


Secrets No One Tells You!

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Agenda

- The Law of Insurance Contracts
- The 9 Rules for Interpreting an Insurance Policy
- Why Personally-Owned Autos Belong on the PAP and How to Handle it When They Are Placed on the BAP
- Employers' Liability: It's More Important Than You Think

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How to Read ANY Insurance Policy

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The Law of Insurance Contracts

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Why Insurance Contracts Are Necessary



How the **Insured** sees his house!



How the **Agent** describes it!



How the **Underwriter** imagines it!

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Insurance is Subject to the Laws of Contract

- "Contract" – A formal agreement between two or more parties intent on accomplishing a specific task, purpose or goal.
- Insurance is the transfer of risk from the insured to an insurance carrier.
- Involves payment of a premium in exchange for a promise. Without a contract, enforcing the promise would be difficult.
- Although subject to the general law of contracts, insurance contracts require special consideration and treatment due to their unique nature.

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The General Law of Insurance Contracts

- Offer and Acceptance
- Consideration
- Legal Object
- Competent Parties
- Legal Form

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Unique Characteristics of Insurance Contracts

- Indemnity Contract
- Personal Contract
- Unilateral Contract
- Conditional Contract
- Contract of Adhesion
- Aleatory Contract
- Contract of Utmost Good Faith

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Indemnity Contract

- "Indemnity" is to put the insured back in the same financial condition that existed prior to the loss or would have existed had no loss occurred. Accomplishes this through:
 - Requiring insurable interest at the time of the loss. Insurable interest can arise out of ownership, bailment, loan/mortgage or contract.
- Cannot put the insured in a better position than existed prior to the loss
 - Actual Cash Value
 - Replacement Cost
- "Other Insurance" provisions
 - Pro-rata split – either proportional or equal shares up to exhaustion of limits
 - Excess of loss – first policy pays until limits are exhausted, then second responds
- Subrogation/Contribution – the insurance carrier's right to collect from the at-fault party

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Personal Contract

- The insurance carrier underwrites the risk presented by the particular insured.

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Unilateral Contract

- The **promise** of one party (the insurer) is given in exchange for the **act** of another party (the insured). The insured pays the premium and the insurance carrier promises to pay if a covered loss occurs (see Aleatory).

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Conditional Contract

Before the insurance contract is activated, certain conditions must be met:

- A **condition precedent** is:
- **Conditions subsequent** are:

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Contract of Adhesion

- Involves an unequal bargaining position. The insurance contract is offered to the insured on an "as is," "take it or leave it" basis.

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Aleatory Contract

- The performance of one or both parties is contingent on the occurrence of an event that may never materialize

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Contract of Utmost Good Faith

• **Uberrima Fidei**

- Both parties to the insurance contract almost totally rely on the honesty of the other party.
- Representations versus Warranties
- Misrepresentation and Concealment
- Material Facts
- Void

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- The Insurance Contract and “Reasonable Expectation”
- Subject to statutes related to contracts
- Subject to the Statute of Frauds
- Subject to common law and the concept of *stare decisis* (precedent)
- Concept of “Adhesion” stated that any ambiguity is found in favor of the insured. The concept of “Reasonable Expectation” goes one step further stating that the contract is to be interpreted in the same way a reasonable buyer would interpret it.

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Construction of the Insurance Contract

- Declarations – Everything about the insured, the insurer, limits and forms
- Insuring Agreement – The broadest the coverage will ever be
- Conditions – What has to be done
- Exclusions – What’s not covered by the policy

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9 Rules for Reading ANY Insurance Policy

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9 “Rules” for Reading an Insurance Policy

1. Ascertain who qualifies as an insured
2. Read the Insuring Agreement first
3. Read the exclusions and/or coverage grants
4. Read the exceptions to the exclusions
5. When the policy refers to another section, read that section immediately.
6. Pay attention to conjunctions
7. Pay attention to key words and phrases
8. Read and understand the definitions of specifically defined terms
9. Understand and make sure all policy conditions have been met

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Who is an “Insured”

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Key “Insured Status” Issues

1. Status as an “Insured” must exist before any question of coverage can be tackled!
2. In Property Coverage, the named insured must have “insurable Interest.”
3. Improperly naming/listing the insured can result in no coverage.

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Who Qualifies as an "Insured"

Four *levels* of "Insured" (mostly liability coverage)

- Named insured
- Extended (Additionally Listed based on entity type) insureds
- Automatic insureds
- Additional insureds (by endorsement)

Property is based on "Insurable Interest": is the person/entity with "insurable interest" protected?

If the person or entity suffering or causing the loss, injury or damage does not qualify as an insured, there is no need to go any further - there is no coverage.

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Correctly Naming Insureds

Entity Type Differences:

1. Corporation:
2. Professional Association:
3. LLC/LLP:
4. Partnerships:
5. Sole Proprietors:
6. Joint Ventures:
7. Associations:
8. Trust:

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Read the Insuring Agreement
First

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Why is This the FIRST Step

This is the broadest the coverage is EVER going to be!

