



## The Meaning of “Publication” in the Electronic World—From Data Collection to Data Breaches

by Josh Mooney, Esq., White and Williams

Concerns over privacy have expanded exponentially, and insurers have borne witness to an ever-expanding privacy risk under commercial policies in the context of data collection and storage, electronic surveillance, and data breaches. ISO, GL and BOP policies all provide limited privacy liability coverage, defining “personal and advertising injury” to include injury arising out of “oral or written publication, in any manner, of material that violates a person’s right of privacy.” The meaning of a “publication” has become a critical legal issue for determining the scope of this coverage.

Standard commercial policies do not define the term, thereby leaving its interpretation to the courts. Many times, the focus of inquiry is the nature of the dissemination of the information. Some courts hold that a “publication” in connection with a claim of invasion of privacy requires “a clear promulgation to the public” of the information at issue.<sup>1</sup> Yet courts sometimes provide inconsistent answers. These inconsistencies cannot be explained merely by jurisdictional differences. Sometimes, the nature of

the alleged privacy violation can have a subtle but significant impact on a court’s interpretation. This principle is evident in the context of the electronic world.

### Data Collection and Consumer Tracking

Courts have found that the collection of data does not necessarily involve a “publication.” In *Urban Outfitters*, the Third Circuit held that the wrongful collection of personal information from consumers during point-of-purchase

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### About This Newsletter

*Policy Wording Matters* is written for underwriters, program managers, claims and legal professionals, and policy drafters. It discusses coverage issues and solutions cutting across many lines of business.

transactions did not constitute a “publication.” There, the insured was accused of unlawfully collecting ZIP codes and other information during credit card transactions to build a database to track consumer purchase histories to use for marketing. The insured sought coverage, contending that the class action alleged a “publication.” Rejecting the notion that the failure to define “publication” in the policy made the term ambiguous, the Third Circuit affirmed the trial court’s decision that “publication” requires dissemination of the information to the public at large. The Third Circuit also held that the phrase “in any manner” within the meaning of “personal and advertising injury” did not change or expand the meaning of the term. In the case before it, because the collection of data involved only an exchange between the retailer and the consumer, there was no “publication” to implicate coverage.

Similarly, in *American Economy Ins. Co. v. Aspen Way Enters.*, the insured faced both a state enforcement action and a class action for uploading and activating spyware onto laptops it leased to consumers.<sup>2</sup> The spyware, called Detective Mode, enabled remote use of the laptops’ webcams to photograph computer users and take screenshots. The spyware also collected keystrokes. The lawsuit alleged that the insured had obtained private data from the consumer class, including emails, keystroke logs, credit card information, usernames and passwords, social security numbers, and photographs of persons in various stages of undress.

In the context of the state enforcement action, the court declined to hold that the lawsuit alleged a “publication” to implicate “personal and advertising injury” coverage because the crux of the lawsuit concerned the wrongful collection and retention of data, not the disclosure of the data. The court reasoned:

In the Washington Action, the Court finds that the State has not alleged facts, which if proven, would have amounted to “publication.” The crux of the State’s Complaint was that Aspen Way violated Washington law by collecting and retaining their customers’ private data. . . The State did not allege that Aspen Way disclosed any private information. Instead, the allegations focused on Aspen Way’s use of “PC Rental Agent to collect information on consumers” and “collect private computer activity while consumers were unaware of the activities being recorded.”

As discussed below, the court reached a different conclusion for the class action allegations.

### Electronic Surveillance

In the context of electronic surveillance, courts have defined “publication” in broad terms.<sup>3</sup> In *American Economy*, the same court that had held a state enforcement action did not allege “publication” also held that the class action lawsuit did allege a “publication.” The difference between the two actions was that the class action lawsuit further alleged that the information collected by the insured through the spyware had been “forwarded to unknown persons and locations” in an unencrypted format.

When addressing the meaning of “publication,” the court discussed with apparent approval decisions that had defined “publication” to require dissemination of information to the public at large, including *Urban Outfitters*. Yet, the court held that dissemination merely to a third party constituted a “publication” (“This Court adopts a definition of ‘publication’ that includes the dissemination of information to at least a third party, if not the public-at-large”). Notably, the court admitted that the context of the claim played a role in its analysis when it determined that its construction of the term “publication” confirmed not only with the insured’s understanding of the term, but with “the perspective of a *consumer* of average intelligence.”

