysville, Assurance, First Financial and First Mercury each contended that coverage for the claims asserted in the underlying lawsuit should be triggered according to dates of completion of the insured's work. Hartford advocated a continuous trigger of coverage, in which each carrier's contribution to indemnity payments would be proportional to the number of months that it was on the risk in relation to the total number of months between completion of the insured's work and manifestation of the damages. Judge Flanagan reviewed the published opinions of the North Carolina courts, noted *Erie v. Builder's Mutual* and determined that *Hutchinson*, *Harleysville*, and *Nelson* misapplied the rule from *Gaston County Dyeing.* If *Gaston County Dye* had equated the date of the defect causing injury with the date of the injury, the result would have been markedly different in *Gaston County Dye.* Therefore, it cannot reasonably be inferred that the Court in *Gaston County* sanctioned using the date of the injury causing defect as a trigger of coverage. Because the holdings in *Hutchinson, Harleysville, and Nelson* could not be reconciled with the Court's opinion in *Gaston County Dyeing*, the Federal Court, sitting in diversity, was not compelled to follow those decisions. Judge Flanagan then inferred, from *Gaston County Dyeing*,

how the North Carolina Supreme Court would rule in such a situation. Judge Flanagan concluded that the North Carolina Supreme Court would adopt a continuous trigger of coverage.

> Having determined that the date construction completed is not the proper trigger of coverage, the question remains what approach instead should be used. Given that the start date of the "occurrence" or "accident" in the underlying lawsuits is inherently uncertain, and could have taken place at any time between the date construction was completed on any building and the date of the lawsuits, it is reasonable to find that coverage is triggered under all policies in effect during that time period.

90 F.Supp.3d at 546, 547.

> When, as in this case, the alleged accidents that cause the injuries in fact occur on dates that are not certain, there are possible multiple occurrences…thus, all policies on the risk on the possible dates of those injury-causing events are triggered. Such an approach remains consistent with *Gaston*, because it still 'looks to the cause of the property damage' e.g., the dates the roofs failed and the water intruded, rather than the ultimate 'effect' of such water intrusion, e.g. manifestation of rotten structural elements or mold…the key difference leading to a multiple trigger of coverage rather than a single trigger of coverage, is that the dates of the injuries in fact are inherently uncertain and cannot be established as a single trigger of coverage.

90 F.Supp.3d at 547. The bottom line - "Because it is inherently uncertain based on the allegations of the underlying lawsuits when property damaged alleged in the multiple underlying lawsuits commenced, a multiple trigger of coverage test applies." 90 F.Supp.3d at 548.

Prognosis

Harleysville v. Hartford has no precedential effect in the North Carolina courts. Even so, the North Carolina courts may look to *Harleysville v. Hartford* for its persuasive effect. *See, Salvie v. Medical Center Pharmacy of Concord, Inc*., 762 S.E.2d 273 (N.C.App. 2014). *Erie v. Builder's Mutual* and *Harleysville v. Hartford* persuasively call *Hutchinson, Harleysville v. Berkley*, and *Nelson* into question. *Harleysville v. Hartford* makes a compelling case for implementation of a

continuous trigger of coverage. Whether *Harleysville v. Hartford* accurately predicts the course that the North Carolina Court will take is a different matter.

Gaston County Dyeing held that there was only one occurrence and only one policy was triggered, notwithstanding the fact that the damages continued to accrue through multiple policy periods.

> In determining whether there was a single occurrence or multiple occurrences, we look to the cause of the property damage, rather than to the effect. As noted previously, an "occurrence" is an accident, **"including continuous or repeated exposure to substantially the same general harmful conditions."** In this case, the rupture of the pressure vessel caused all of the ensuing property damage, even though the damage continued over time, contaminating multiple dye lots and continuing over two policy periods. Therefore, when, as in this case, the accident that causes injury-in-fact occurs on a date certain and all subsequent damages flow from the single event, there is but a single occurrence; and only policies on the risk on the date of the injury-causing event are triggered.

