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## The Anatomy of Legal Malpractice Insurance: A Comparative View

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# THE ANATOMY OF LEGAL MALPRACTICE INSURANCE: A COMPARATIVE VIEW

ROBERT W. MINTO, JR.\* AND MARCIA D. MORTON\*\*

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## I. INTRODUCTION

Malpractice and malpractice insurance are not exactly what the legal profession considers cocktail party conversation. Seldom does a discussion of malpractice occur at a partnership meeting except when someone has to confess to a potential loss, or when the subject of how to afford this year's premium creeps sullenly onto the agenda. Avoiding the subject is to ignore history. The legal profession is quickly gaining on the medical profession's twenty year lead into the quagmire of malpractice litigation which has kept so many in the bar busy and prosperous.<sup>1</sup>

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1. R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* § 6 (1981) (there were almost as

Attorneys, by their own teaching and conduct, have increased the standard of care to which the public, and now the courts, hold them in determining if the attorney adequately and properly represented a client in an ever-widening number of legal matters and transactions. There is a much higher degree of sophistication on the part of the legal consumer; they have learned well as attorneys have taught them that where there is an injury, you look for a "wrong" and then for "who" will compensate them. The ABA, through its Standing Committee on Lawyers' Professional Liability Insurance,<sup>2</sup> in conjunction with many commercial insurers and the attorney-owned companies represented in NABRICO (the National Association of Bar Related Insurance Companies), has amassed a vast quantity of data on the subject. It covers the whole spectrum, from what areas of practice represent the highest degree of exposure, to the profile of the attorney and the firms with the greatest degree of exposure.

Our mortality is before us as we recognize that each new attorney beginning practice in 1988 faces an average of three malpractice claims before retirement.<sup>3</sup> It's not hard to make a mistake — a simple "yes" to any one or more of the following questions makes an attorney a prime candidate for a malpractice claim.<sup>4</sup>

### 1. Have you ever missed a deadline?

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many reported legal malpractice decisions in the 1970s as were reported in the entire history of American jurisprudence).

2. The Standing Committee on Lawyers' Professional Liability Insurance and its staff have dedicated countless years of study, research, and teaching to the subject of the causes and cures for the specific incidence of legal malpractice. Inquiries about the committee, its work, and programs should be directed to: Sheri Swetin, ABA Standing Committee on Lawyers' Professional Liability Insurance, 750 North Lake Shore Drive, Chicago, Illinois, 60611.

3. Mallen, *Cutting Through the Malpractice Maze*, THE BRIEF, Summer 1986, at 10.

4. See ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST ATTORNEYS 6-7 (1986) [hereinafter PROFILE OF LEGAL MALPRACTICE]. The *Profile of Legal Malpractice* provides four major hazard areas for malpractice: (1) Administrative errors - 26% of claims; (2) Substantive errors - 44% of claims; (3) Client relations errors - 16% of claims; (4) Intentional wrongs - 12% of claims. *Id.* at 6-7. The remaining 2% comprise miscellaneous errors. *Id.* at 6.

Among the administrative errors, almost half (43%) are due to failure to calendar properly. Additionally, 21% of these alleged errors are attributed to procrastination in performances or lack of follow-up. Among substantive errors, failure to know or properly apply the law (23%), inadequate discovery of facts or inadequate investigation (21%), planning error in choice of procedures (19%), and failure to know or ascertain deadline correctly (16%) are leading offenders. Of client relations errors, over half (55%) are attributed to failure to obtain client's consent or to inform client and more than one third (36%) to failure to follow client's instructions. Intentional wrongs are primarily split between malicious prosecution or abuse of process (33%) and fraud (33%).

*Id.*

2. Have you ever neglected to follow-up on a matter?
3. Have you ever failed to know or properly apply the law?
4. Have you ever failed to discover all the facts?
5. Have you ever made a planning or strategy error?
6. Have you ever ignored the client's instructions?
7. Have you ever failed to obtain the client's consent or to adequately inform the client?
8. Have you ever given the wrong advice?

Not many attorneys can truthfully answer "no" to all these questions, and frankly, some feel that attorneys are not aggressive advocates of their clients' causes if they do not push close to the edge in some areas. These fine distinctions mandate that the profession can not sit by without educating itself in every aspect of this burgeoning area.

Attorneys must understand the causes, the cures, and more importantly in these days of rising cost and shrinking coverage, the obligation to their client to be financially responsible and accountable for their errors. Attorneys can not deal with these issues without a clear understanding of the coverage and language contained in today's malpractice insurance policies. Each carrier has its own style, set of priorities, and loss experiences to color their strategies. These all contribute to the unique language of each policy.<sup>5</sup>

In this day and age, the policy variations become increasingly important as firms analyze their coverage in the light of specific firm needs and circumstances. While in the past attorneys saw pretty much the same treatment from all carriers, they now must look at exclusions, limits of liability, whether the defense costs are within the limits, and the various deductible options.

Even though the coverage we have may give us peace of mind on a momentary basis, to alleviate the long-term effect of malpractice claims requires the more permanent solution — that of prevention. The existence of malpractice insurance does not prevent malpractice, attorneys do. The only answer to the ever-rising costs and decline in coverage rests with attorneys; nobody else can solve the problem.<sup>6</sup>

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5. It is essential from a human and health perspective that attorneys learn to deal with the stress and distress of facing a malpractice suit. It is not fun to worry about what our colleagues will think of us as we march to the courthouse, files in hand, to defend ourselves against the claims of those clients that we once probably called friends.

6. See generally T.P. BROWN III, HOW TO AVOID BEING SUED BY YOUR CLIENT (1981) (ABA Monograph series, section of Economics of Law Practice).

This article seeks to provide a very brief, albeit deep body, of "malpractice insurance" knowledge which will enable attorneys to analyze their firm's needs, select an appropriate policy, and custom-fit the coverage. It consists of four major parts: (1) a historical overview of attorneys' professional liability insurance;<sup>7</sup> (2) a review of policy provisions which compares, in detail, the four policies available in North Dakota;<sup>8</sup> (3) a discussion of the role reinsurance plays in the arena of attorneys' malpractice insurance;<sup>9</sup> and (4) some views and suggestions to help firms apply these principles to custom fit coverage to their specific needs.<sup>10</sup>

Although this article focuses on malpractice coverage issues and the technical nuances of the policies and not specifically the techniques for malpractice prevention, it must, at the very least, underscore the need for attorneys to learn how to practice smart and engage in malpractice prevention each and every day. Face it, we now live and practice in a defensive world and should develop practical skills that will permit us to survive. While many may well view the preceding eight questions as very basic ones which any competent attorney could avoid, factually, we will all fall down from time to time. Unless attorneys make a very conscious and continued effort to practice defensively so as to prevent a "yes" answer to any of those so simple questions, we are destined to fail and be sued for our lack of effort. A malpractice prevention management program should have the highest priority in every law firm, for even though malpractice insurance remains quite widely available today, a law firm which develops an adverse claims history will face substantial premium increases coupled with policy restrictions at renewal. Moreover, depending on the circumstances and the frequency of claims, the carrier will likely issue a non-renewal notice or even consider mid-term cancellation. A word of emphasis — once a firm has a policy cancelled or non-renewed, the coverage options available dry up very quickly, and if available at all, the cost becomes prohibitive. Here, as always, "an ounce of prevention is worth a pound of cure."

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7. For a discussion of the historical overview of attorney's professional liability insurance, see *infra* notes 11-24 and accompanying text.

8. For a discussion of the specifics of the four major legal malpractice policies available in North Dakota, see *infra* notes 25-366 and accompanying text.

9. For a discussion of the role of reinsurance in attorney malpractice insurance, see *infra* section containing note 353.

10. For a discussion of how to apply the principles of this article to custom fit coverage for a specific firm, see *infra* notes 354-66 and accompanying text.

## II. OVERVIEW OF PROFESSIONAL LIABILITY INSURANCE

The existence of attorneys' professional liability insurance in the United States is a post-World War II phenomenon.<sup>11</sup> Up until then, domestic insurance companies did not offer such coverage. The exception to the rule came in the form of the "Solicitor's Indemnity Policy" written by the various underwriter syndicates of Lloyds of London.<sup>12</sup> In the time span from the end of World War II to today, attorney awareness of their potential liability for professional malpractice has increased along with the consequential need for an expanded market for such coverage. For years we have lived in an environment of relative plenty; coverage was cheap and obtainable with a simple call to our local agent — not so anymore. The underwriting standards are tough, the cost relatively high given the levels of income of most members of the bar, and in many states, coverage availability is marginal if not nonexistent.<sup>13</sup>

Supporting the need for liability insurance, the *Profile of Legal Malpractice*, published by the Standing Committee on Lawyers' Professional Liability of the American Bar Association, displays alarming malpractice statistics.<sup>14</sup> The statistics, derived from an analysis of 29,227 claims asserted against attorneys from January 1983 through September 30, 1985,<sup>15</sup> portray some real insights into attorney errors and how to correct the problem. According to the ABA study, 34.9% of all legal malpractice claims are filed against solo practitioners.<sup>16</sup> An additional 43.6% are filed against firms with two to five attorneys.<sup>17</sup> Despite these figures, it is estimated that nearly 40% of attorneys in some states are practicing without any coverage.<sup>18</sup> Those who are currently practicing without professional liability coverage ought to be aware of the attorney's ethical, if not moral obligation to be financially responsible for the injuries inflicted upon clients.<sup>19</sup>

In the past insurance companies offered two forms of malprac-

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11. Annotation, *Lawyers' Professional Liability Insurance*, 84 A.L.R.3d 187, 190 (1978).

12. *Id.* (citing Dautch, *Lawyers' Indemnity Insurance*, 46 COM. L.J. 412, 412 (1941)).

13. Mossner, *Legal Malpractice Insurance Trends - The National and Michigan Experience*, 65 MICH. B.J. 550, 551 (1986).

14. PROFILE OF LEGAL MALPRACTICE, *supra* note 4, at 20.

15. *Id.* at 3.

16. *Id.* at 20.

17. *Id.*

18. Spangenberg & Searns, *The Attorney's Professional Liability Insurance Alternatives*, 17 COLORADO LAWYER 257 (Feb. 1988).

19. See C. WOLFRAM, MODERN LEGAL ETHICS § 5.6.8, at 240 (student ed. 1986)(citing

tice insurance coverage: "occurrence" and "claims-made."<sup>20</sup> The "occurrence" policy provided the attorney coverage as to acts, errors, or omissions which occurred during the policy period in rendering professional services as an attorney, regardless of when the claim was made.<sup>21</sup> Currently in this country, carriers only offer "claims-made" coverage, protecting the attorney for any acts, errors, or omissions, where the claim is first made, and in some cases, reported during the policy period.<sup>22</sup> To limit their exposure and encourage the insured to report claims to prior carriers, under a "claims-made" form, insurance companies typically exclude coverage for claims made during the policy period where the attorney, prior to the effective date or loss inclusion date of the policy, knew or should reasonably have foreseen that the claim might accrue.<sup>23</sup> This can create all kinds of problems for the insured in interpreting when the attorney knew or should have known that a claim would probably arise. This issue and others relating to the exclusions that affect the issue of coverage will be more fully developed in the portions of this article dealing with policy comparisons and custom fitting coverage.

