

# Adventures in Errors & Omissions Avoidance

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# How to AVOID E&O Claims

Don't

Do

Dangerous

# Don't Do Dangerous

Don't Do Dangerous, as the basis statement for this session focuses on the foundational issues.

Avoiding an E&O situation requires:

- That we simply “**Don't**” undertake certain actions;
- That we always undertake to “**Do**” certain activities; and
- That we recognize and avoid “**Dangerous**” actions and practices.



# Don't

# What is it that we DON'T

- Delay
- Answer coverage questions without the policy
- Answer “unanswerable” questions
- Answer “theoretical” questions definitively
- Act outside your licensure, authority or duties
- Fail to follow up
- Fail to offer higher limits – even unintentionally
- Delete coverage too quickly
- Promise coverage after a loss

# Delay

- Reporting a claim
- Endorsing the policy (especially if broadening coverage)

# Delay

## Giving bad news:

- Problem with a claim
- Coverage availability problems
- Non-renewal from carrier
- An E&O situation

# Answer Coverage Questions Without the Policy

- An insurance policy is a contract between the insurance carrier and the insured
- It specifies the coverages, exclusions and conditions of the relationship
- The policy is almost as unique as the insured

“Does my policy cover....?”

# Answer “Unanswerable” Questions

- “How much coverage do I need?”

# Answer “Theoretical” Questions Definitively

*“This hasn’t happened, but if ‘X’ happened, is it covered?”*

It’s not that these questions should NOT be answered, it is that they should not be answered definitively

Safe response: “Based on the facts as you have presented them, the policy provisions appear (or do not appear) to provide coverage. However, if the facts are different, the coverage may respond differently because claims adjusting is primarily based on the facts of the specific claim.”

Insureds will remember what they were told when “X” happens.

It is recommended that such theoretical questions and answers be detailed in the client’s file.

# Act Outside Licensure, Authority or Duty

- Making recommendations regarding contract language
- Interpreting non-insurance statutes
- Arbitrating between parties

# Act Outside Licensure, Authority or Duty

- “In an HOA, does the swimming pool have to be ADA compliant?”
- “I want to lease my personally-owned auto to the company, do you have a sample lease?”
- “What is the best form of business entity?”
- “Is this covered by my home warranty coverage (form provided)?”

# Fail to Follow Up

- The agent is in the “middle” of the relationship between the insurance carrier and the insured and is tasked with following up with both sides contract
- The agent is the project manager tasked with confirming all the parts are moving and working in unison
- Failure to follow up on any of these moving parts could result in an E&O claim

# Fail to Offer Higher Limits – Even Unintentionally

- Property: Depending on Replacement Cost Estimators
- Liability: Failure to use one simple phrase...

**“Higher Limits Available Upon Request”**

# Delete Coverage Too Quickly

Remember when coverage ceases!

- PAP / BAP
- Special Events coverage

# Promise Coverage After a Loss

“Do you think this is going to be covered?”

- COVID Business Income claims
- UM/UIM losses
- “Gray area” losses



Do

# What Should We Always Do

- Document the file
- Use checklists
- Use sign-off forms, waivers and other documents
- Manage expectations

# Document the File

Documentation practices must be **invariable** internal procedures and practices

Remember, documentation may be read in court!

# Document the File

Pay attention to the quality of documentation

- Be consistent (everyone documenting the same way)
- Be timely (immediate documentation while fresh)
- Be detailed
- Not use random abbreviations or jargon that could be misunderstood
- Include unalterable date/time stamp
- Written in first person but without personal opinion
- Not contain the person's opinion as to whether or not there is coverage for a loss

# Document the File

Documentation should contain

- **Who:** Name all customers and personnel involved in the transaction/meeting.
- **What:** Topics discussed, decisions reached and actions taken
- **When:** Dates and times.
- **Where:** By phone, in person, via text or email.
- **Why:** The purpose and the basis for the conversation.
- **How:** What needs to be done and by when

# Document the File

## What to Document

- In-person Discussions
- Phone Calls
- Emails
- Instant Messages
- Live Chats
- Faxes (if still existent)
- Text Messages
- “Contact Us” Page
- Social Media

**ANY communication  
with a prospect or  
insured!**

# Use Checklists

- Why? So you don't forget anything
- Common arguments against checklists include:
  - No insured wants to sit through all the checklist questions.
  - I focus on a single niche and have for more than 20 years – I know what I need.
  - I only do personal lines (home, auto and umbrella); they are package policies so I don't need to use checklists.
- Types of Checklists
  - Exposure checklists
  - Coverage checklists
- Checklists become part of the documentation and can be used to gain the insured's signature – acknowledging agreement with the information obtained
- Some E&O carriers either discount or waive deductibles when checklists are used