351 N.C. at 303, 304, 524 S.E.2d at 565 (emphasis supplied). The Court found that there was but one occurrence where damages continued over time. Because the standard policy language defines an occurrence as "repeated exposure to substantially the same general harmful conditions," there does not appear to be a strong basis for distinguishing between damages caused by the rupture of a pressure vessel and damages caused by repeated exposure to moisture for purposes of counting the number of occurrences involved. Moreover, the standard language of the ISO General Liability Policy provides that " '[p]roperty damage' which occurs during the policy period … includes any continuation, change or resumption of that … 'property damage' after the end of the policy period." This language would be consistent with a rule that ongoing, hidden damages constitute one occurrence and trigger only one policy period, regardless of whether the date of the inception

of those damages can be determined with "substantial certainty" or merely by a preponderance of the evidence.

Gaston County Dyeing expressly considered and rejected a continuous trigger theory:

> International asserts that if the manifestation or date-of-discovery approach is not accepted, this Court should find that both policy periods are triggered under a "continuous" or "multiple trigger" theory. We decline to do so. **In determining whether there was a single occurrence or multiple occurrences, we look to the cause of the property damage rather than to the effect.** As noted previously, an "occurrence" is an accident, "including continuous or repeated exposure to substantially the same general harmful conditions."

351 N.C. at 303, 524 S.E.2d at 565 (emphasis supplied). Again we come back to the policy language regarding "continuous or repeated exposure to substantially the same general harmful conditions." In *Gaston County Dyeing*, the Court indicated that such an exposure would constitute but one occurrence. While *Gaston County Dyeing* did not deal with a situation in which the onset of the damages could not be pinpointed, one could reasonably predict that the North Carolina Supreme Court would find but one occurrence and one policy triggered in such a case. Two Federal District Court cases have relied on *Gaston County Dyeing* in concluding that multiple injuries arising from a single cause of loss constitute but one occurrence. *See, Western World Ins. Co. v. Wilkie*, 2007 WL 3256947 (E.D.N.C. 2007) (numerous children contracted E.coli due to exposure to a petting zoo during the course of a ten day fair – one occurrence); *Mitsui Sumitomo Ins. Co. v. Automatic Elevator Co.*, 2011 WL 4103752 (M.D.N.C. 2011) (187 persons claimed injury due to exposure to hydraulic fluid mistakenly identified as surgical detergent – one occurrence). In *Western World*, Judge Malcolm Howard concluded: "While the court is sympathetic to the plight of the minor defendants and their guardians ad litem, the court must conclude, based on its analysis of the available authorities, that if the Supreme Court of North

Carolina were presented with this question it would conclude that there was but a single occurrence." 2007 WL 32569467, at page 5.

Similarly, in *Mitsui Sumitomo Ins. Co. v. Automatic Elevator Co.*, Magistrate Judge Auld concluded that the North Carolina Supreme Court would find but a single occurrence if confronted with a claim involving numerous people exposed to a mislabeled barrel of hydraulic fluid.

> Finally, Duke has argued that a finding of a sole occurrence would conflict with the decision of the North Carolina Supreme Court in *Gaston Cnty.* which pinpointed the immediately preceding injury-causing event as the occurrence. … This Court disagrees. **The facts of *Gaston Cnty.* suggest the court was applying the cause test to interpret the term occurrence for purposes of triggering coverage. In that scenario, the court would properly look to the more immediate cause of the injury. A determination in *Gaston Cnty.* as to whether the negligent manufacture of the vessel or the vessel failure was an occurrence for purposes of determining number of occurrences would have been moot, as either would have resulted in the insurer being obligated for only a single occurrence.** Here, in contrast, the Court must apply the cause approach to determine the number of occurrences as it relates to insurer obligations under specific policy limits. The Court concludes that, if the present issue were decided by the North Carolina Supreme Court, it would find but a single occurrence on the part of Automatic Elevator under the 04–05 Policy.

In *Western World Ins. Co. v. Wilkie* and *Mitsui Sumitomo Ins. Co. v. Automatic Elevator Co.* the courts saw in *Gaston County Dyeing* a predilection toward finding a single occurrence and a single policy triggered, by reference to the root cause of the damages. In *Harleysville v. Hartford*, Judge Flanagan saw the causes of the property damage as "the dates the roofs failed and the water intruded" – "possible multiple occurrences." 90 F.Supp.3d at 547. One might also conclude that in construction defects cases the cause of the damages is the construction defects, a single occurrence, even if the damages occur in response to multiple exposures to natural elements that would not have been harmful, but for the construction defects. The key to predicting how the North Carolina Supreme Court will rule on trigger of coverage in cases involving latent

construction defects will likely lie in predicting the Court's response to these divergent views on causation.