### Cybersecurity Data Breaches

For cybersecurity data breach claims, accessibility, not disclosure, of information has become a key issue. In *Zurich Amer. Ins. Co. v. Sony Corp.*, Index No. 651982/2011 (N.Y. Supr. Ct. Feb. 21, 2014), for instance, the court analogized the issue to Pandora’s box as to whether a “publication” took place. For the court, the mere access of information by a network hacker was sufficient to constitute a “publication.” Whether the compromised data was later disbursed to the public was not relevant:

Because, I look at this as a Pandora’s box. Once it is opened, it doesn’t matter who does what with it. It is out there. It is out there in the world, that information. And whether or not it’s actually used later on to get any benefit by the hackers, that in my mind is not the issue. The issue is that it was in their vault.

Similarly, *Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, LLC*, involved an underlying action where medical records inadvertently were made accessible through hyperlinks on the Internet.<sup>4</sup> Patients discovered the error when they Google-searched their names. Subsequent coverage litigation centered over the meaning of “publication.” There was no evidence that a third-party had accessed the medical information. The court held that fact was irrelevant. Because the information was accessible, it was published. For another example, see *Recall Total Info. Mgmt, Inc. v. Federal Ins. Co.*, where there was no evidence that a third-party could access private data on lost encrypted computer tapes and hence no “publication.”<sup>4</sup>

The electronic world and privacy concerns will surely generate more claims and coverage questions. It is likely that the answers given by the courts discussed here will provide guidance. ■

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**Gen Re Note:**



ISO, AAIS and MSO now have mandatory data breach exclusions for CGL, BOP and Umbrella policies. See earlier Gen Re Policy Wording Matters editions for more on these.

CUT AND PASTE



Defined or Not?

Key defined terms are used multiple times in insurance policies, usually in “quotes” or in **bold** so the insured and insurer know their meaning in the place they are used. What happens when the same term appears in the policy without any such denotation? Should it still be interpreted using the definition provided in the policy?

In this property policy, the term “occurrence” was a defined term within the coverage grant. However, when used in the deductible provision, there was no emphasis or quotation mark. In the claim at hand, the issue involved multiple thefts at the same location, using the same means and steps. If each theft was a single occurrence, as the insurer argued, multiple deductibles would apply.

Without a clear indication that the word used in the deductible was intended to be defined in the same way as the rest of the policy, the court said that there is no definition for the deductible provision. Citing World Trade Center case law, the court made clear that the word “occurrence” is ambiguous and susceptible to more than one meaning. Therefore, it is up to a jury to decide what it means for the number of deductibles.

Whether or not the absence of quotation marks or emphasis in the deductible language was intended by the insurer, the takeaway is the same. Checking all uses of defined terms is an important part of form reviews. Another step is considering what will happen if the definition does not apply, because it may mean—as it did here—that a jury will tell the insurer what it means. *Rokeach v. Hanover Ins.*, 2015 U.S. Dist. LEXIS 6580. ■

THE MEANING OF “PUBLICATION” IN THE ELECTRONIC WORLD

## ISO Revises Its Farm Program

by Lucille Hyland, Gen Re's Policy Wording Unit, Stamford

In June of this year, ISO announced a major revision to its Farm program. The 400-plus page filing, submitted in all relevant jurisdictions for an effective date of December 1, 2016, involves changes to the basic forms, amendments to more than half the existing endorsements and 20 new endorsements. All forms carry an April 2016 edition date. In this article, we discuss the form changes relating to agritainment, highlight basic form updates and note new endorsements that may be of particular interest. Most of the issues are not new to farm insurers.

### Agritainment—Property and Liability

In our *Casualty Matters* publication, we've discussed the increased exposure that many farmers have taken on by engaging in recreational and entertainment activities, such as apple picking, hay rides, horseback riding, petting zoos, farm shops and restaurants. While farmers may be protected to a certain extent by state immunity laws, these laws vary and may be untested. It is not surprising, then, that ISO is amending its basic Farm forms to exclude agritainment and offering specialized coverage solutions through optional endorsements.

ISO's latest Farm Property and Farm Liability Coverage Forms (FP 00 12, FP 00 13 and FL 00 20) *exclude* agritainment property and activities, with agritainment defined as "an agricultural or aquacultural related activity or enterprise that is primarily operated on the insured location: for the purposes of tourism or entertainment; and engaged in for monetary or other compensation." The endorsements help insurers address unique coverage needs.

#### > Agritainment—Property Endorsement FL 05 05.

This new endorsement is available to provide coverage for direct physical damage to scheduled agritainment property, up to scheduled limits, which apply separately to livestock; machinery, vehicles and equipment; and all other property.