# Use Signoff Forms, Waivers, Etc.

- For every coverage recommendation resulting from the use of checklists and other information gathering sources, the insured must sign off on coverages accepted and especially coverages rejected (waived)
- Part of this documentation includes follow-up correspondence detailing to the insured the recommendations made and the options chosen and/or rejected

# Manage Expectations

- An insurance agency does not provide risk management services. Be careful creating an expectation that cannot be met.
- The insured is not expected to necessarily understand the insurance marketplace and what coverage can be purchased and at what price. Prepare the insured for the reality of the current insurance market.



# Dangerous

# Dangerous Activities to Avoid

- Mistakes with Applications
- Failing to Review the Policy
- Not Paying Attention to Certificates of Insurance
- Not understanding the risks from Changing Liability Forms from Occurrence to Claims Made without Explanation
- Failure to understand the Exposure Created by Employees Crossing State Lines to Work
- Not understanding Business Auto Coverage Symbols
- Failing to properly manage personally owned autos insured on a BAP
- Ignoring building code issues and Ordinance or Law coverage
- Improperly naming insureds

# Mistakes With Applications

- Failure to ask all the questions
- Improperly interpreting the application questions
- Failure to provide all necessary underwriting information (creative lying)

# Failing to Review the Policy

## **“Each Renewal is a New policy”**

- Effective dates: Confirm that coverage began or was renewed when intended.
- Named Insureds: Confirm the named insured(s) is/are correct, including the entity type. Improperly named insureds can negatively affect coverage as can the incorrect entity type.
- Additional Insureds. Confirm coverage is properly extended to intended additional insureds.
- Locations: Confirm all locations intended to be covered are listed on the policy.
- Autos: Confirm all owned autos are listed on the policy.
- Coverage Symbols: Confirm the auto coverage symbols in the BAP are as broad as possible and as intended.
- Coverage Limits. Confirm all limits are those requested. This applies to both property and liability coverages.
- Correct Forms and Endorsements. Confirm the carrier has attached all the intended coverage forms and endorsements and none have been attached that unexpectedly limit coverage (some exclusionary and limiting endorsements are automatic). When checking forms and endorsements, confirm edition dates listed on the Declaration Page match those attached to the policy.
- Class Codes: Confirm class codes are correct for policies such as the GL and WC.
- Premiums. Confirm the premiums are as quoted.

# Certificates of Insurance

- The Description of Operations: The most dangerous box in the entire COI
- Additional Insureds and Certificate Holders

	Scheduled	Privity of Contract	Contractual Requirement
Premises/Operations	CG 20 10	CG 20 33	CG 20 38
Completed Operations	CG 20 37	CG 20 39	CG 20 40

# Changing Between Occurrence and Claims Made

- **Occurrence:** The policy in effect when the injury occurs
  - Date of “occurrence”
- **Claims-Made:** The policy in effect when the claim is made
  - Date of “occurrence”
  - Date of claim
  - Retroactive date

What happens if you change coverage triggers?