Hutchinson, Harleysville v. Berkley, and *Nelson* relied on *Gaston County Dyeing* in equating the date that the injury causing defect was created with the date of the occurrence. *Erie v. Builders Mutual*, convincingly explained why this reliance was not justified; one cannot equate the date of the defect with the date of the injury without rewriting the standard GCL policy. Even so, *Hutchinson, Harleysville v. Berkley*, and *Nelson* remain good law. Moreover, while *Erie* questioned the rationale articulated in *Hutchinson* it did not negate the prospect of the same or a similar outcome based upon other rationale that might have been articulated consistent with *Gaston County Dying*. In *Gaston County Dying* the Court observed that "although other jurisdictions have adopted varied approaches in determining the appropriate trigger of coverage, the injury-in-fact approach is widely accepted." 351 N.C. at 303, 524 S.E.2d at 564. This suggests a predisposition toward this approach that could extend to fact situations such as those in *Hutchinson, Harleysville v. Berkley*, and *Nelson.*

On the other hand, the *Gaston County Dyeing* holding regarding the number of policy periods triggered by ongoing damages extending through multiple policy periods runs counter to the rule adopted in most jurisdictions. One authoritative source notes:

> Another recurring issue that arises in the context of determining which policies are triggered is ascertaining the date of injury/damage in a case involving continuing injury/damage that was latent for a period of time. The correct answer, and the rule in the vast majority of the courts to have addressed the issue, is that coverage is triggered from the date of the first latent injury/damage and continues to be triggered at least until the date the injury/damage becomes manifest. Since coverage is triggered in the event of an injury/damage during the policy period, the foregoing rule merely comports with the express terms of the policy.

Windt, Allan D., *Insurance Claims and Disputes, Fifth Ed.* (West Group 2010) §11:4 (with a lengthy list of citations). Windt notes that in the majority of jurisdictions, the courts have held that: "[W]hen there is an ongoing process of property damage or bodily injury, every policy period in effect during the ongoing damage/injury process provides coverage." *Id.* Windt criticizes the *Gaston County Dyeing* opinion:

> In *Gaston County Dyeing Mach. Co. v. Northfield Ins. Co*., 351 N.C. 293, 524 S.E.2d 558 (2000), the court held that only the policy in effect at the time a leak commenced afforded coverage because there was only one occurrence: the leak. The opinion is incorrect because the court overlooked the fact that, under the policy language, it is the date of the property damage (which was ongoing) that triggers the coverage, not the date of the occurrence. The occurrence can take place long before the inception of the policy; it is enough simply that the property damage was caused, in the past, by an occurrence. The only thing that has to take place during the policy period is the property damage.

Windt, §11.4, footnote #24. In cases distinguishable from *Gaston County Dyeing*, the considerations urged by Wendt, and apparently by the appellate courts in other states, could conceivably prompt to the courts to find coverage under multiple policy periods.[9] This happened in *Harleysville v. Hartford*. In light of the *Erie* decision, suggesting that *Hutchinson* was based on fallacious reasoning, and in light of the dearth of opinions on trigger of cover issues from the North Carolina Supreme Court, it would not be terribly surprising to see a continuous trigger applied in the North Carolina courts. While it appears to this observer that a trigger of coverage theory implicating but one policy would be more consistent with *Gaston County Dyeing* than a continuous trigger, this issue is clearly open to debate.

[9] On the other hand, while this commentary suggests that the North Carolina Supreme Court should overrule *Gaston County Dyeing*, it also suggests that, absent such action, *Gaston County Dyeing* would reasonably be interpreted as supporting an injury-in-fact trigger (only one policy period triggered) in all cases involving latent construction defects.