The schedule further delineates other aspects of coverage, including: covered causes of loss (basic or broad for livestock and other animals; basic, broad or special

for all other property); valuation (ACV or replacement cost); if coverage is included for theft of agritainment property from part of an insured location rented to others; if food contamination coverage does *not* apply, any property *not* covered; and any designated events *not* covered. The endorsement includes \$1,000 of extra expense coverage and certain additional coverages at limits specified in the endorsement rather than the limits in the basic form. For example, credit and EFT cards are covered up to \$3,000.

- > **Agritainment—Liability Endorsement FL 05 01.** This optional endorsement provides coverage for scheduled agritainment operations, subject to the Farm Liability Coverage Form limits. The endorsement adds a liquor liability exclusion, but it can be waived via the schedule. The schedule also allows for: deletion of the mobile equipment exclusion with respect to farm wagons or trailers used to transport visitors; deletion of the livestock and animals exclusion for rides to visitors; rental of premises to others; and exclusion of designated events. Recognizing that agritainment operations may change throughout the year and be different than originally anticipated, premium for the endorsement is considered a deposit, subject to audit.
- > **Farm Umbrella.** ISO's Farm Umbrella policy (FB 00 01) excludes agritainment, except when coverage is provided by the underlying policy. In that case, the Umbrella will follow form with the primary.

### Property Updates—Variety of Exposures

The Farm Property Coverage Forms (FP 00 12, FP 00 13, and FP 00 14), Farm Property—Other Farm Provisions Form (FP 00 90), and Causes of Loss Form—Farm Property (FP 10 60) include a number of updates. Among these:

- > An exclusion for contraband property has been added.
- > Valuation threshold for settlement on an ACV basis instead of a replacement cost basis has been increased from \$2,500 to \$5,000, until the property is actually replaced.
- > Unoccupancy and vacancy loss condition change: in the event a building or structure is vacant or unoccupied for more than 120 days, the loss is reduced by 15% instead of the limit being reduced by 50%.



## New ISO Farm Endorsements

### Property

ISO has introduced several new Property endorsements, including:

- > Debris Removal Expense Endorsement FP 05 03—Removes the restriction in the basic form that limits coverage for debris removal to 25% of the loss.
- > Earthquake Inception Extension Endorsement FP 10 39—Allows for loss that occurred during the policy period and that was caused by an earthquake that began prior to the policy period if the series of earthquake shocks began within 72 hours prior to policy inception. For use when earthquake coverage is provided via the Cause of Loss—Earthquake Form FP 10 40.
- > Limitations on Windstorm or Hail Coverage for Roof Surfacing Endorsement FP 12 09—Includes two options with respect to damage to roof surfacing (e.g., shingles, tiles, cladding) caused by windstorm or hail: (i) changing the valuation basis from replacement cost to ACV, and (ii) excluding cosmetic damage.

### Liability

ISO now has a Limited Product Withdrawal Expense Coverage Endorsement (FL 04 02) for its Farm Liability form, similar to the ISO CGL endorsement. Additionally, ISO is adding several Farm Liability and Farm Umbrella exclusionary endorsements to provide underwriters with the option of removing what may be unwanted exposures:

- > Exclusion—Athletic Activities—Medical Payments Endorsement FL 10 09
- > Exclusion—Injury or Damage from Genetically Modified Beans, Crops, Grains, Seeds, Plants, Shrubs or Trees Endorsement FL 10 64, FB 10 64
- > Exclusion—Injury or Damage from Genetically Modified Animals or Fish Endorsement FL 10 65, FB 10 65
- > Exclusion—Animal Liability FL 10 99, FB 10 99
- > Exclusion—Designated Events—FB 10 69

- > Vacancy restrictions with respect to vandalism and accidental discharge or leakage of water or steam now apply when the property is vacant for 60 days instead of 30 days.
- > Earth movement exclusion has been revised to apply whether the loss is “caused by an act of nature or is otherwise caused”; to encompass man-made causes; and foster consistency with the water exclusion and other ISO Property forms.
- > Utility services exclusion has been broadened to encompass water and communications services (including electronic network access and internet services) and failure of a provider’s utility equipment situated at the insured location.
- > Credit card/EFT card coverage has been revised to provide that all loss related from a series of acts committed by one person is considered a single loss, and to exclude use of credit/EFT cards by household residents or persons entrusted with the cards.
- > Various sublimits have been changed, e.g., increased sublimits for watercraft, off-premises business property, and refrigerated products (not farm property); extension of trailer sublimit to semi-trailers.