Attorneys should know what their policy covers and does not cover, understand the case law addressing the various policy provisions, and in particular, how these two intellectual elements fit within the firm's areas of practice and special expertise.

Cases involving interpretation of attorney malpractice insurance occur in a variety of circumstances; however, the two most prevalent types involve: (1) the attorney suing a liability insurer for expenses incurred in defending a malpractice suit which the insurer refused to defend, and (2) the insurer seeking a declaratory judgment that an attorney's acts or omissions are not covered by the provisions of the policy.<sup>24</sup>

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Boyer & Conner, *Legal Malpractice and Compulsory Client Protection*, 29 HAST. L.J. 835 (1978).

20. Annotation, *supra* note 11, at 190.

21. *Id.*

22. Kroll, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 UCLA L. REV. 925, 928 (1975).

23. See *infra* Appendix B: ATTORNEYS LIABILITY PROTECTION SOCIETY, INC., RISK RETENTION GROUP PROFESSIONAL LIABILITY POLICY, at B-6 ("Exclusions," (j)) [hereinafter ALPS]; HOME, PROFESSIONAL LIABILITY INSURANCE POLICY, LAWYERS (H36581F Ed. 5-86), at B-14 (§ B, art. I(b)(2)) [hereinafter HOME]; CNA, LEGAL PROFESSIONAL'S LIABILITY POLICY (General Conditions: G-41500-B, ED. 02/85; Lawyers Agreement G-42072-D, ED. 09/85), at B-28 (art. II(D)) [hereinafter CNA]; ST. PAUL FIRE & MARINE INS. CO., LAWYERS PROFESSIONAL LIABILITY PROTECTION - CLAIMS MADE (43478 Ed. 9-84), at B-33 ("When A Claim Is Covered," "1. Prior acts") [hereinafter ST. PAUL].

24. Annotation, *supra* note 11, at 191.



### III. POLICY FORM COMPARISON

Educating oneself to understand the coverage provided is not as simple as sitting down and reading the policy, although that's clearly the best place to start. This portion of the article uses a transactional approach to comparing the four attorney professional liability insurance policies most commonly issued in North Dakota,<sup>25</sup> and for that matter, most of the surrounding states:<sup>26</sup> Attorneys Liability Protection Society, Inc., A Risk Retention Group (ALPS), The Home Insurance Co. (Home), CNA Insurance Co. (CNA)<sup>27</sup> and St. Paul Fire & Marine Insurance (St. Paul).<sup>28</sup> References to and discussions of relevant case law is interspersed throughout the article to help bring into focus how the courts grapple with often ambiguous policy provisions. Rather than trying a direct section-by-section comparison of the policies, this section deals with six broad concepts: (a) the insured,<sup>29</sup> (b)

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25. Attorneys with policies issued outside the State of North Dakota will find that the policy provisions indicated here may differ from those found in their specific policies. Because of specific regulatory considerations inherent to each of the individual state insurance commissioners, the forms may be altered or endorsed to deal with such concerns. Any effort to compare these policies to a firm's specific policy will require a direct comparison of the form identification numbers found on the policies for the following reasons: (1) Because ALPS is a Risk Retention Group and subject only to policy form review by the Commissioners of the State of Nevada, it has only one policy form and therefore carries no identification number; (2) The compared Home policy carries the number L10035 Ed.86 in the lower right-hand corner of the front page, and the North Dakota endorsements carry the number H37028 f Ed. 8/87 in the lower left-hand corner; (3) The CNA policy carries the number G-41500-B (Ed. 02/85) on the front cover in the lower left-hand corner and the number G-42072-D (Ed. 09/85) on the first page of the Professional Liability Coverage Part-Lawyers in the lower left-hand corner; (4) The St. Paul policy form carries the number 43478 Ed. 9-84 on the front page in the lower left-hand corner.

26. This is true in all the surrounding states, except Minnesota, which has an attorney-owned captive known as Minnesota Mutual Lawyers Insurance Company. A "captive" is a limited purpose insurance company organized under the laws of a congenial off-shore jurisdiction or under laws of a congenial domestic jurisdiction to provide specific levels of insurance to insureds who are usually the owners and the insureds of the company. Jacobson, *Self-Insurance Using Captives and Risk Retention Groups and Purchasing Groups*, in CURRENT PROBLEMS AND ISSUES IN LIABILITY INSURANCE (1987) (Practicing Law Institute, Commercial Law and Practice Course Handbook series) (WESTLAW, Ins. library, text and periodical file). "The major purpose of the captive is to provide some or all of the coverages which commercial insurers cannot or will not provide, or which are unaffordable or 'overpriced.'"

Minnesota's captive has a substantial share of the market in that state, but the author has been informed that it has only a minimal presence in North Dakota where it may insure some multi-state firms located along the eastern edge of North Dakota. While at first the policy form from Minnesota's captive was going to be included in the comparison for the article, this section quickly became too unwieldy. Therefore, those comparisons were eliminated from the text in order to make the comparisons of the more relevant policies more clear and concise.

27. Effective August 1, 1988, CNA changed the form of policy that it uses in North Dakota. For purposes of this article, the new CNA policy has been used for the article. North Dakota attorneys with CNA policies issued prior to that date will find that they have different coverage than what is described throughout this article.

28. See *infra* Appendix B: ALPS at B-1; HOME at B-13; CNA at B-24; ST. PAUL at B-32.

29. For analysis of policy provisions relating to "the insured," see *infra* notes 36-68.

coverage,<sup>30</sup> (c) exclusions,<sup>31</sup> (d) defense and settlement of claims,<sup>32</sup> (e) liability limits,<sup>33</sup> and (f) conditions and limitations;<sup>34</sup> drawing from multiple sections of the various policy forms to clearly focus on the issues. Verbatim copies of all four of the policies are attached as appendices to this article for ease of reference.<sup>35</sup> It will prove helpful to at least preliminarily review these policies before continuing with the next section of this article.

### A. THE INSURED

In reviewing the various policies, the definition of "insured" is probably one of the most important in that a claims-made policy not only focuses on the present configuration of the firm, but also its past. The firm should be viewed as a whole entity made up of several different parts: its partners, stockholders, attorneys, paralegals, and staff, both past and present. The definition of "insured" usually comes in several parts and will vary from policy to policy. All the policies provide coverage for persons or entities named in the declaration, and generally, any predecessor firm.<sup>36</sup> Some of the policies list only the insured firm in the declaration and deal with the insured attorneys in a generic way in following subparagraphs,<sup>37</sup> while others list the insured attorneys.<sup>38</sup> This becomes quite significant depending upon how the remainder of the policy deals with additions and deletions from the firm. For example, coverage for new associates and lateral hires can fall through the cracks in certain limited circumstances. Fortunately, all four of the subject policies handle this problem with omnibus inclusive language.<sup>39</sup> The issues of whether and when you have to pay for additions or whether you will receive a return of premium

30. For analysis of policy provisions relating to "coverage," see *infra* notes 69-147.

31. For analysis of policy provisions relating to "exclusions," see *infra* notes 148-277.

32. For analysis of policy provisions relating to "defense and settlement of claims," see *infra* notes 278-97.

33. For analysis of policy provisions relating to "liability limits," see *infra* notes 298-313.

34. For analysis of policy provisions relating to "conditions and limitations," see *infra* notes 314-52.

35. See *infra* Appendix B. For comparison of the language of the policies while reviewing this article, it may be convenient to photocopy and enlarge the policies printed in Appendix B.

36. *Infra* Appendix B: ALPS at B-5, B-8 ("Insuring Agreements," art. IV; "Conditions," art. I(j)); HOME at B-14 (§ A, art. I); CNA at B-30 ("Lawyers Agreement," art. IV, "You or Your Means"); ST. PAUL at B-33 ("Who Is Protected Under This Agreement").

37. *Infra* Appendix B, ALPS at B-5 ("Declaration;" "Insuring Agreements," art. IV).

38. *Infra* Appendix B: HOME at B-14 (§ A, art. I); CNA at B-30 ("Lawyers Agreement," art. IV, "You or Your Means"); ST. PAUL at B-33 ("Who Is Protected Under This Agreement").

39. *Infra* Appendix B: ALPS at B-5 ("Insuring Agreements," art. IV(c) & (e)); HOME at B-14 (§ A, art. I(a) & (d)); CNA at B-30 ("Lawyers Agreement," art. IV, "You or Your

for attorneys who leave the firm is less clear and should be explored carefully.

### 1. *Predecessor Firms*

While all four policies cover the easily identifiable persons or entities named in the declaration, the policies vary with respect to coverage for "predecessor firms."<sup>40</sup> The issue in relation to "predecessor firm" language in a policy is whether a policy which names the successor firm and its members as the insured will cover claims made against the predecessor firm and members no longer with the successor firm. As a consequence of the varying treatments of the "predecessor firm," attorneys should evaluate their firm's history.

ALPS and Home define predecessor firms as "any attorney, law firm or professional corporation engaged in the private practice of law to whose financial assets and liabilities the firm listed as the Named Insured in the Declarations is the majority successor in interest."<sup>41</sup> CNA defines "predecessor firm" as a "partnership or professional corporation, which has: a) undergone dissolution; and b) at least 50% of the lawyers in such firm are still affiliated with the *named insured* [successor firm]."<sup>42</sup>

The St. Paul policy approaches the issue differently by providing coverage for any individual, partnership, joint venture, professional association, or corporation named in the introduction, members of such professional corporations or associations, stockholders, and employed lawyers.<sup>43</sup> In addition, the St. Paul policy stipulates that the coverage applies "even if you have changed your firm name from what it was."<sup>44</sup> This language is at best ambiguous. The policy provides no definitive guidelines relating to what constitutes a name change, in contrast to the ALPS, Home, and CNA policies.

Consider the situation where a successor firm, listed as the "Named Insured" in a policy declaration, evolved from a prede-

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Means"); ST. PAUL at B-32, B-33 ("What This Agreement Covers;" "Who Is Protected Under This Agreement").

40. Generally speaking, a predecessor firm is a law firm which existed prior to a split or restructuring. The firm which replaces the predecessor firm will be referred to as the successor firm throughout the remainder of the article.

41. *Infra* Appendix B: ALPS at B-8 ("Conditions," art. I(j)); HOME at B-14, (§ A, art. I(b)). Home inserts "legal" before corporation and deletes the word "private" before "practice of law."