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Commercial Property

- We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

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Commercial General Liability – Cov. Part 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....

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Read the Exclusions or Coverage Grants – Depending on the Coverage Form

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Most Liability and Special Cause of Loss Forms

- Coverage is created when the loss or activity is **not** excluded.

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Specialty Liability and Named Peril Property Forms

- Loss/claim is covered only if the peril or action is specifically listed. In these cases, read the list of covered perils FIRST, then read the exclusions.

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Read the Exceptions to the Exclusions

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• Why Does the Carrier Exclude then Give Back? •

It's easier for the carrier to give coverage back by exception than to delete coverage using a long list of exclusions!

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• Read the Exceptions to the Exclusions •

- Excluding coverage and giving some of it back allows the insurance carrier to dictate the exact amount of coverage they are willing to offer. They control the breadth of coverage.
- Taking coverage away and giving it back in pre-determined amounts makes far more sense and reduces the potential for confusion.
- This tactic is used in property and liability coverage forms.

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Why do Exclusions Exist?

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Three Categories of Exclusions

- Excluded "perils"
- Excluded "hazards"
- Excluded "property"

From these three broad exclusionary categories flow the six reasons for policy exclusions.

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Six Reasons Exclusions Exist

- The peril or property is better covered elsewhere
- The loss or damage is collectively catastrophic in nature
- The loss or damage is not accidental or unforeseen
- The insurance carrier is willing to provide coverage; they just want more information and more premium
- The insurance carrier wants to control the amount of coverage granted
- The loss results from a "speculative" or business risk

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Follow the Policy

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Immediately Read Referenced Sections

- When and where the policy refers to another section, immediately read that section; this gives you a clear picture of the coverage or exclusion.
- Annotate when an endorsement changes specific wording.

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Conjunction Junction

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Pay Attention to Conjunctions

"And" is **inclusive**.

Versus

"Or" is **exclusive**.

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More Conjunctions and Conjunctive Phrases

- But
- Yet (not yet...)
- Even if...
- Provided that...

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Pay Attention to Key Words and Phrases

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Key Words and Phrases

- "Not"
- "The most..."
- "Subject to..."
- "Greater than..."
- "All"
- "However"
- "Lesser than..."
- "Any"
- "Includes"
- "Greater of..."
- "Unless,"
- "Must"
- "Lesser of..."
- "Except"
- "Regardless"
- "No more than"
- "Only if..."
- "First"

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Understanding Definitions

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Understanding Specifically Defined Terms

- When the insurance industry wants to control the meaning (and thus application of a term), it is specifically defined in the policy.
- If the word is not defined in the policy it's given it's "Everyday meaning" from the dictionary.
- If it's a "term of art" specific to an industry (in professional liability situations), it's given its Technical Meaning.
- Some words are given a "legal meaning" prescribed by the courts – for example, some courts have decided that "Bodily Injury" includes Mental Anguish

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**Confirm All Policy Conditions
Have Been Met**

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Conditions Precedent

- Premium has been paid
- A covered loss occurs
- Claim is reported

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Conditions Subsequent

- Duties in the Event of Loss or Damage
- Recovered Property
- Vacancy
- Coinsurance
- Duties in the Event of Occurrence, Offense, Claim or Suit
- Legal Action Against Us

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Why Personally-Owned Autos Belong on the PAP and How to Handle it When They Are Placed on the BAP

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Personally-Owned Autos Belong on the PAP

- Confirm the owner of **every** vehicle (not just those being “leased back”) – don’t assume;
- Confirm any request or need to add a personally-owned auto to the BAP is legitimate by asking the key exposure questions;
- Require and closely review the formal lease agreement; and
- Attach the CA 99 47

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Avoid an Improper Assumption

- Never add a vehicle to the BAP auto schedule without asking one simple question:

"Who owns the vehicle?"

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Why??

- Why would an insured want to add a personally-owned auto to the BAP?
 - ☐ A mistake (not understanding there are different "persons")
 - ☐ Employment relationship
 - ☐ Desire to avoid PAP
 - ☐ Titled in individual and company name

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Is the Request "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?

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If the Request is Legitimate...

- Require the creation and execution of a **formal lease agreement**; and
- Attach the **CA 99 47 - Employee as Lessor** endorsement.

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Information Required for the CA 99 47

- Only three (3) pieces of information are required to complete this endorsement:
 - The Named Insured (not the employee's name)
 - The Effective Date of the Endorsement
 - A Description of the "Auto"

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Coverage Provided by the CA 99 47

- **Part A** of the CA 99 47 eliminates any question of or claim denial related to ownership or "title" of the vehicle.
- **Part B** states that the "employee" who leases the scheduled auto (scheduled on the endorsement) to the named insured is included as a specific (not named) insured within the BAC's "Who Is An Insured" definition.

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What Happens if CA 99 47 Not Attached

- The "Employee-Owned" Gap in the Coverage Exception II.A.1.b.(2):

*"Anyone else while using with your permission a covered "auto" you own, hire or borrow (is insured) **except:***

(2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household."