### Liability Updates—Follow the CGL and CU

The Farm Liability Coverage Form (FL 00 20) and Farm Umbrella Liability Policy (FB 00 01) include updates that have previously been incorporated into ISO’s CGL and Commercial Umbrella policies to address emerging issues or improve language. Notably:

- > Pollution exclusion has been revised to include exceptions for fuels used to operate mobile equipment and for the release of gas, fumes or vapors from materials brought into a building by contractors.
- > Negligent supervision, hiring and training have been added to the professional liability exclusion.
- > Distribution of material in violation of statutes (CAN-SPAM) exclusion has been amended to also apply to the recording of information in violation of law (FACTA).
- > Personal Injury and Advertising Injury definitions have been revised to include publication “in any manner” to recognize electronic publication; advertisement definition has been revised to include electronic advertisements.

- > Personal Injury and Advertising Injury exclusions have been added to address new areas of exposure, i.e., intellectual property rights, internet-type businesses, chat rooms, and unauthorized use of another’s name or product.
- > Plaintiff attorney fees are now specifically excluded as a supplementary payment.
- > Coverages subject to a sublimit are now excluded under the Farm Umbrella unless the sublimit is scheduled on the Umbrella.

- > Farm Umbrella employment practices exclusion has been amended to refer specifically to malicious prosecution and to apply whether the offense occurs before, during or after employment.
- > More extensive follow form language has been included in Farm Umbrella exclusions that are subject to follow form exceptions.

For more information, refer to ISO Forms Circular LI-FR-2015-031 and related Rules Circular LI-FR-2015-032. ■

### AAIS Introduces New Farm Endorsements

AAIS has filed the several new Farmowners endorsements. Among them:

- > **Mandatory Amendment of Policy Terms Endorsement FO 1310 05 15.** Key changes include:
  - Modifies the Property earth movement exclusion so that it applies whether the earth movement results from a natural cause, a manmade cause, or a combination of the two. Manmade causes are defined and specifically mention hydraulic fracturing.
  - Amends the Property Incidental Coverage for collapse to specify that the collapse must be abrupt.
  - Adds a Liability electronic aggression exclusion.
- > **Mandatory Exclusion—Asbestos GL 4100 05 15.** Excludes BI, PD and clean-up costs.
- > **Optional Roof Surfacing Amendment—Actual Cash Value FO 2001 05 15.** Changes the valuation basis for roof surfacing from replacement cost to ACV.
- > **Optional Exclusion—Cosmetic Damage FO 2002 05 15.** Excludes damage to roof surfacing, siding, doors and windows caused by windstorm or hail when the damage is only cosmetic in nature.
- > **Optional Exclusion—Raw Milk GL 4000 05 15.** Excludes BI and PD arising out of the production, processing, packaging, distribution or sale of raw milk or raw milk products.
- > **Optional Exclusion—Canine GL 4003 05 15.** Excludes BI and PD arising out of direct physical contact with described canines owned by the insured or in the insured’s care, custody or control.

Not all provisions will apply in all states, and the effective date, originally proposed for October 1, 2015, will also vary. Refer to Filing Bulletins 15-0438 and 15-0497 as well as approval bulletins for more details.

## CASE IN POINT



### Clear Wording Beats Artful Pleading

For a good example of exclusion and buyback wording that survived challenge, read this case: In *Liberty Surplus Insurance Corporation v. McFadden’s at Ballpark, LLC 2015 U.S. Dist. LEXIS 89615*, the General Liability and Liquor Liability policies excluded the assault and battery (A&B) hazard, but then were endorsed with an A&B aggregate sublimit of \$200,000. The GL and LL policies were also endorsed to state that defense costs would erode the applicable limits. The coverage buyback for the GL and LL policies defined A&B broadly to include negligent supervision and training.

When two claims based on assaults by security staff arose, the lower federal court in Pennsylvania had no trouble enforcing the exclusion and sublimit. Only the A&B sublimit was available, despite carefully drafted pleadings designed to maximize coverage. If you have A&B, Sexual Abuse and Molestation (SAM) or other forms with similar construction or intent to that discussed here, you might want to see the policy language that worked. Let us know if you would like a copy. ■

## Defining Pollutants—Will New Indiana Pollution Exclusions Work?

by Mindy Pollack, Gen Re's Treaty Department, Stamford

After several losing coverage battles in Indiana, many insurers took stock of the situation and filed Indiana-specific pollution exclusions. These wordings were designed to overcome one hurdle: the need for more specificity in the definition of “pollutants.” The wordings varied, but all made an attempt to identify the materials they consider to be pollutants.