42. *Infra* Appendix B, CNA at B-29 ("Lawyers Agreement," art. IV., "Predecessor Firm").

43. *Infra* Appendix B, ST. PAUL at B-33 ("Who Is Protected Under This Agreement").

44. *Id.*

cessor law firm which dissolved. Assume that the policy affords "prior acts" coverage,<sup>45</sup> that fifty-five percent (55%) of the predecessor's firm's assets remained with the successor firm, while only ten percent (10%) of the partners (none of whom were named partners) and fifty percent (50%) of the associates and staff of the predecessor firm remained with the successor firm, that the firm name (at least partially) went with another group of partners, and that there was no formal dissolution of the former partnership. The predecessor firm is now named in a lawsuit stemming from the acts, errors, or omissions of a retired former partner, who never became a partner or employee of either of the successor firms.

Under this scenario, the four policies treat coverage differently. If insured by ALPS or Home, the policy extends coverage to the predecessor firm because the successor firm remains the majority successor in interest of the assets and liabilities of the predecessor firm.<sup>46</sup> If insured with CNA, the policy extends coverage to the predecessor firm because at least 50 percent of the lawyers of the predecessor firm are affiliated with the successor firm.<sup>47</sup> In contrast, if insured by St. Paul, a literal reading of the policy would not extend coverage to the predecessor firm because the successor firm is not just the predecessor firm with a new name.<sup>48</sup> The real issue is whether the St. Paul policy covers the predecessor firm, and more importantly, the retired partner. Possibly a court could deny coverage to the predecessor firm and the retired partner because of the ambiguous "change of name" language and the conspicuous absence of specific language referencing predecessor firms. On the other hand, the predecessor firm can make a strong argument that since the successor firm kept a majority of the assets and employees of the predecessor firm, the predecessor firm and former members can rely on the name change language to give them coverage.

In many respects discussion of the language in the St. Paul policy is academic. Any competent plaintiff's attorney will sue the successor firm and its current members, leaving little reason for St. Paul to deny coverage or a defense to the predecessor firm and

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45. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (j)); HOME at B-14 (§ B, art. I(b)(2)); CNA at B-29 ("Lawyers Agreement," art. II(J)); ST. PAUL at B-33 ("When A Claim Is Covered," "1. Prior acts").

46. *Infra* Appendix B: ALPS at B-8 ("Conditions," art. I(j)); HOME at B-14 (§ B, art. I).

47. *Infra* Appendix B, CNA at B-29 ("Lawyers Agreement," art. IV, "Predecessor Firm").

48. *Infra* Appendix B, ST. PAUL at B-33 ("Who Is Protected Under This Agreement").

retired partner.<sup>49</sup> Absent guidelines as set forth in the ALPS, Home, and CNA policies, the St. Paul policy leaves the door open for litigation to determine whether the policy affords coverage to predecessor firms. There seems little reason to doubt that a court would employ the general rule that where language of the policy is ambiguous or susceptible to two different constructions, it will be strictly construed against the insurer, and construed in the manner most favorable to the insured.<sup>50</sup> As a test for interpreting ambiguous insurance policies, courts typically do not look at what the insurer intended the words of the policy to mean, but what a reasonable person in the position of the insured would understand them to mean.<sup>51</sup> A careful review of the policy options before a problem arises and a critical look at the history of a firm may well alleviate the necessity of a court battle in the future.

## 2. *Former Members*

To some degree, all four policies provide coverage to some extent for attorneys or professional corporations who are former partners, shareholders, or employees of the firm. ALPS and CNA provide coverage to attorneys or professional corporations who are former partners, shareholders, or employees of the firm or predecessor firm, but solely while acting in a professional capacity on behalf of the firm.<sup>52</sup> Simply stated, these policies provide extended coverage for only the work performed while former members were with the firm. If a firm engages in lateral hiring,<sup>53</sup> this coverage will not cover errors committed by the lateral hire prior to employment with the firm.<sup>54</sup> ALPS offers a no-cost endorsement to remove this restriction, but it is optional.<sup>55</sup> Firms may consider not taking the endorsement because it exposes their own funds to the extent of the deductible for errors committed by lateral hires

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49. A word of caution here. This situation may change in states where new tort reform legislation eliminates joint and several liability.

50. *E.g.*, *Park Saddle Horse Co. v. Royal Indemnity Co.*, 81 Mont. 99, —, 261 P. 880, 884 (1927).

51. *St. Paul Fire and Marine Ins. Co. v. Thompson*, 150 Mont. 182, —, 433 P.2d 795, 798 (1967).

52. *Infra* Appendix B: ALPS at B-5 ("Insuring Agreements," art. IV(d)); CNA at B-30 ("Lawyers Agreement," art. IV, "You or Your Means," (C)(2) & (D)).

53. Lateral hiring involves hiring someone from outside the firm with experience who does not begin at the bottom of the organizational structure of the firm.

54. *See, e.g.*, *infra* Appendix B, ALPS at B-5 ("Insuring Agreements," art. IV(c)). This section serves to limit the liability of the current firm for acts which were not under its control. *Id.* Note that if the current firm is named in the suit, there will be coverage and defense under the principle insuring clause of the policy. *Infra* Appendix B, ALPS at B-4 ("Insuring Agreements," art. I).

55. *Infra* Appendix B, ALPS at B-11 ("Conditions," art. X).

while working for another firm. The higher the deductible, the greater the firm's risk.

The Home policy contains an additional condition that coverage applies only for those services rendered prior to the date of "retirement."<sup>56</sup> This "retirement" language appears insignificant when viewed in the context of the other policies. The others state, or at least clearly imply, the same condition, except where the retired partner remains a named insured.<sup>57</sup>

The St. Paul coverage, like the rest, applies only to claims that result from wrongful acts prior to the date an attorney leaves the firm.<sup>58</sup> The primary problem with the St. Paul "change of name" provision stems from the absence of a clear definition of "predecessor firm." It appears on its face that the policy will not provide coverage to the former partners of those firms which have been altered beyond a mere "change of name."<sup>59</sup>

### 3. *Non-Attorney Employees*

Non-attorney employees pose one of the least significant issues when comparing the policies. All four policies afford coverage and the degree of difference is mostly one of verbiage.<sup>60</sup> All non-attorney employees are covered when they are working for the firm and under the direction of an attorney. ALPS, Home, and CNA limit the coverage to acts done within the scope of the employee's duties for the firm.<sup>61</sup> This seems sensible from a cost-containment standpoint and does not impose a significant limitation on the coverage afforded the firm when viewed from the perspective of why it purchased the coverage in the first place. The St. Paul policy has an even broader definition and covers those persons that the named insured is "legally responsible for."<sup>62</sup> Query: Will such language extend coverage to non-attorneys outside their scope of employment? Moreover, will coverage under the St. Paul policy extend to third party process servers or title companies where the

56. *Infra* Appendix B, HOME at B-14 (§ A, art. I(c)).

57. For a more detailed discussion of the problem of covering retired partners who still work with the firm, refer to the "Custom Fitting Your Coverage" section of this article, *infra* notes 354-66 and accompanying text.

58. *Infra* Appendix B, ST. PAUL at B-33 ("Who Is Protected Under This Agreement," "Changes").

59. *Id.*

60. *Infra* Appendix B: ALPS at B-5 ("Insuring Agreements," art. IV(e)); HOME at B-14 (§ A, art. I(d)); CNA at B-30 ("Lawyers Agreement," art. IV, "You or Your Means," (D)); ST. PAUL at B-32 ("What This Agreement Covers").

61. *Infra* Appendix B: ALPS at B-5 ("Insuring Agreements," art. IV (e)); HOME at B-14 (§ A, art. I(d)); CNA at B-30 ("Lawyers Agreement," art. IV, "You or Your Means," (D)).

62. *Infra* Appendix B, ST. PAUL at B-32 ("What This Agreement Covers").

relationship is more than casual? There appears to be no case law, so the issue remains open for interpretation.

#### 4. "Of Counsel" Attorneys

What about "Of Counsel" attorneys? Firms have attorneys that they list as "Of Counsel" for political reasons, and then there are those retired or almost retired former partners that firms keep on the letterhead out of respect and for the benefit of name recognition. Again all four policies cover these "Of Counsel" lawyers. The ALPS, Home, and CNA policies contain specific covering clauses, while St. Paul's policy probably covers them under the "any person for whose acts you're legally responsible" clause or the "Employed Lawyers" clause.<sup>63</sup>

The real issue is not whether the policy covers "Of Counsel" attorneys, rather, it is what representations were made to the company in the application and what do the insurer's underwriting guidelines say about charging premiums for "Of Counsel" attorneys. Even if the policy provides "Of Counsel" coverage, it may be avoidable if the firm intentionally or inadvertently misrepresents the true employment status of the "Of Counsel" lawyers. Some professional liability insurers will provide this coverage for free in certain circumstances, while others charge for such coverage.<sup>64</sup>

#### 5. Liability After Death or Bankruptcy

The last area of consideration under the definition of "insured" is the issue of coverage for executors, administrators, legal representatives, and assigns of the insured for liability of the insured. It really breaks down two ways: for firms, the issue of appointed receivers in liquidation; and for solo practitioners, the issue of estate administration upon the death of the attorney. Under a claims-made form, it is a short-term problem spanning the remainder of the current policy year. At that point, the receiver, executor, administrator, or personal representative will have to apply for and obtain an extended reporting endorsement.<sup>65</sup> Dur-

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63. *Infra* Appendix B: ALPS at B-5 ("Insuring Agreements," art. IV(g)); HOME at B-14 (§ A, art. I(f)); CNA at B-30 ("Lawyers Agreement," art. IV, "You or Your Means," C(3)); ST. PAUL at B-32, B-33 ("What This Agreement Covers"; "Who is Protected Under This Agreement," "Employed lawyers").

64. This issue is developed in greater detail in the "Custom Fitting Your Coverage" section of this article. See *infra* notes 354-66 and the accompanying text.

65. Extended reporting endorsements, or "tail coverage," is dealt with in detail later in this section. See *infra* notes 141-47 and accompanying text.

ing the interim, however, the issues for the firm and the individual attorney are different. ALPS and Home provide coverage to the heirs, executors, administrators, assigns, and legal representatives of each insured for liability of each insured as specified in the policy in the event of death, incapacity, or bankruptcy.<sup>66</sup> Maintaining a contrary position, CNA appears to limit its liability by requiring the company's written consent to transfer or assign the policy, except in the case of death.<sup>67</sup> If the insured dies, CNA affords coverage to the insured's executor or administrator for liability of the insured only with respect to professional services performed prior to the insured's death.<sup>68</sup> The St. Paul policy is silent as to coverage for the heirs, executors, administrators, legal representatives, and assigns of the insured for the liability of the insured.