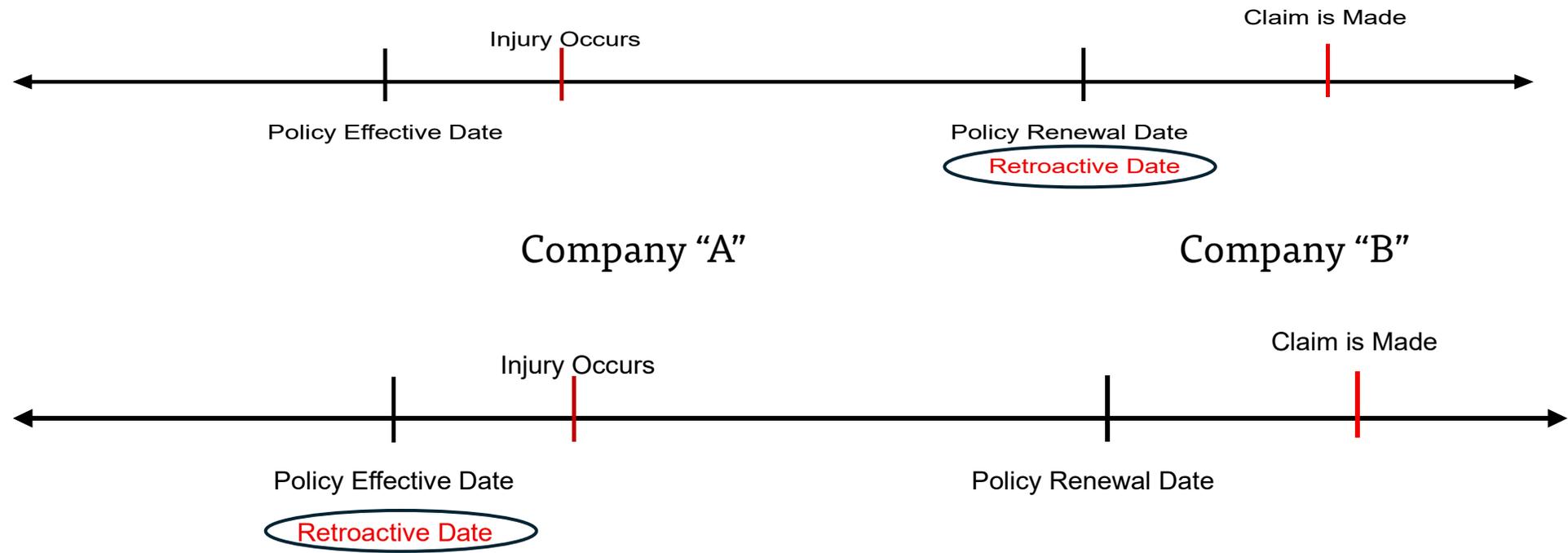
# Changing Between Occurrence and Claims Made

Occurrence forms:



# Changing Between Occurrence and Claims Made

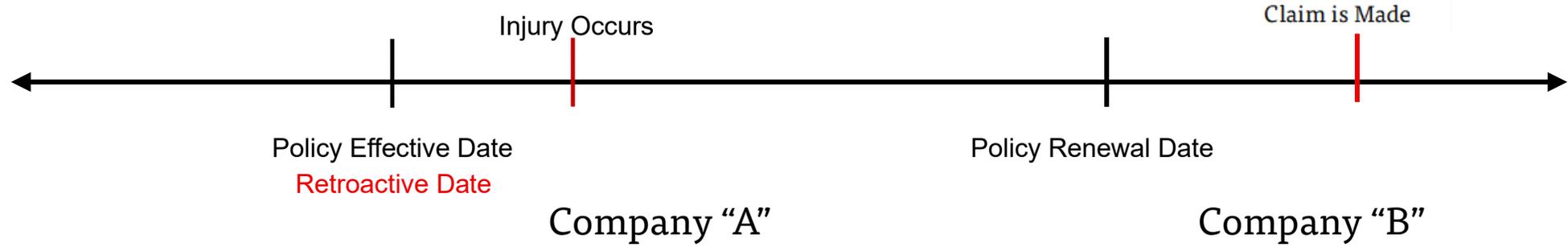
Occurrence to Claims Made:



# Changing Between Occurrence and Claims Made

Claims Made to Occurrence:

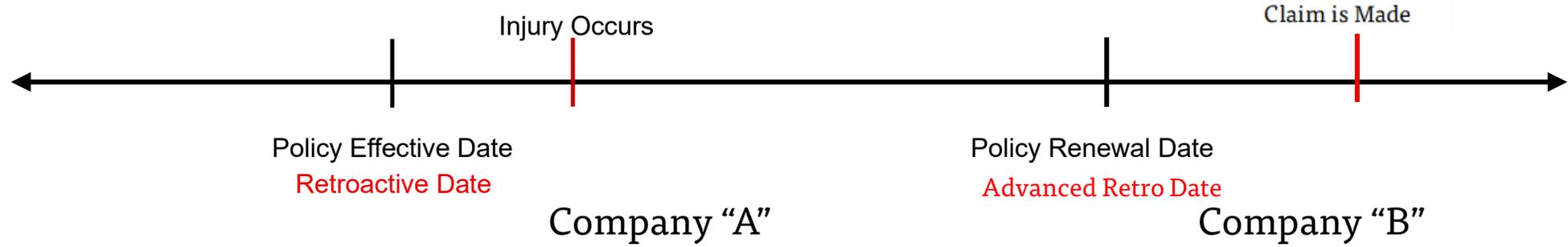
“Tail”  
Required



# Changing Between Occurrence and Claims Made

Claims Made to Claims Made:

“Tail”  
Required



# Employees Working in Other States

RECIPROCALITY  
EXTRATERRITORIALITY

# Employees Working in Other States



# Business Auto Coverage Symbols

Section I.A. of the BAP defines which autos are granted coverage based on the applicable **Coverage Symbols**

ISO developed and utilizes 10 primary coverage symbols divided into three categories:

- **General Purpose Symbols** (5): Are or can be used to trigger liability, physical damage and other coverages
- **Statutory Symbols** (2): Reserved for and used only when statute requires specific coverage be provided
- **Special Purpose Symbols** (3): Generally used in combination with other symbols to extend protection in “special” or unique circumstances, and often in an attempt to “build” protection for the named insured or other insureds

# Business Auto Coverage Symbols

- Symbol 1: Any "Auto"
- Symbol 2: Owned "Autos" Only
- Symbol 3: Owned Private Passenger "Autos" Only
- Symbol 4: Owned "Autos" Other Than Private Passenger "Autos" Only
- Symbol 5: Owned "Autos" Subject to No-fault
- Symbol 6: Owned "Autos" Subject to a Compulsory Uninsured Motorists Law
- Symbol 7: Specifically Described "Autos"
- Symbol 8: Hired "Autos" Only
- Symbol 9: Non-owned "Autos" Only
- Symbol 19: Mobile Equipment Subject to Compulsory or Financial Responsibility or Other Motor Vehicle Insurance Law Only



# Managing Personally-Owned Autos on the BAP

# Managing Personally-Owned Autos on the BAP

## 1. Who Is An Insured

The following are "insureds":

a. You for any covered "auto".

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow **except**:

(1) The owner or anyone else from whom you hire or borrow a covered "auto".

\*\*\*\*\*

(5) A partner (if you are a partnership) or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.

"You" is the named insured business.

The OWNER (if not the business) is NOT an insured!

# “Who Owns the Car” – The Problem

No coverage for the owner of the vehicle  
if it's NOT the business (named insured)!



# “Who Owns the Car” – The Solution(s)

- The vehicle needs to be placed on a PAP that covers the vehicle owner.

**OR**

- Attach the CA 99 47 – Employee As Lessor
  - Makes the vehicle an unquestionably insured vehicle
  - Makes the driver a specifically listed insured
  - Requires proper underwriting and a legitimate reason to be on the BAP
  - Requires the use of a proper and formal Leaseback Agreement

# Proper Use of the CA 99 47: “Leaseback”

Use the CA 99 47 **ONLY** if the request is legitimate!!

1. Is the vehicle owned by an employee?
2. Is the vehicle owner the listed vehicle's only driver?
3. What are the employee's duties?
4. What is the percentage of personal versus commercial use?
5. Is the employee closely related to any owner or executive officer?

If a legitimate request, attach the CA 99 47 endorsement – **but first...**

# Proper Use of the CA 99 47: “Leaseback”

A **formal** lease agreement is required

- Two or three sentences stating that the “Employee” owns the “Vehicle” and is leasing said vehicle to “Company” does not constitute a formal lease.
- Because a lease agreement is a legal document subject to contract law and creates dual ownership of the subject automobile, specific information should be addressed or provided in the agreement

# Ignoring Building Code Issues

- **Commercial Property** Exclusion “B.1.a.” in all three Cause of Loss forms specifically excludes any loss caused by the enforcement of any ordinance or law
- Commercial Property only pays to repair the damaged property
- No coverage in unendorsed CP for undamaged part
- Insured must pay for removal of undamaged part and/or the increased cost to bring the building into compliance with current building code

# Ignoring Building Code Issues

## CP 04 05 Ordinance or Law Coverage

- Coverage A – Coverage for Loss to Undamaged Portion of the Building
- Coverage B – Demolition Cost Coverage
- Coverage C – Increased Cost of Construction