Now we have the first court decision interpreting one of these pollution wordings, and the outcome is not heartening. In *St. Paul F&M v. City of Kokomo*, the U.S. District Court in Indianapolis held that the definition of pollutant was not sufficiently specific to bar coverage of lead, chromium, arsenic and mercury leaking from metal drums.<sup>6</sup> We review the *Kokomo* decision, form filings and consider what lies ahead.

### Kokomo Decision

*St. Paul (Travelers) v. City of Kokomo* is all about insurance coverage under policies spanning an 11-year period. The facts surrounding the claim would certainly meet anyone's concept of pollution and pollutants. The question was whether, under Indiana precedent, the policies' definitions of pollutant applied to the claim for duty to defend and indemnity purposes. Two different policy forms are most relevant to our discussion, with two distinct rulings from the court.

**2007–2011 Policies—Hazardous Material Registers:** The 2007 definition did not name lead, chromium or any the other chemicals as pollutants. Rather, pollutant was defined to include materials “identified as dangerous, hazardous or toxic, or as otherwise regulated, in any federal or Indiana environmental, health protection, or safety law.” It went on to provide examples of federal laws, such as the Clean Water Act and Toxic Substance Control Act, and referenced the Indiana environmental and health laws but without actual examples.

**Court:** This “general incorporation” of state and federal laws is “insufficient to comply with Indiana's stringent standard” that a policy “specify what falls within its pollution exclusion.” It did not reference any of the substances found or being tested at the site. The court did not think the Indiana Supreme Court's favorable comments on a similar wording (from the *Flexdar* decision) were clear enough to draw any conclusion that the 2007 definition meets the specificity test.

**2011–2013 Policies—Partial Material List:** The 2011 definition did name some specific substances, including lead, chromium, arsenic and mercury. However, it did not attempt to name every hazardous material found in regulatory registers, and it did not incorporate any federal or state material lists, as did the 2007 version.

**Court:** There is no coverage for the four specific chemicals. However, the site is still being tested for 147 substances, and some are not listed in the exclusion. Until all the chemicals can be found and compared to the definition of pollutant, the insurer is still on the hook.

### Variety of Forms

Not all of the new Indiana pollution exclusions are the same. We found over a dozen introduced in the past few years. Thinking about the federal court's comments in *Kokomo*:

- > **Named Substances**—Several filings contain very long lists of hazardous substances, and then add an “all other” catchall for similar materials.
- > **Named Substances and Named Laws/Registers**—In varying lengths, these forms list specific materials and then add all substances described in named statutes, related regulations and registers.
- > **Named Substances, Named and Unnamed Laws/Registers**—All of the above, but with an additional catchall for other unnamed laws and regulations applicable to hazardous materials.
- > **Named Substances, Registers and Schedule**—All of the above, but with a schedule for ability to list additional materials.
- > **Statutory Violation Exclusion**—Instead of excluding pollution, this form excludes all liability arising from named environmental statutes.

Most of these filings include one or more additional limitations to the effect that the exclusion will apply regardless of whether:

- > The substance is specifically identified in the definition
- > The substance is innocuous in other contexts

- > The substance has any function in or is a major source of liability for insured's business
- > The insured produces the pollutant
- > The insured considers the substance to be a pollutant

It is clear that there was no single response to the Indiana challenge. Indeed, many carriers stayed with their existing forms. Others borrowed from or followed ISO (schedule to list materials) or AAIS (named materials, incorporated hazardous material registers, and schedule to list materials). The AAIS approach is common to several forms we reviewed. We cannot say if any wordings would have fared better than the Travelers policy did in the same federal district court.

### More Decisions Will Come

The court in *Kokomo* denied reconsideration on November 25, and we fully anticipate an appeal. The federal appellate panel has upheld some pollution exclusions that probably would have been shot down by this court, so an affirmance is not automatic. However, state courts have the final word on questions of contract and insurance policy interpretation. Coverage litigation will eventually test the newer wordings—likely some of the variations—in state courts and perhaps the Indiana Supreme Court.