These may all be differences without distinction. The requirement that the company consent in the CNA policy and the absence of any reference in St. Paul's policy will not affect rights of third parties to redress of wrongs. If an insured is in receivership or bankruptcy, the courts will most assuredly find coverage for claims made during the policy period, regardless of contrary language or the absence thereof. In essence, the Home and ALPS policies practically provide an assurance of coverage without litigation.

## B. COVERAGE

In reviewing the published attorneys' professional liability cases dealing with coverage, courts generally examine the conduct of the insured in reference to specific provisions of the policy.<sup>69</sup> The policy presumably governs the decision unless it violates some statutory precept, constitutional provision, or clear public policy. Accordingly, the insuring agreements and exclusions need examination to determine the risks covered.

### 1. *Focus on Conduct of Insured*

All four policies, ALPS, Home, CNA, and St. Paul, provide professional liability coverage for any insured's acts, errors, or omissions in "professional services" as an attorney or notary.<sup>70</sup> CNA further provides coverage by reason of an act, error, or omis-

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66. *Infra* Appendix B: ALPS at B-5 ("Insuring Agreements," art. IV(f)); HOME at B-14 (§ A, art. I)(e)).

67. *Infra* Appendix B, CNA at B-30 ("Lawyers Agreement," art. V(B)(2)).

68. *Infra* Appendix B, CNA at B-30 ("Lawyers Agreement," art. V(B)(2)).

69. Annotation, *supra* note 11, at 191.

70. *Infra* Appendix B: ALPS at B-4 ("Insuring Agreements," art. I(a)); HOME at B-14



sion in providing real estate title insurance agent professional services.<sup>71</sup> This policy provision is rather ordinary and the courts have found little need to inject themselves into the interpretation of these types of provisions, except in unusual circumstances. The cases generally do not deal with interpretation of the policy language as much as they deal with how to interpret the conduct of the insured.<sup>72</sup>

Addressing the question of whether the insured acted in his or her capacity as an attorney, courts have found coverage in several unusual areas. For instance, in *Sachs v. St. Paul Fire & Marine Insurance Co.*<sup>73</sup> the court held that the defendant insurer had a duty to defend a suit against the plaintiff attorney which charged him with wrongful interference with a contract of retainer between another attorney and that attorney's client.<sup>74</sup>

The court characterized the plaintiff attorney's role at the time the alleged wrongful acts were committed as follows:

It is apparent to the Court that the plaintiff was acting in his professional capacity as an attorney when the incidents complained of occurred. Indeed the plaintiff's undertaking to represent a client [that the other attorney] claimed was his — the crux of the interference with contract complaint — could only be done by an attorney pursuing his profession.<sup>75</sup>

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(§ B, art. I); CNA at B-28, B-29 ("Lawyers Agreement," art. I(A) & (B); art. IV, "Wrongful Acts"); ST. PAUL at B-32 ("What This Agreement Covers").

71. *Infra* Appendix B, CNA at B-29 ("Lawyers Agreement," art. IV, "Professional Services"). It should be noted that the Home and ALPS policies offer this coverage as an optional endorsement.

72. An issue addressed in many cases is whether the lawyer was acting in his professional capacity as a lawyer when the alleged wrongful act was committed. Annotation, *supra* note 11, at 191.

73. 303 F. Supp. 1339 (D. Colo. 1969).

74. *Sachs v. St. Paul Fire & Marine Ins. Co.*, 303 F. Supp. 1339, 1341 (D. Colo. 1969). *Sachs* was a declaratory action by a plaintiff attorney [insured] alleging that the defendant insurer had breached its professional liability insurance contract by refusing to defend the plaintiff attorney in the underlying wrongful interference with contract action. *Id.* at 1340. The court summarized the policy as follows:

The policy provided that defendant would pay all sums up to \$100,000 which the insured would become obligated to pay as damages arising out of the performance of professional services as a lawyer by the plaintiff. . . . The policy further provided that "as respects such insurance as is afforded by the other terms of this policy the company shall \* \* \* defend \* \* \* in any suit against the insured alleging damages even if such suit is groundless, false or fraudulent \* \* \*"

*Id.*

75. *Id.* at 1340-41. Interestingly, the court stated that an insurer's duty to defend is broader than the scope of the coverage. *Id.* at 1341.

The court's rationale thus focused on the attorney's role as a professional at the time of the alleged acts.

In *Passanante v. Yormark*<sup>76</sup> the court addressed a situation where an attorney failed to file the client's medical malpractice action prior to the expiration of a statute of limitations, and where the attorney's professional liability insurance policy lapsed 15 days before the statute ran.<sup>77</sup> The insurer claimed that the attorney's liability for negligence did not attach until the statute of limitations had expired, and that at that point coverage under the policy had ceased.<sup>78</sup> The court affirmed the trial court's finding that the attorney had acted negligently in relation to his client during the policy period which resulted in injury to the client, even before the statute of limitations had run.<sup>79</sup> The court based its holding on the following rationale:

Reasonable care in the performance of [the attorney's] duty to his clients dictated that he take ordinary precautions to protect his clients' interest and not delay filing suit until the eleventh hour. . . .

That [the attorney] might have been able to rescue himself from complete and certain liability by a last-minute filing of suit should not serve to relieve him from his continuing dilatory conduct. . . . Nor should it permit the insurance carrier to escape responsibility under its policy because the full measure of damage resulting from such misconduct might not be ascertainable until the statute ran.<sup>80</sup>

This decision seems particularly unconscionable in light of the generally accepted premise and policy language making coverage available for actions only arising during the policy period.<sup>81</sup> The

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76. 138 N.J. Super. 133, 350 A.2d 497 (App. Div. 1975).

77. *Passanante v. Yormark*, 138 N.J. Super. 133, —, 350 A.2d 497, 498 (App. Div. 1975). *Passanante* involved an "occurrence" policy. *Id.* at —, 350 A.2d at 449. For a discussion of the distinction between "occurrence" and "claims made" policies, see *supra* notes 20-23 and accompanying text. *Passanante* was an action for declaratory judgment on whether the insurer was liable for damages caused by the formerly-insured attorney's negligence in handling a medical malpractice case. *Passanante*, 138 N.J. Super. at —, 350 A.2d at 498.

78. *Passanante*, 138 N.J. Super. at —, 350 A.2d at 498.

79. *Id.* at —, 350 A.2d at 500. It is interesting that the court cited to Annotation, *When Statute of Limitations Begins to Run Upon Action Against Attorney for Malpractice*, 18 A.L.R.3d 978 (1968). *Passanante*, 138 N.J. Super. at —, 350 A.2d at 500.

80. *Passanante*, 138 N.J. Super. at —, 350 A.2d at 500 (citations omitted). The court in *Passanante* stated the rule of construction that insurance policies are to be interpreted according to the expectations of the applicants and intended beneficiaries. *Id.* at —, 350 A.2d at 499.

81. The court in *Passanante* summarized the pertinent portions of the policy as follows:

court, in essence, states that the coverage begins when the first act in a chain of events occurs. The court confuses the attorney's duty to his client with the insurer's responsibility to the attorney. It obviously wanted to compensate the client and found that a positive coverage determination was the only way to ensure collectibility.<sup>82</sup>

In *Transcontinental Insurance Co. v. Faler*<sup>83</sup> the policy in question included a defense and indemnity provision for "any claim made against the insured arising out of the performance of professional services for others in the insured's capacity as a lawyer. . . ."<sup>84</sup> The complaint, made by several governmental bodies against the insured and other attorneys, alleged that the attorney had concealed a conspiracy to exact fees far in excess of those authorized.<sup>85</sup> The plaintiff insurer brought a declaratory action for a determination that the policy did not apply to the acts at issue on the grounds that the underlying complaint was simply for the return of excess fees and not based upon the breach of a duty by the attorney in his professional capacity.<sup>86</sup> The court in *Faler* reversed the summary judgment granted by the trial court and held that a genuine issue of material fact existed because "the rela-

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The insurer agreed to provide coverage for Yormark's "professional liability," with a limit of \$500,000 for "Each Occurrence" and a provision for a deductible amount. Under the heading "INSURING AGREEMENTS" the company agreed to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages arising out of the performance of professional services for others in the Insured's capacity as a lawyer and caused by the Insured or any other person for whose acts the Insured is legally liable \* \* \* [Emphasis provided].

The policy recites that it applies \* \* \* to professional services performed for others (a) during the policy period (b) prior to the effective date of the Policy if claim is made or suit is brought during the policy period and providing the Insured, at the effective date of the Policy, had no knowledge or could not have reasonably foreseen any circumstance which might result in a claim or suit. \* \* \*

It provides further that:

1. The limit of liability stated in the Declarations as applicable to "each occurrence" is the limit of the Company's liability for all damages arising out of the same professional services regardless of the number of claims or claimants. If more than one Insured is included in the Policy the limit of liability shall apply separately to each.

*Id.* at —, 350 A.2d at 499.

82. The attorney in *Passanante* absconded after being disbarred. *Id.* at —, 350 A.2d at 498.

83. 9 Wash. App. 610, 513 P.2d 864 (1973).

84. *Transcontinental Ins. Co. v. Faler*, 9 Wash. App. 610, —, 513 P.2d 864, 865-66 (1973). The court distinguished a case with similar facts and a contrary result. *Id.* at —, 513 P.2d at 867; see *Strauss v. New Amsterdam Casualty Co.*, 30 Misc. 2d 345, 216 N.Y.S.2d 861 (New York City Mun. Ct. 1961).

85. *Faler*, 9 Wash. App. at —, 513 P.2d at 866. The insured and other attorneys had represented the governmental bodies in anti-trust litigation. *Id.* at —, 513 P.2d at 866.

86. *Id.* at —, 513 P.2d at 865, (citing *Strauss*, 30 Misc. 2d 345, 216 N.Y.S.2d 861 (New York City Mun. Ct. 1961)).

tionship of attorney-client places upon the attorney the strict duty of full disclosure.”<sup>87</sup> The court stated that “[t]he complaint, therefore, makes out a cause of action against [the attorney] which arose from his conduct while engaged in an attorney-client relationship and in connection with the performance of professional services,” and thus, was within the coverage of the policy.<sup>88</sup>

In *Mendelsohn v. CNA Insurance Co.*<sup>89</sup> the court again focused on the attorney’s conduct rather than taking issue with policy language, but this time, the court found for the insurer.<sup>90</sup> The court determined that an attorney’s act of filing a divorce action against his own wife, at a time when he allegedly knew that she suffered from mental and physical exhaustion, could not be deemed to be an occurrence arising out of the insured’s “professional and business activities” as contemplated by his professional liability policy.<sup>91</sup> The determinative issue in this case was whether “an attorney’s conduct of all or part of a lawsuit in which he is the plaintiff may be deemed among his ‘professional and business activities.’”<sup>92</sup> The court equated the policy language, “professional and business activities,” with the practice of law.<sup>93</sup> The court found that the definition of the practice of law involves “service to another.”<sup>94</sup> The court concluded that “because appellant’s *pro se* conduct of the suit for divorce may not be said to be among his ‘professional and business activities,’” the defendant insurer had no duty to defend the insured attorney.<sup>95</sup>

## 2. Practice-Related Personal Injury

As the prior cases indicate, the pure practice of law issues do not give much cause for judicial scrutiny. The most prevalent

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87. *Id.* at —, 513 P.2d at 866 (citing the Canons of Professional Ethics).