Some Considerations Regarding Trigger of Coverage Issues

It is foreseeable that more carriers will join in the defense effort, so long triggers of coverage issues remain clouded in North Carolina. *Erie v. Builder's Mutual* and *Harleysville v. Hartford* demonstrate the inherent uncertainty in this area of the law that could compel carriers to err on the side of caution when deciding whether a construction defects action might trigger a duty of defense. For defense counsel, this means that the insured's attorney should be especially vigilant in identifying all potentially applicable policies and placing those carriers on notice of the claim. For coverage counsel, this means that counsel should be reticent to make any dogmatic statements concerning trigger of coverage upon which the carrier might rely.

The *Harleysville* case also illustrates the significant impact that choice of law determinations can have on a coverage dispute. The case was decided in the North Carolina Federal District Court under application of North Carolina choice of law principles. Hartford attempted to have the case resolved in South Carolina. Because Harleysville filed first in North Carolina, the South Carolina case was dismissed. This was affirmed on appeal. *See, Hartford Fire Ins. Co. v. Harleysville*, 736 F.3d 255, 263 (4th Cir. 2013) (denying remand to the South Carolina State Court; the Federal District Court of South Carolina dismissed the action on grounds that the declaratory judgment action in the Eastern District of North Carolina had been filed first). Had Hartford succeeded in having the case heard before the Federal District Court in South Carolina, there is little doubt that the Court would have found South Carolina law applicable. South Carolina Code Section 38-61-10 provides:

> All contracts of insurance on property, lives or interest in this State are considered to be made in the State, and all contracts of insurance, the applications for which are taken within the State, are considered to have been made within the State and are subject to the laws of this State.[10]

[10] North Carolina as a similar statute. See, N.C.G.S. §58-3-1.

The policy in question was issued and delivered in North Carolina. However, the work performed in South Carolina was likely sufficient to invoke Sections 38-61-10 and the application of South Carolina law to the interpretation of this policy. See *Sangamo Westin Inc. v. National Surety Corporation*, 307 S.E. 143, 414 S.E.2d 127 (S.C. 1990). Under South Carolina law, a continuous trigger would have applied, along with a time on the risk analysis. *See, Joe Harden Builders, Inc. v. Aetna Casualty and Surety Company*, 326 S.C. 231, 486 S.E.2d 89 (1997); *Crossman Communities of North Carolina, Inc. v. Harleysville*, 395 S.C. 40, 717 S.E.2d 589 (2011). Hartford got part of it wanted—the continuous trigger—but did not get the time on risk analysis.[11] The allocation of indemnity payments would have been substantially different if South Carolina law had applied.

This case also illustrates some of the pros and cons involved in resolving coverage disputes in Federal Court on diversity jurisdiction. The lack of certification in North Carolina can work for or against a carrier.[12] Businesses and individuals in this State would benefit from greater certainty in the law relating to many coverage issues, including trigger of coverage. A certification procedure would promote that end.

[11] *Harleysville v. Hartford* rejected Hartford's argument for application of a time on risk analysis. Hartford advocated a pro rata allocation based on the number of months that a carrier was on the risk between the time that the insured's work was completed and the time that the damages manifested. The *Harleysville v. Hartford* opinion did not discuss the number of policy periods in effect, which is slightly different from the time on risk analysis proposed by Hartford. If there were ten policies issued by ten carriers, each policy in effect for a one year period, should the outcome be different than if there were ten policy periods in effect, where nine of those policies were issued by one carrier and one policy by the other carrier? Should the carrier that issued nine policies share equally with the carrier that issued one policy? According to *Harleysville v. Hartford,* the answer is that the two carriers should share equally. Thus, if each policy had a one million dollar limit of coverage, an insured that was covered by ten different carriers over a ten year period would have ten million dollars of coverage, while an insured that was covered under one carrier for the entire ten years would only have one million dollars of coverage. If a continuous trigger theory is in fact applicable in North Carolina, this is something that needs to be sorted out.

[12] North Carolina is the only state never to have enacted a certification procedure by which questions of state or local law can be certified to its highest court. Eisenburg, Eric, *A Divine Comity, Certification (at Last) in North Carolina.* 58 Duke L.J. 69 (2008).

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".

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) 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 "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) 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:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or

(b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(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", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

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".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, 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.

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.**

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 "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods – Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of web-sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b.** and **c.** of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

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, 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

(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".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

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 practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage **A.**

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. 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, or the products and completed 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. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "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, road-beds, 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.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

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.

b. Includes

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