One legal blogger quipped that had the insurer actually listed every material named in federal and state laws and regulations, it could run thousands of pages. Whether accurate or not, the writer makes a good point. Travelers argued that it would be unrealistic to identify, by its “exact name,” every excluded substance. References to a class of substances, such as petroleum derivatives, did seem to get the court's acceptance. What will not work, at least in this federal district court, is the absence of any specific materials or classes of materials.

This is the first and certainly not the last word on pollution exclusions in Indiana. We look forward to reading what the courts say in the future. ■

### Form Filings Available— Definition of Pollutant

We can provide you with the handful of filed forms used for this article and discuss wording options. All of the referenced filings were taken from public databases. There are surely more, and if you have any to share, we welcome the opportunity to read it. Just contact your Gen Re account executive or any of the *Policy Wording Matters* authors to obtain or share any filings.

## BUREAU UPDATE

### ISO Changes the Definition of “Residence Premises”

ISO has released new endorsements effective October 1, 2015 that revise the definition of “residence premises” in the HO Program. The changes are the result of inconsistent court cases interpreting the “where you reside” language in the definition of “residence premises.” The purpose of the endorsements is to provide consistency in applying coverage under the forms. The two changes are:

- > Mandatory endorsements HO 06 48 10 15, HO 17 48 10 15 and MH 04 26 10 15 amend the definition of “residence premises” to be satisfied if the insured resides at the residence on the inception date of the policy period.
- > Optional endorsements HO 06 49 10 15, HO 17 47 10 15 and MH 04 27 10 15 allow the insurer to temporarily remove the residency requirement in the definition of “residence premises.” Insurers can include a start date and termination date in which the residency requirement will be temporarily removed.

The endorsements are for all jurisdictions except Hawaii, North Carolina, Virginia, Puerto Rico, and Washington. ISO has also announced the availability of a residence premises questionnaire policy writing support form to be used with these endorsements. ■





## The Importance of Reviewing Endorsements With the Entire Policy

by Christine Unger, Gen Re's Policy Wording Unit, Stamford

Endorsements are often helpful in tailoring coverage under an insurance policy to a particular risk and can broaden or lessen coverage depending on the intent of the underwriter. However, when endorsements are placed on a policy without careful consideration as to how the endorsement may affect the other portions of the policy, they can have coverage consequences not contemplated by the underwriter and inadvertently provide coverage for claims that were meant to be excluded.

In this article we discuss several recent court cases in which the court interpreted endorsements contrary to the alleged intent of the insurance company, resulting in unintended coverage.

### The Court Ignores the Intent of the Parties

In a recent Texas appellate ruling, *Illinois Union Insurance Co. v. Sabre Holdings Corp.* the court interprets a conflicting endorsement.<sup>7</sup> The policy at issue was a follow form policy, which stated that the policy “provide[d] insurance coverage to the insureds in accordance with the terms, definitions, conditions, exclusions and limitations of the followed policy, except as otherwise provided herein.” The insurer argued that since the excess policy was a follow form policy, the policy was a claims-made and reported policy, the same as the underlying policy. Therefore, the insurer denied coverage when the insured reported a claim outside the coverage period.

Despite policy language to the contrary, the court ruled that the excess policy was not follow form as to the notice provisions because of a conflicting endorsement that was attached to the policy. This endorsement added a non-follow form provision to the insuring agreement of the policy, and amended the end of the Insuring Agreement to state that the “[i]nsurer shall not provide insurance coverage to the insureds in accordance with the terms and conditions” of the underlying policy. The court concluded that the policy follows form to the underlying policy in connection with the definitions, exclusions and limitation, but not the terms and condition. The court went on to state that the reporting requirements are conditions, and therefore the excess policy does not follow form to the underlying policy. The court acknowledged that it may have been the intent of the insurer to follow form on the reporting requirements, but because

an endorsement is attached to the policy which conflicts with that intent, the only way to settle the ambiguity is against the intent of the insurer and to rule that the policy does not follow form as to the terms and conditions of the underlying policy.

### Competing Endorsements Are Interpreted in Favor of the Insured

In a recent Superior Court of Vermont case, *The Sharon Academy, Inc. v. Wieceorek Ins.*, the court held that in the case of conflicting endorsements, the endorsement that is more favorable to the insured will be interpreted as being part of the policy.<sup>8</sup> This was a case of sexual molestation under an umbrella policy. The umbrella contained two endorsements, one that provided coverage for sexual molestation and another endorsement that did not provide coverage. The insurer argued that the endorsement that did not provide sexual molestation coverage was dated later, and therefore, should be the controlling endorsement. The court rejected this argument stating that it is not entirely clear that the numbers at the bottom of the endorsement are dates. The court held that “the conflicting endorsements present an ambiguity, which the court interprets in favor of coverage.”