88. *Id.* at —, 513 P.2d at 867.

89. 155 Ill. App. 3d 964, 451 N.E.2d 919 (1983).

90. *Mendelsohn v. CNA Ins. Co.*, 155 Ill. App. 3d 964, —, 451 N.E.2d 919, 923 (1983).

91. *Id.* at —, 451 N.E.2d at 921, 922. The plaintiff insured’s former wife brought an action against him for damages to compensate for mental anguish and emotional distress allegedly caused by the insured’s conduct on behalf of himself in suing for divorce. *Id.* at —, 451 N.E.2d at 920-21. The plaintiff insured sought coverage by the defendant insurer under clause “1. Coverage B(6)” of his CNA policy, which provided payment: “[O]n behalf of the insured of all sums which the insured shall become legally obligated to pay as damages: . . . (b) because of *personal injury caused by an occurrence and arising out of the professional and business activities of the insured.*” *Id.* at —, 451 N.E.2d at 921 (emphasis added).

92. *Id.* at —, 451 N.E.2d at 922.

93. *Id.* at —, 451 N.E.2d at 922.

94. *Id.* at —, 451 N.E.2d at 922 (citing Illinois Code of Professional Responsibility EC 3-5 and *People v. Peoples Stock Yards State Bank*, 344 Ill. 462, 475, 176 N.E. 901, 907 (1931)).

95. *Id.* at —, 451 N.E.2d at 922.

cases fall squarely in the area of practice-related personal injury.<sup>96</sup> The ALPS policy offers specific coverage for an act, error, or omission of the attorney or non-attorney employee which causes personal injury.<sup>97</sup> The ALPS policy defines personal injury to include false arrest, libel, slander, wrongful eviction, an invasion of privacy, and malicious prosecution when those acts are committed in the context of the firm's professional activities.<sup>98</sup>

The CNA policy handles the situation by including certain personal injuries within the supplemental definition of "Wrongful Act," thus extending these coverages under the basic insuring clause which provides that the policy will cover amounts that the insured is legally obligated to pay, within the confines of the policy's stated limits, for "wrongful acts" of the insured.<sup>99</sup> The coverage provided in the CNA policy deals with the events encompassing personal injury by setting them out clearly in a numbered format which perhaps leaves the least room for judicial interpretation.<sup>100</sup>

The St. Paul and Home policies remain silent on the subject of practice-related personal injury. No cases appeared dealing with either policy because the coverage clauses in both are clear and unambiguous.<sup>101</sup> This creates a significant difference in coverage, especially for those attorneys who work in personal injury and communications law. We see more and more cases arising out of practice-related personal injury.

### 3. *Attorney in Role of Fiduciary*

Does an attorney, acting as personal representative, executor, administrator, or trustee have coverage under professional liability policies? In *Cohen v. Employers Reinsurance Corp.*<sup>102</sup> the court held that a policy which covered professional services as an attorney did not cover actions against the attorney acting as a trustee,

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96. Generally, practice-related personal injury does not include bodily injury or injury to property. See *infra* Appendix B: ALPS at B-6 ("Exclusions," (c)); HOME at B-18 (§ C, art. I(Xd)); ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover"). However, CNA does not exclude such injury. *Infra* Appendix B, CNA at B-28 ("Lawyers Agreement," art. II).

97. *Infra* Appendix B, ALPS at B-4, B-7 ("Insuring Agreements," art. I(b) & (c); "Conditions," art. I(g)).

98. *Infra* Appendix B, ALPS at B-7 ("Conditions," art. I(g)).

99. *Infra* Appendix B, CNA at B-28, B-29 ("Lawyers Agreement," art. I(A); art. IV, "Wrongful Act").

100. *Id.*

101. *Infra* Appendix B: HOME at B-14, B-15 (§ B, art. I); ST. PAUL at B-32 ("What This Agreement Covers").

102. 117 A.D.2d 435, 503 N.Y.S.2d 33 (1986).

where the policy did not specify that particular coverage.<sup>103</sup>

Since the policy is clear and unambiguous in its terms, it will be construed according to the plain and ordinary meaning of its terms. . . . The insuring clause of this policy clearly articulates the coverage of plaintiff in his 'capacity as a lawyer.' The issue is not whether a lawyer's duty to his clients is that of a fiduciary. The issue is rather whether plaintiff, acting as trustee, was engaged in the practice of law.<sup>104</sup>

The *Cohen* decision represents a sound application of general contract principals to the interpretation of an insurance policy. The plain meaning approach clearly excludes such coverage under all four policies, except for specific exceptions which recognize that most general practitioners and most probate specialists have to serve in the capacity of trustee, executor, administrator, or personal representative as an integral part of their practice.<sup>105</sup>

ALPS, Home, and CNA cover all acts of the attorney performing services as trustee, executor, administrator or personal representative with the qualification that the coverage does not apply to any loss sustained where the insured is also the beneficiary of any trust or estate.<sup>106</sup> ALPS adds a further requirement that the attorney also be counsel for the estate; its rationale being that its policy intends to cover an attorney's errors and omissions incurred incident to the practice of law, not those incurred in other business enterprises.<sup>107</sup> Therefore, if the attorney runs a trust company or escrow company on the side that is separate from the practice of law, no coverage applies under the ALPS policy.

In contrast, the St. Paul policy defines legal services as including those provided in a fiduciary capacity.<sup>108</sup> This provision lists examples of fiduciary roles which are covered such as trustee, executor, administrator, guardian, or conservator.<sup>109</sup> The St. Paul policy limits this coverage by stating that "we'll only cover you to

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103. *Cohen v. Employers Reinsurance Corp.*, 117 A.D.2d 435, —, 503 N.Y.S.2d 33, 34 (1986).

104. *Id.* at —, 503 N.Y.S.2d at 35 (citations omitted).

105. *Infra* Appendix B: ALPS at B-4, B-6 ("Insuring Agreements," (a) & (b); "Exclusions," (h)); HOME at B-14 (§ B, art. I); CNA at B-29 ("Lawyers Agreement," art. IV, "Professional Services"); ST. PAUL at B-32 ("What This Agreement Covers").

106. *Infra* Appendix B: ALPS at B-4 ("Insuring Agreements," art. I(a)); HOME at B-14 (§ B, art. I); CNA at B-28, B-29 ("Lawyers Agreement," art. II(D)(5); art. IV, "Professional Services").

107. *See infra* Appendix B, ALPS at B-4 ("Insuring Agreements," art. I(a)).

108. *Infra* Appendix B, ST. PAUL at B-32 ("What This Agreement Covers").

109. *Id.*

the extent you would be legally responsible as attorney or a fiduciary in the usual attorney-client relationship.”<sup>110</sup> This leaves open the issue of where to draw the line. One can argue that all acts of an attorney working in such a capacity are covered, or conversely, that legal services means only those activities for which the attorney needs to have a license to practice law. If the plain language rule of construction in *Cohen* is followed, it would mitigate toward the latter interpretation, making such a policy significantly less protective. This potential lack of coverage may force attorneys to limit their ordinary practice which of necessity occasionally calls for providing services in a fiduciary capacity.

In examining the provisions discussed above, consider, for example, an attorney serving as a trustee who makes two errors. First, the attorney makes an error investing funds for the trust; second, the attorney fails to file a claim for a tax refund on the trust's behalf within the time provided by the law.<sup>111</sup> Under this scenario, Home and CNA would cover both errors, assuming that the insured attorney is not also the beneficiary of any portion of the trust or estate.<sup>112</sup> ALPS likewise covers both errors, provided that the insured was also counsel for the estate.<sup>113</sup> In contrast, the St. Paul policy would cover only the legal services performed and would not cover any liability which results from the attorney's business judgment in investing the funds.<sup>114</sup>

#### 4. *Miscellaneous Costs*

What about interest, appeal bonds, and costs in legal malpractice cases? More and more states enact pre-judgment interest laws each year and post-judgment interest is the rule everywhere. The four policies do not differ significantly in that for the most part, they are silent on the issue. Only the St. Paul policy specifically addresses interest, premiums for appeal bonds, and miscellaneous costs.<sup>115</sup> The ALPS, Home, and CNA policies cover both pre- and post-judgment interest by virtue of their insuring agreements which provide for payment on behalf of the insured all sums in excess of the deductible which the insured shall become legally

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110. *Id.*

111. This example is a paraphrase of the example set out in the St. Paul policy form. *Infra* Appendix B, ST. PAUL at B-32 (“What This Agreement Covers”).

112. For the pertinent provisions of the Home and CNA policies, see *supra* note 106.

113. For the pertinent provisions of the ALPS policy, see *supra* note 107.

114. For the pertinent provisions of the St. Paul policy, see *supra* note 108.

115. *Infra* Appendix B, ST. PAUL at B-32, B-33 (“Additional Benefits”).

obligated to pay.<sup>116</sup>

The limits of liability section in the ALPS policy specifically addresses interest on judgments and premiums for appeal bonds within the classification of claim expenses.<sup>117</sup> By way of limitations, the ALPS policy specifically excludes any obligation on the part of the company to furnish or provide collateral for an appeal bond.<sup>118</sup>

The Home and CNA policies do not address pre- and post-judgment interest and appeal bonds. While the policies do not address the issues specifically, if statutorily mandated, both pre- and post-judgment interest fall in the classification of amounts that the insured is legally obligated to pay, and therefore, are deemed covered under their respective insuring agreements.<sup>119</sup>

### 5. "Claims Made"

All four policies cover only claims made and reported during the policy period.<sup>120</sup> While the policies differ in their specific definitions, ALPS, Home, CNA, and St. Paul all define a "claim" to mean a demand received by an insured for money or services, including the service of a suit or institution of arbitration proceedings against an insured.<sup>121</sup> These definitions and the ultimate development of the "claims-made and reported" form evolved from the companies' desire to get control of the unknowns resulting from policies that were no longer in effect. Carriers received claims years after the fact, based on some notation in an attorney's file that a claim had been suggested while the policy was in effect. In discussing a "claims made and reported" clause, the court in *Zuckerman v. National Union Fire Insurance Co.*<sup>122</sup> held that an insurer was not required to defend an attorney-insured against a former client's suit where the claim was made against the insured during the policy period, but was not reported to the company

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116. *Infra* Appendix B: ALPS at B-4 ("Insuring Agreements," art. I); HOME at B-14 (§ B, art. I); CNA at B-28 ("Lawyers Agreement," art. I(A)).