# Which Policy Pays What Part

Coverage C: Increased Cost of Construction



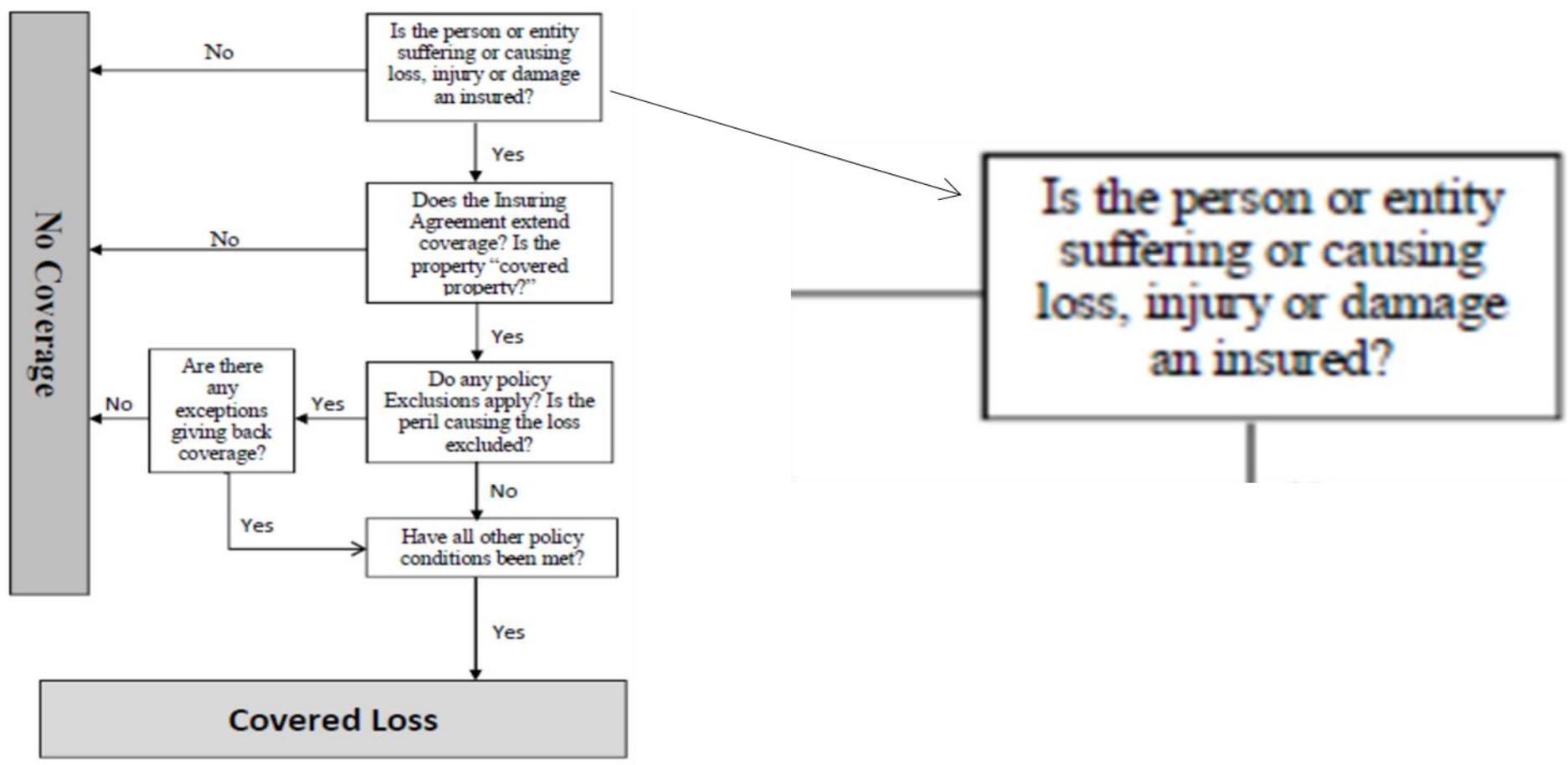
Coverage Part B: Cost to tear down and remove the UNDAMAGED portion of the building

Coverage A: Value of the UNDAMAGED portion of the building

CPP: Cost to remove DAMAGED portion of building

CPP: Cost to rebuild DAMAGED portion of building to its pre-loss condition

# Improperly Naming Insureds



# Improperly Naming Insureds

If the insured is a(n)...	...the Named Insured should read:
Individual	The full legal name of the individual.
Partnership	The answer depends on the existence of and information in the partnership agreement: <ol style="list-style-type: none"> <li>1) If a partnership name is found in the partnership agreement, that is the named insured; but</li> <li>2) If there is no name provided in the agreement or there is no agreement, the named insured is the last names of the individuals making up the partnership.</li> </ol>
Joint Venture (JV)	The name of the JV as found in the written agreement.
Limited Liability Company	The name filed with the regulatory authority.
Other Organizations	Exactly as listed by the Secretary of State or other regulatory authority.
Trust	The name found on the declaration of trust.

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