### The Plain Language of the Endorsement Provides Exactly What It Says

In our last case, the U.S. Court of Appeals for the Fourth Circuit interpreted an additional insured (AI) endorsement. In *Capital City Real Estate v. Certain Underwriters at Lloyd's London*, the general contractor of a construction project, Capital City, subcontracted the foundation, structural and underpinning work to Marquez.<sup>9</sup> Capital City had Marquez add them as an additional insured under their GL policy by attaching ISO endorsement CG 20 10 07 04. While Marquez was working on the underpinning of the construction project, the shared wall with the adjacent property collapsed.

A subrogation complaint was filed by the neighboring property's insurance carrier against Capital City and did not raise any allegations of negligence against Marquez. Coverage was denied by Marquez's insurer for Capital City because the complaint did not mention any wrongdoing on behalf of Marquez. The endorsement only provided coverage to Capital City “with respect to liability for...‘property damage’...caused

in whole or in part by the acts and omissions of the Named insured or...the acts or omissions of those acting on behalf the Named insured.” Marquez’s insurer stated “that the scope of coverage is limited to Capital City’s vicarious liability for Marquez’s acts of omissions.”

The court stated that if the parties had intended for coverage to be limited to vicarious liability they could have stated that in the endorsement. Therefore, the court held that the endorsement did not bar coverage for Capital City because

extrinsic evidence showed that the collapse could have been caused by Marquez. The court held “that the plain language of the Endorsement provided for exactly what is says.”

These cases remind us that insurers need to pay attention to the wording of the endorsements that they attach to their policies. In particular, insurers should review policies to make sure that none of the endorsements conflict with each other and that the endorsements clearly express the intent of the coverage. ■

## HOT ISSUE



### Home Sharing

Two developments may be of interest to HO carriers following the share economy and home sharing trends.

#### ISO Issues Policyholder Notice

ISO has issued a home-sharing services policyholder notice for its Homeowners Program to highlight provisions in the Homeowners Policy (HO) that may limit or exclude coverage in the event the insured participates in a home-sharing service. The notice points out that an insured’s HO may limit or exclude coverage when the insured is participating in a home-sharing service. The notice gives a few examples of what may not be covered. Examples include: loss to a structure, other than the insured’s residence; loss of personal property of renters; theft of the insured’s personal property; and liability for bodily injury or property damage if the insured frequently rents out his or her property. The notice also warns insureds that their HO policy may also be limited when the insured is a guest. The notice urges insureds to review their policy and get agent input about potential coverage gaps.

As is typical of policyholder notices, the form has not been filed in with any insurance department. The notice is available in all jurisdictions except: Hawaii, Puerto Rico, Washington, North Carolina and Virginia.

#### Airbnb Expands Insurance Program

Earlier this year Airbnb launched the Home Protection Insurance Program in the U.S. The program initially went into effect on January 15, 2015 and provided *excess* coverage to Airbnb hosts; however, effective October 22, 2015 the program was expanded to provide *primary* coverage for Airbnb hosts. The program is offered at no cost to the host and provides \$1,000,000 in coverage. The coverage applies to third-party bodily injury or property damage claims and does not apply to the host’s own property.

If the host is looking for coverage for his or her own property there is a separate Host Guarantee (this guarantee has been an Airbnb policy for some time). Host Guarantee is not classified as insurance by Airbnb, and is not a replacement for HO insurance, but does provide some protection for damages caused by guests to the host’s own property.

By contrast, HomeAway suggests that its hosts purchase HomeAway Assure, which is a CBIZ Insurance Program. HomeAway Assure is a tailor-made product that provides both property and liability coverage for vacation rentals. Some examples of the coverage provided under HomeAway Assure include coverage for damage to the host building and contents caused by a guest, loss of income, and liability coverage in the event of injury or death of a guest. ■

## LEGAL ROUND-UP



### States Adopting or Updating E-Delivery

The legislative and regulatory trend to allow emailing and web posting of policy documents continues, so that roughly half the jurisdictions recognize the process. In general, the laws require policyholder consent, and contain various notice, access and archive requirements. The latest states to join the movement are:

- > **Alabama**—SB 292, effective September 1, 2015
- > **Illinois**—SB 1680, effective January 1, 2016
- > **Iowa**—HB 504, effective July 1, 2015 (clarification of existing law)
- > **Oregon**—SB 578, effective January 1, 2016
- > **Vermont**—Reg. I-2014-01, effective September 18, 2015

### Alaska Eases Multiple Filing Requirements

Where insurers are making the same change for more than one type of policy, new Regulatory Order R 15-06 relieves them of making a separate filing for each form. The change must be identical or substantially similar to qualify for the exemption. The regulation, which applies to property and casualty business, took effect July 29, 2015.