117. *Infra* Appendix B, ALPS at B-8 ("Conditions," art. II).

118. *Infra* Appendix B, ALPS at B-5 ("Insuring Agreements," art. II).

119. For the pertinent provisions of the Home and CNA policies which would cover state-mandated pre- and post-judgment interest, see *supra* note 116.

120. *Infra* Appendix B: ALPS at B-4 ("Insuring Agreements," art. I); HOME at B-14 (§ B, art. I); CNA at B-28 ("Lawyers Agreement," Preamble); ST. PAUL at B-33 ("When A Claim Is Covered," "2. Reported acts").

121. *Infra* Appendix B: ALPS at B-7 ("Conditions," art. I(a)); HOME at B-15 (§ B, art. I); CNA at B-29 ("Lawyers Agreement," art. IV, "Claim"); ST. PAUL at B-33 ("When A Claim Is Covered").

122. 194 N.J. Super. 206, 476 A.2d 820 (A.D. 1984).



until after the policy had expired.<sup>123</sup> The court reasoned: "In exchange for limiting the time within which notice must be given, the insurance company has increased the risk it assumed by insuring for acts which the attorney may have committed before the policy was purchased."<sup>124</sup> All four policies contain language consistent with the holding in *Zuckerman*.<sup>125</sup>

Illustrating the significance of a small change in language, contrast the court's ruling in *Gyler v. Mission Insurance Co.*<sup>126</sup> which dealt with a "claim or claims. . . which *may be made*" clause.<sup>127</sup> The court found the phrase "which may be made" to extend coverage to any claim which arose or could have been asserted during the policy period, including claims not actually asserted until after the policy's expiration.<sup>128</sup> In essence, the court, by its decision, converted the policy from what the insurer intended to be a "claims-made" form to an "occurrence form."<sup>129</sup> The actuarial computations for the two types of risks vastly differ, and as a result of the court's decision, the company did not receive an appropriate amount of premium.<sup>130</sup>

On a related subject, "claims-made and reported" policies treat reporting differently. The Home, CNA, and St. Paul policies cover all claims reported during the policy period, regardless of when the suit was commenced.<sup>131</sup> In contrast, the ALPS policy limits coverage to claims made within five years of the policy period in which the potential claim was reported.<sup>132</sup> This corresponds to the longest statute of limitations period in any of the states in which ALPS does business. In some respects, the ALPS policy limitation seems inconsequential since a claim reported during the policy period will expire by its own weight with the running of the statute of limitations. However, the provision does give greater latitude than the others with regard to how solid a

123. *Zuckerman v. National Union Fire Ins. Co.*, 194 N.J. Super. 206, —, 476 A.2d 820, 824-25 (A.D. 1984).

124. *Id.* at —, 476 A.2d at 824, 825.

125. For the pertinent provisions of the policies as to how to properly initiate a claim, see *supra* notes 120-21.

126. 10 Cal. 3d 216, 514 P.2d 1219, 110 Cal. Rptr. 139 (1973).

127. *Gyler v. Mission Ins. Co.*, 10 Cal. 3d 216, 218, 514 P.2d 1219, 1220-21, 110 Cal. Rptr. 139, 140 (1973) (emphasis added).

128. *Id.* at 219, 514 P.2d at 1221, 110 Cal. Rptr. at 141.

129. For a discussion of the distinction between "claims made" and "occurrence" policies, see *supra* notes 20-23 and accompanying text.

130. For a discussion of the actuarial bases for insurance policy premiums, see Goebel, *Professional Liability From An Underwriters Viewpoint*, 65 MICH. B.J. 560 (1986).

131. *Infra* Appendix B: HOME at B-15 (§ B, art. III); CNA at B-28 ("Lawyers Agreement," art. I(B)); ST. PAUL at B-33 ("When A Claim Is Covered," "2. Reported acts").

132. *Infra* Appendix B, ALPS at B-9 ("Conditions," art. IV).

notice of claim need be to extend coverage to a suit filed subsequent to termination of a policy. The only other instance where this provision might be a limiting factor is in cases with claims involving persons under a disability, such as minor children.

In a recent case, the California Court of Appeals in *Village Escrow Co. v. National Union Fire Insurance Co.*<sup>133</sup> significantly altered the horizon for insurance companies in California by, in essence, striking down the reporting requirement in a "claims made and reported" policy.<sup>134</sup> The case dealt with a title insurance company's errors and omissions policy, not significantly dissimilar to most attorneys' professional liability policies.<sup>135</sup> The case arose out of a policy issued by National Union prior to November 1983, and its refusal to extend coverage where a suit for an error by the insured was filed during the policy period, but was not served on the insured until after the policy's expiration.<sup>136</sup> The facts indicated that the insured was not aware of the claim during the policy period, and therefore, did not report it to National Union within the policy period as required by the policy.<sup>137</sup> The following quote from the decision illustrates just how far the court was prepared to go in its effort to find coverage:

This 'triple hurdle' specie of insurance policy — requiring the occurrence, the making of the claim, and the reporting of the claim all to take place within the same policy period — is a relatively recent innovation which has received only limited consideration by the appellate courts of other states. However, it is unnecessary to consult the law of other jurisdictions or to resort to vague principles of fairness to resolve the instant case. Under California law, there is a well-settled doctrine which if applied to this type of policy would mean National must honor this unknown but 'made' claim.<sup>138</sup>

The court relied on an old precedent which predated the "claims made and reported" form and could not have contemplated a

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133. — Cal. App. 3d —, 248 Cal. Rptr. 687 (Cal. Ct. App. 1988).

134. *Village Escrow Co. v. National Union Fire Ins. Co.*, — Cal. App. 3d —, —, 248 Cal. Rptr. 687, 693 (Cal. Ct. App. 1988).

135. *Id.* at —, 248 Cal. Rptr. at 689 (policy language).

136. *Id.* at —, 248 Cal. Rptr. at 689.

137. *Id.* at —, 248 Cal. Rptr. at 689.

138. *Id.* at —, 248 Cal. Rptr. at 691. The "well-settled doctrine" referred to in the *Village Escrow* quote was labelled by the court as the "notice-prejudice" rule. *Id.* at —, 248 Cal. Rptr. at 692. This rule requires the insurance company to prove it suffered actual prejudice in defending the claim as a result of the failure to comply with the notification requirement. *Id.* at —, 248 Cal. Rptr. at 691.

clear contractual agreement such as that found in the National Union policy.<sup>139</sup> If followed by other courts this decision will have a significant chilling effect on the availability of professional liability coverage. All the insurers discussed herein offer tail or extended reporting endorsement coverage to address facts such as found in this case.<sup>140</sup> Where the insured chooses not to accept the option, the insurer should clearly be able to rely on the policy to expire as agreed.

### 6. Tail Coverage or Extended Reporting Endorsement

Near and dear to the hearts of all attorneys who contemplate life after the practice of law is the subject of "Tail Coverage" or the "Extended Reporting Endorsement." Extended reporting endorsements, in essence, convert the claims-made policy to an occurrence policy. They generally cover any reported claim as if made and reported during the original policy period. The ALPS and Home policies permit the insured to purchase an extended endorsement and each contains price formulas so that the insureds know the cost up front.<sup>141</sup> The policies, however, differ as to scope and terms, with ALPS offering an unlimited right to annually renew based on a reducing annual premium.<sup>142</sup> The Home policy offers the option of extending the claims reporting period after non-renewal of the policy for twelve, twenty-four, or thirty-six months, and such coverage is renewable annually at the expiration of the optional reporting period.<sup>143</sup> Both the ALPS and Home endorsements offer the insured the flexibility to decide how long to continue the coverage with premium payments being based upon an annual basis as coverage is renewed.<sup>144</sup> Both the ALPS

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139. See *id.* at —, 248 Cal. Rptr. at 691.

140. *Infra* Appendix B: ALPS at B-9 ("Conditions," art. IV); HOME at B-15 to 16 (§ B, art. VI); CNA at B-31 ("Lawyers Agreement," art. V(C)(9)); ST. PAUL at B-33 ("When A Claim Is Covered," "3. Optional Reporting Endorsement").

141. *Infra* Appendix B: ALPS at B-9 ("Conditions," art. IV); HOME at B-15 to 16 (§ B, art. IV). The ALPS policy calculates the premium for the extended reporting periods by a predetermined percentage of the current year's premium: First year, 95%; second year, 75%; third year, 55%; fourth year, 35%. Fifth and subsequent years, 0%. *Id.*, ALPS at B-9 ("Conditions," art. IV). The Home policy sets the premium rates for the extended reporting periods as follows: 100% for 12 months, 150% for 24 months, or 185% for 36 months, of the full annual premium. *Id.*, HOME at B-16 (§ B, art. IV). Renewal rates for extended reporting periods are determined by Home in accordance with rates in effect at each annual renewal date. *Id.*

142. *Infra* Appendix B, ALPS at B-9 ("Conditions," art. IV).

143. *Infra* Appendix B, HOME at B-16 (§ B, art. IV).

144. For the provisions of the ALPS and Home policies on extended reporting endorsements, see *supra* notes 140-41. With the high cost of liability coverage, the flexibility of being able to choose how long to continue coverage allows the insured to decide how long they may be exposed to a malpractice risk, and therefore continue paying premiums.

and Home policies keep the limits of liability under the endorsement the same as the last year that the policy was in effect.<sup>145</sup>

As an additional form of "tail coverage," the Home policy also provides an option for attorneys who retire or otherwise cease engaging in the private practice of law, but limits the coverage to that which is set out in a separate schedule.<sup>146</sup> The CNA and St. Paul policies also make extended reporting endorsements available, but both policies remain silent as to the length or cost of the endorsement.<sup>147</sup> They prefer not to commit themselves to specifics, but rather to examine the circumstances under which the endorsement is purchased and to price it accordingly. This option is not always available to a company in states where insurance regulations require that the policy specify the endorsement terms.

### C. EXCLUSIONS

Courts examining attorney professional liability insurance policies in connection with the question of coverage will often look to the exclusions as well to determine covered conduct. Typically, the policy excludes certain conduct on the part of the insured from coverage. These exclusions generally deal with misconduct on the part of the insured, high risk areas that the company does not want to cover, and areas where the insured may or will have a conflict of interest.

#### 1. *Dishonest, Fraudulent, or Criminal Conduct*

The most common exclusion concerns dishonest, fraudulent, or criminal conduct of the insured. All four policies exclude coverage for such actions.<sup>148</sup> They also provide a waiver of such exclusion for any insured who did not personally participate in any fraudulent, criminal, or dishonest conduct, or remain passive after

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145. *Infra* Appendix B: ALPS at B-9 ("Conditions," art. IV); HOME at B-16 (§ B, art. IV).