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- Other “Outside Owner” Endorsements for BAP

- Leased from a “traditional” leasing entity – CA 20 01
- Owned by someone other than employee – CA 99 16

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Employers’ Liability: It’s More Important Than You Think

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Employers’ Liability – A Gap Filler

There are “work-related” **bodily** and **financial** injuries that:

- Fall outside workers’ compensation protection; and
- Are excluded by the general liability policy.

Part Two - Employers’ Liability Insurance dovetails to connect the workers’ compensation policy and the commercial general liability policy.

Employers’ liability insurance is similar to and contains components of both the commercial general liability and the workers’ compensation policies

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Employer's Liability Vs. CGL

EL (Part Two) shares slightly more similarities with the commercial general liability (CGL) policy than with workers' compensation coverage (Part One).

Employers' Liability and Commercial General Liability both:

- *Require negligence be proven by the injured person or entity before any payment of benefits.*
- *Apply a specific limit.*
- *Provide coverage on a per occurrence basis with an aggregate limit for injury by disease; and*
- *Have access to additional limits available from an umbrella/excess policy.*

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Employers' Liability Vs. Work Comp

Employers' liability coverage dovetails and correlates with workers' compensation benefits by requiring that...

- *Bodily injury or financial injury for which the insured is held legally liable arise out of and in the course of the employee's employment for the insured.*
- *The employment leading to injury must occur in or be attributable to a "3.A." listed (primary) state.*
- *Bodily injury occur during the policy period and the last day of any exposure causing or aggravating a bodily injury by disease must occur during the policy period.*

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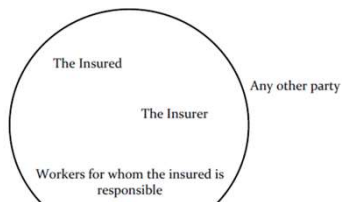
EL: Coverage for an "Outside Party"

Employers' liability protection covers injuries to an "outside party." Workers' Compensation coverage and the Commercial General Liability policy each provide a separate "definition" of "outside party."

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WC and the "Outside Party"



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CGL and the "Outside Party"



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WC and CGL Coverage Gaps

Workers' compensation insurance benefits are statutorily mandated and **restricted** to costs directly **assignable** to a specific employee injured in the course and scope of employment.

Two exclusions found in ISO's CGL policy preclude the extension of coverage to any party suffering bodily injury or financial loss as a result of an injury to an employee:

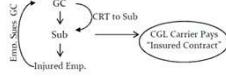
- Exclusion "d." **Workers' Compensation and Similar Laws**
- Exclusion "e." **Employers' Liability**

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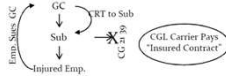
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Exceptions to Exclusion "e." in the CGL

- Liability to an "outside party" arising out of an injury to an employee is covered by the unendorsed CGL, provided such liability is contractually assumed prior to the injury under an "insured contract."



- Beware the **CG 21 39**, "Contractual Liability Limitation." It redefines "insured contract" by removing definition "f" and thereby deleting coverage for the assumption of tort liability of another party via contract.



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What's Covered by Employers' Liability

- Third-party-over actions;
- Loss of consortium (loss of family service);
- Consequential bodily injury; and
- Dual Capacity actions.

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Third-Party-Over Actions

An employer is sued by an "outside party" as a direct result of an injury to an employee. Any liability to the "outside party" would be excluded from the workers' compensation coverage and by the two commercial general liability policy exclusions.

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Loss of Consortium

The injured employee's family may suffer in ways that aren't compensated or even compensable by WC coverage part. These include additional costs to hire outside help to provide the services previously provided by the injured employee, the loss of companionship and, in some jurisdictions, claims for emotional injury.

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Consequential Bodily Injury

A work-related disease subsequently spread to another member of the immediate family.

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Dual Capacity

- Employers may have business-related contact with their employees outside the employee-employer relationship.
- These additional relationships can be in the form of a product supplier, service provider or as the owner of a premises.
- Dual persona relationships create employer obligations to the worker independent of those imposed on an insured strictly as the employer.
- In essence, the exclusivity of workers' compensation protection is waived in situations where the employer could be liable to the **general public** for the same injury.

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Monopolistic States and Employers' Liability

Only four monopolistic states remain in operation: North Dakota, Ohio, Washington and Wyoming

Insureds with on-going operations in one of these states must purchase workers' compensation protection from the state and must find an alternate means to secure employers' liability coverage

Three methods are available to fill this protection gap to which employers operating in monopolistic states are subject.

- **Stand-alone employers' liability coverage.**
- **Endorsement to the workers' compensation and employers' liability insurance policy.**
- **Endorsed onto the commercial general liability policy.**

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Employers' Liability Limits

Standard limits:

- \$100,000 Per Person Bodily Injury
- \$500,000 Aggregate for Occupational Disease
- \$100,000 Per Person Occupational Disease

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