### Colorado Issues Auto Step-Down Rule

New Regulation 5-2-17 establishes notification and other rules for auto policies that limit liability coverage for permissive users. Under the rule, insurers must provide a required notice per the size and text indicated. Medical payments may not be reduced by such provisions. The regulation took effect October 15, 2015.

### Maryland Clarifies Dog Breed Exclusions Standards

The Maryland DOI issued Bulletin 15-25 to provide guidance on dog breed exclusions, a hot topic in the state. Insurers may exclude losses caused by specific breeds or specific mixed breeds, provided the insurer can justify the underwriting standard under statutory requirements. Insurers may use Maryland-specific experience, national statistics or “other appropriate data.” The burden is on the insurer to show that the underwriting standard is justified. The Bulletin took effect on September 28, 2015.

### New York to Study Anti-Concurrent Causation Clauses

A bill passed in New York, AB 453, commissions a study on use of anti-concurrent causation (ACC) clauses with regard to sewer back up coverage in HO policies. The analysis must include, among other issues, the effects of prohibiting ACC clauses in sewer back up policies/endorsements. The report is due by January 1, 2017.

### Oklahoma Requires Earthquake Coverage Notice

In response to the growing number of earthquakes and a possible link to fracking, the DOI has issued Bulletin 2015-04 mandating a policyholder notice explaining coverage and exclusions. The “clarifying notice” explains what is or is not covered regarding loss from fracking-related activity. The notice must be sent by P/C insurers to policyholders within 45 days of the Bulletin date, which was October 20, 2015. The bulletin also makes clear that it does not affect whether or not insurers offer earthquake coverage.

### Rhode Island Revises Coverage Change Notice

Under Regulation 97, the Rhode Island DOI has issued guidance for compliance with the material change notice law enacted earlier in the year. The notice is required at least 30 days before expiration/renewal date, and the regulation requires one or more methods for alerting insureds that changes are being made by the insurer. Until a compliant notice is provided, the expiring policy remains in effect. The regulation took effect July 1, 2015 and applies to personal lines auto and homeowners/residential fire policies.

### Texas Amends Timing of Policy Delivery

For personal auto and homeowners policies, insurers must deliver the policies no later than the 30th day after the effective date, or if requested by the policyholder, within 15 days of the written request. Other provisions address short-term policy requirements. The revisions in SB 956 took effect September 1, 2015. ■

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*We send you an unambiguous wish  
for a happy and safe holiday season.*

## PRIOR AND PENDING

Our June 2015 *Policy Wording Matters* publication discussed these issues:



- > Drone Exposures and New ISO Wordings
- > Claims-Made and Reporting Triggers
- > ISO Personal Umbrella Program Updates
- > Expense Wording and Claim Costs

If you missed it and would like a copy, just contact your Gen Re representative or ask any of the *Policy Wording Matters* authors.

### Endnotes

- 1 *OneBeacon Amer. Ins. Co. v. Urban Outfitters*, 21 F. Supp. 2d 426, 437 (E.D. Pa. 2014), aff'd, — Fed App'x — (3d. Cir. Sept. 15, 2015).
- 2 2015 WL 5680134 (D. Mont. Sept. 25, 2015).
- 3 See *National Fire Ins. Co. of Hartford v. NWM-Oklahoma, LLC*, 546 F. Supp. 2d 1238 (D. Okl. 2008).
- 4 35 F. Supp. 2d 765 (E.D. Va. 2014).
- 5 83 A.3d 664 (Conn. App. Ct. 2013), aff'd, 115 A.3d 458 (Conn. 2015).
- 6 2015 U.S. Dist. LEXIS 82465.
- 7 02-14-00130-CV (Tex. App. 2015).
- 8 2015 Vt. Super. LEXIS 76.
- 9 No. 14-1239 (4th Cir. June 10, 2015).
- 10 2015 U.S. Dist. LEXIS 89615.
- 11 No. 14-1270, 2015 WL 4569612 (10th Cir., July 30, 2015).
- 12 2015 U.S. Dist. LEXIS 78559.

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