146. *Infra* Appendix B, HOME at B-16 (§ B, art. V). The extended coverage for retiring attorneys option allows the insured to extend the coverage to claims first made twelve, twenty-four, thirty-six, or an unlimited period beyond the expiration date, but is limited to services provided before the insured's retirement. *Id.* The rates for this extension are 100% for 12 months, 150% for 24 months, 185% for 36 months, or 225% for an unlimited period of full annual premium. *Id.*

147. *Infra* Appendix B: CNA at B-31 ("Lawyers Agreement," art. V(C)(9)); ST. PAUL at B-33 ("When A Claim Is Covered," "3. Optional reporting endorsement"). The St. Paul policy states that the premium will be based on the rules and rating plans in effect on the day the extended period begins. *Infra* Appendix B, ST. PAUL at B-34 ("When A Claim Is Covered," "3. Optional reporting endorsement").

148. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (a)); HOME at B-18 (§ C, art. I(a)); CNA at B-28 ("Lawyers Agreement," art. II(D)(3)); ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover," "Dishonest acts").

having personal knowledge of any such act or omission.<sup>149</sup> This waiver is often referred to as innocent partner coverage and is particularly important in states with joint and several liability among partners and statutory schemes creating such liability for shareholders in professional corporations.

In *Aragona v. St. Paul Fire & Marine Insurance Co.*<sup>150</sup> the court held that the policy did not afford coverage to the innocent partners where the insured's partner misappropriated escrow funds.<sup>151</sup> The policy form excluded from coverage any loss resulting from any dishonest, fraudulent, or criminal act and did not provide protection for innocent partners: "We think the parties intended, from the language used in the insurance contract construed as a whole, that any loss which resulted from any dishonest or criminal act of the insured's partner was excluded from coverage, and that the exclusionary clause was all-encompassing in this respect."<sup>152</sup> The court clearly had a hard time with the conclusion, but found that the clear and unambiguous policy language controlled and did not violate public policy or any constitutionally mandated precept.<sup>153</sup>

In determining that the conduct of an insured fell within the dishonest, fraudulent, or criminal conduct exclusion, the court in *Battisti v. Continental Casualty Co.*<sup>154</sup> held that where the complaint alleged facts that the attorney engaged in a course of conduct that was grossly dishonest, fraudulent, and malicious, coverage was properly excluded.<sup>155</sup> The court found that the attorney's conduct alleged in the complaint, in representing a husband and wife in preparing settlement agreements and court documents incident to the couple's marital problems, was so egregious as to bring into play the policy's exclusion.<sup>156</sup>

The plaintiff in *Battisti* was an attorney seeking attorneys fees from his professional liability insurer because the insurer had

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149. *Infra* Appendix B: ALPS at B-9 ("Conditions," art. III); HOME at B-19 (§ C, art. II); CNA at B-31 ("Lawyers Agreement," art. V(C)(4)); ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover," "Dishonest acts").

150. 281 Md. 371, 378 A.2d 1346 (1977).

151. *Aragona v. St. Paul Fire & Marine Ins. Co.*, 281 Md. 371, —, 378 A.2d 1346, 1351 (1977).

152. *Id.* at —, 378 A.2d at 1351.

153. *See id.* at —, 378 A.2d at 1351. The court in *Aragona* concluded that "[t]he law generally will not permit by indirection or circuitry what it will not allow directly." *Aragona*, 281 Md. at —, 378 A.2d at 1351 (quoting *Parker v. State Farm Mut. Auto. Ins.*, 263 Md. 206, 216, 282 A.2d 503, 508 (1971)).

154. 406 F.2d 1318 (5th Cir. 1969).

155. *Battisti v. Continental Casualty Co.*, 406 F.2d 1318, 1321 (5th Cir. 1969).

156. *Id.*

refused to defend him in a fraud action.<sup>157</sup> The plaintiff in the underlying action alleged that the attorney had prepared, among other documents, a will executed by the wife in which she devised her entire estate to her husband.<sup>158</sup> The complaint also stated that the attorney failed to inform the husband that under Florida law the will would become void upon entry of the divorce decree.<sup>159</sup> Additionally, it was alleged that approximately three weeks after the preparation of the documents, which included the will, the attorney represented the wife in obtaining a divorce against the husband.<sup>160</sup> Thereafter, the attorney allegedly prepared a new will for the wife in which she left her property to others, excluding the former husband from the estate.<sup>161</sup>

The attorney argued that some of the acts alleged in the complaint were in the nature of negligence.<sup>162</sup> Although the court cited the general principle that where any allegation in the complaint might fall within the spectrum of coverage the insurer is obligated to defend,<sup>163</sup> it concluded that "[a] complete reading of the complaint. . .leaves but one conclusion, that the pleading alleged facts of an over-all scheme,. . .that was grossly 'dishonest,' 'fraudulent' and 'malicious.'"<sup>164</sup>

The exclusion and corresponding lack of a duty to defend were triggered in *Battisti* by the general rule that an insurer's duty to defend is measured by the allegations in the plaintiff's pleadings.<sup>165</sup> The court of appeals in *Rabideau v. Schmitt*<sup>166</sup> followed a similar rationale when it determined that allegations of an attorney's theft of securities fell within the exclusion from the attorney's liability policy for "any dishonest, fraudulent, criminal or malicious act or omission."<sup>167</sup> This finding was sufficient to support the trial court's granting of a summary judgment, thereby dismissing the insurer from the suit.<sup>168</sup>

Taking a different approach, the court in *Donnelly v. Transportation Insurance Co.*<sup>169</sup> held that allegations against an attorney

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157. *Id.* at 1319.

158. *Id.*

159. *Id.* at 1320.

160. *Id.*

161. *Id.*

162. *Id.* at 1321.

163. *Id.*

164. *Id.*

165. *Id.*

166. 404 So. 2d 519 (La. Ct. App. 1981).

167. *Rabideau v. Schmitt*, 404 So. 2d 519, 520 (La. Ct. App. 1981).

168. *Id.* at 520.

169. 589 F.2d 761 (4th Cir. 1978).

with respect to an allegedly unauthorized sale of securities and the receipt of \$20,000 intended as a loan from a client's sister did not constitute conduct that fell clearly within the exclusion for "dishonest, fraudulent, criminal or malicious act(s) or omission" and therefore, the insurer was required to provide a defense under the provisions of the policy.<sup>170</sup> The court in *Donnelly* cited two rules which brought the alleged facts within the insurer's duty to defend. First, "[i]f a complaint, however ambiguous, may be read as premising liability on alternative grounds, and either ground states liability potentially or arguably covered by the policy, the insured is entitled to a defense."<sup>171</sup> Second, the court noted that absent policy provisions to the contrary, a policy exclusion of coverage for dishonest, fraudulent, criminal, or malicious acts or omissions does not relieve an insurer of its duty to defend, merely because such acts or omissions are alleged.<sup>172</sup>

## 2. *Business Enterprise*

Any business enterprise which the insured owns or controls forms the basis for another exclusion found in some form or another in all four of the examined policies.<sup>173</sup> The ALPS policy creates an exception to the exclusion where an insured is providing incidental legal services to the business enterprise in the ordinary course of the insured's daily business activities and for which a fee, other than a director's fee, is charged and collected.<sup>174</sup> In other words, ALPS will not cover claims arising out of an insured's ownership or control of any business, but will cover legal work done by members of the firm for the company as long as a fee is charged and the firm is paid for its services. The purpose of such provisions is to insure the practice of law, and not, inadvertently, an attorney's other outside business activities.

Addressing the obligation of the malpractice insurer, the court in *Senger v. Minnesota Lawyers Mutual Insurance Co.*<sup>175</sup> held that the insurer had no duty to defend the attorneys where the action arose out of a business owned by the attorneys and not out of their

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170. *Donnelly v. Transportation Ins. Co.*, 589 F.2d 761, 767 (4th Cir. 1978).

171. *Id.*

172. *Id.* at 768-69.

173. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (h)); HOME at B-18 (§ C, art. I(b)); CNA at B-28 ("Lawyers Agreement," art. II(D)(2)); ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover," "Separate business activity").

174. *Infra* Appendix B, ALPS at B-6 ("Exclusions," (h)).

175. 415 N.W.2d 364 (Minn. Ct. App. 1987).

legal practice.<sup>176</sup> Although the court held against the insured attorneys, the court emphasized the general rule that if any part of the cause of action against the insured falls within the scope of the coverage, either on the face of the complaint or from the facts known to the insurer, the insurer must defend all claims.<sup>177</sup> Unfortunately for the insured in *Senger*, the issues were too well defined. The action arose completely separate from the attorney's legal practice, and thus no part of the claim fell within the scope of the malpractice insurance coverage.

### 3. *Officers and Directors*

Another exclusion found in all the examined policies is the officers and directors liability exclusion.<sup>178</sup> The policy will typically exclude from coverage any act, error, or admission where an insured attorney acts in the capacity of an officer, director, or trustee of a business enterprise which is not named in the policy. As a practical matter, an attorney who performs legal services for a corporation while also acting as an officer or director is much more likely to be sued than an attorney who merely serves as counsel and performs legal services for the corporation. Plaintiffs injured by the actions of a corporation often seek remedies against the officers, directors, and the attorneys for the corporation.<sup>179</sup> Where the insured acts as an officer or director, the suit will be brought under the legal theory of "officers and directors legal liability."<sup>180</sup> Where the insured is also sued for the advice given or the legal

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176. *Senger v. Minnesota Lawyers Mut. Ins. Co.*, 415 N.W.2d 364, 370 (Minn. Ct. App. 1987).

177. *Id.* at 369 (citing *Johnson v. Aid Ins. Co.*, 287 N.W.2d 663, 665 (Minn. 1980)).

178. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (f)); HOME at B-18 (§ C, art. I(c)); CNA at B-28 ("Lawyers Agreement," art. II(D)(1)); ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover," "Management activity").

179. Annotation, *supra* note 11, at 190.

180. H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* 612 (3d ed. 1983). The authors set forth the following duties for officers and directors:

[D]irectors, with their powers and responsibilities for managing the property of another, i.e., the corporation, and officers, as agents for a principal, i.e., the corporation, are in a fiduciary relationship with the corporation.

The various duties of directors, officers, and controlling shareholders are owed clearly to the corporation as an entity and sometimes to the community of corporate interests: the shareholders and, probably at least when the corporation is insolvent, the creditors, and possibly to others.

Broadly speaking, the duties of management are threefold in nature: (a) obedience, (b) diligence, and (c) loyalty. When management fulfills such duties, by acting *intra vires* and within their respective authority, by exercising due care, and by observing applicable fiduciary duties, the transaction is usually immune from attack, and management is usually immune from liability under the so-called "business judgment" rule.

*Id.* (citations omitted).



services performed, the suit will be brought under a legal malpractice theory.<sup>181</sup> The policy forms recognize that the firm should not be liable for the directors liability aspects of a case, and with the increased likelihood of suit, the companies have excluded this coverage.<sup>182</sup>

The ALPS, CNA, and St. Paul policies specifically provide that the officer-director exclusion does not apply to preclude coverage for legal services rendered in the attorney-client relationship.<sup>183</sup> Taking a different approach, Home covers the legal services rendered in the attorney-client relationship as long as the insured does not own ten percent or more of the issued and outstanding shares of the corporation.<sup>184</sup>

The St. Paul policy includes an example of the struggle that exists in determining the coverage and applicability of the officers and directors exclusion:

While serving on the Board of Directors of a client firm, you make two errors. You vote as a director approving the purchase of real property at a stated price. Prior to that vote you made a legal error in the title search of property. We won't cover any claim that results from your vote as a director to purchase the property. But we will cover your liability for the legal error in the title search.<sup>185</sup>

Under the facts in the St. Paul example, the other three policies likewise exclude coverage for the insured's vote as a director to approve the purchase of real property at a stated price.<sup>186</sup> The ALPS, CNA, and St. Paul policies would cover the incidental legal services in the attorney-client relationship where the attorney makes an error in the title search of the property.<sup>187</sup> Under the

181. *C.f.* Oregon Auto Ins. Co. v. Fitzwater, 271 Or. 249, —, 531 P.2d 894, 897 (1975) (attorney/corporate director, sued for malpractice for negligently failing to register securities).

182. See *infra* Appendix B: ALPS at B-6 ("Exclusions," (f)); HOME at B-18 (§ C, art. I(h)); CNA at B-28 ("Lawyers Agreement," art. II(D)(1)(a)(1)); ST. PAUL at B-34 to 35 ("Exclusions — Claims We Won't Cover," "Management activity").

183. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (f)); CNA at B-28 ("Lawyers Agreement," art. II(D)(1)); ST. PAUL at B-34 to 35 ("Exclusions — Claims We Won't Cover," "Management Activity").

184. See *infra* Appendix B, HOME at B-18 (§ C, art. I(h)).

185. See *infra* Appendix B, ST. PAUL at B-35 ("Exclusions — Claims We Won't Cover," "Manager" example).

186. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (f)); HOME at B-18 (§ C, art. I(c)); CNA at B-28 ("Lawyers Agreement," art. II(D)(1)).

187. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (f)); CNA at B-28 ("Lawyers Agreement," art. II(D)(1)); ST. PAUL at B-35 ("Exclusions — Claims We Won't Cover," "Management activity").

Home policy, the additional inquiry about ownership would have to be made to ultimately determine the result.<sup>188</sup> Under the ALPS policy, coverage will turn on the question of whether a fee, other than a director's fee, was billed and collected.<sup>189</sup> The ALPS policy language protects the insurer from that certain element of the bar that would use its insurance coverage to collect its fees.<sup>190</sup> The ALPS policy language also addresses the problem of fraudulent bills sent solely to provide coverage.<sup>191</sup>

#### 4. ERISA

The ERISA exclusion relates to the fiduciary responsibilities under the Employee Retirement Income Security Act of 1974 (ERISA),<sup>192</sup> as amended from time to time by subsequent federal tax legislation.<sup>193</sup> This exclusion did not exist until the late 1970s and is a product of the same insurance crisis that brought about the preeminence of the "claims-made" policy form.<sup>194</sup> ERISA created a whole new area of exposure by magnifying statutory standards of conduct for fiduciaries.<sup>195</sup> While many of the insurance policies already carried exclusions for trustees, the ERISA definition of "fiduciary" goes far beyond to include virtually anybody who has any discretionary power over the handling of plan assets.<sup>196</sup> This definition would include attorneys, accountants,

188. *Infra* Appendix B, HOME at B-18 (§ C, art. I(b)).

189. *Infra* Appendix B, ALPS at B-6 ("Exclusions," (f)).

190. *Id.*

191. *Id.*

192. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of titles 5, 18, 26, 29, 31, and 42 U.S.C.).

193. For a list of the numerous amendments to ERISA since 1974 and their location within the code, see United States Code Annotated, 1988 General Index, Popular Name Table. For a discussion of liability concerning the broad definition of fiduciaries under ERISA, see *infra* notes 192-200, and accompanying text.

194. For a discussion of the "insurance crisis," see Mossner, *Legal Malpractice Insurance Trends — The National and Michigan Experience*, 65 MICH. B.J. 550, 550-52 (1986); Mallen, *Cutting Through the Malpractice Maze*, THE BRIEF, Summer 1986, at 10, 12.

195. See 29 U.S.C. §§ 1101-1114 (1982) (ch. 18 - Employee Retirement Income Security Program, subchapt. I - Protection of Employee Benefit Rights, Subtitle B - Regulatory Provisions, Part 4 - Fiduciary Responsibility).

196. 29 U.S.C. § 1102(a)(1) and (2) (1982). The relevant portion of the statute provides:

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

*Id.* This definition is further expanded by the following language:

investment advisors, and plan administrative committees, to name a few.

The companies' concern again focused on limiting their risks to definable exposures.<sup>197</sup> The ALPS, Home, and CNA policies all exclude liability arising from an insured's activities as a fiduciary under ERISA.<sup>198</sup> However, they also contain a waiver of the exclusion where the insured is deemed a fiduciary solely by reason of legal advice rendered with respect to an employee benefit plan.<sup>199</sup> In essence, the three policies cover attorneys when they draft plans, give legal opinions, do trust work, or just render general legal services for the trust. On the other hand, they will not cover giving investment advice. The St. Paul policy contains no ERISA exclusion and so at least in principle, the coverage is broader. However, an attorney's ordinary ERISA activities might be excluded under the St. Paul policy's "Management Activities" exclusion.<sup>200</sup> The policy is, at best, unclear and therefore subject to judicial interpretation.

### 5. *Public Officials*

An elected public official or an employee of a governmental body, subdivision, or agency exclusion appears in the ALPS, Home, and CNA policies.<sup>201</sup> The ALPS and CNA policies provide an exception to the exclusion where the public entity is a client and the claim relates solely to the attorney-client relationship.<sup>202</sup> The policy language in both, although they differ somewhat, indicates that non-law practice-related public activities are excluded

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Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

*Id.* § 1002 (21A) (1982).

197. Goebel, *supra* note 130, at 560.

198. *Infra* Appendix B: ALPS at B-7 ("Exclusions," (l)); HOME at B-18 (§ C, art. I(c)(3)); CNA at B-28 ("Lawyers Agreement," art. II(D)(4)).

199. *See* sources cited *supra* note 198.

200. *Infra* Appendix B, ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover," "Management activity").

201. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (k)); HOME at B-18 (§ C, art. I(c)(2)); CNA at B-28 ("Lawyers Agreement," art. II(D)(1)(b)).

202. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (k)); CNA at B-28 ("Lawyers Agreement," art. II(D)(1)(b)).

from coverage.<sup>203</sup> It seems clear that both policies will not cover an elected county attorney or prosecutor, even for law-related activities, but they will cover an attorney who works for a firm under contract with a county.<sup>204</sup> The Home policy does not contain a similar exception; therefore, in the absence of any other qualifying language, the Home policy will not cover any work where an attorney is deemed a public official, even by appointment or under the terms of a contract.<sup>205</sup> In contrast, the St. Paul policy does not contain this exclusion. However, it may implicitly exclude coverage for "PUBLIC OFFICIAL" activities because the insured is not rendering "legal services" as contemplated by the insuring agreement.<sup>206</sup> Nevertheless, the St. Paul policy is open to differing opinions on the subject and may well need a judicial interpretation to resolve the issue.

### 6. *Physical Injury*

The ALPS, Home, and St. Paul policies all exclude coverage for claims arising out of bodily injury, sickness, and death.<sup>207</sup> The bodily injury exclusion does not significantly diminish coverage from an attorneys' professional liability point of view since the rendering of professional services seldom causes such injuries. Additionally, most attorneys will carry general liability insurance that will cover such claims. The CNA policy stands alone in specifically excluding any liability "resulting from owning, using, taking care of, loading or unloading of any auto, mobile equipment, boat or aircraft."<sup>208</sup> This language likely refers to an attorney's acts in a replevin action.

### 7. *Notary Liability*

The ALPS and Home policies exclude liability arising from notary certificate of acknowledgment when the person signing the document did not physically appear before the notary.<sup>209</sup> The CNA and St. Paul policies do not contain this specific exclusion.

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203. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (k)); CNA at B-28 ("Lawyers Agreement," art. II (D)(1)(b)).

204. The key element for coverage is the existence of an attorney-client relationship under both the ALPS and CNA policies.

205. *Infra* Appendix B, HOME at B-18 (§ C, art. I(c)(2)).

206. *Infra* Appendix B, ST. PAUL at B-32 ("What This Agreement Covers").

207. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (c)); HOME at B-18 (§ C, art. I(d)); ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover," "Bodily injury or property damage").

208. *Infra* Appendix B, CNA at B-25, B-28 ("General Conditions," art. V, "Completed Operations Hazard"; "Lawyers Agreement," art. II(C)).

209. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (i)); HOME at B-18 (§ C, art. I(e)).

However, for a notary to sign an acknowledgement certificate without the physical presence of the signatory is a misdemeanor in most states, and as such, both policies would exclude coverage under the dishonest acts exclusion.<sup>210</sup>

### 8. *Insiders*

The ALPS and Home policies exclude coverage for any claim made by the insured or any present, former, or prospective employer, partner, officer, director, owner, stockholder, employee, or related individual.<sup>211</sup> The purpose of this exclusion is that companies do not want to get embroiled in disputes between parties or claims relating to wrongful termination or employment discrimination. The Home policy does, however, provide an exception or waiver of the exclusion for claims arising out of the professional services of the insured in an attorney-client relationship.<sup>212</sup> Seemingly, if one attorney in a firm prepares a contract for another and in doing so commits malpractice, the policy would cover the loss incurred. Query: Whether the requirement of an attorney-client relationship requires that the attorney charge and collect a fee. Such an interpretation is unlikely because coverage under such policies generally depends upon the nature of the insured's conduct, not the status of the party harmed.<sup>213</sup> The CNA policy specifically excludes any claim by the insured's employees or related individuals.<sup>214</sup> The St. Paul policy contains no such exclusion; however, be aware of a false sense of security because the St. Paul policy probably excludes such coverage by the following language from its insuring agreements: "We'll pay amounts you and other protected persons are legally required to pay to compensate others for loss that results from an error, omission or negligent act committed *in the performance of*

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210. *Infra* Appendix B: CNA at B-28 ("Lawyers Agreement," art. II(D)(3)); ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover," "Dishonest acts").

211. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (e)); HOME at B-18 (§ C, art. I(f)).

212. *Infra* Appendix B, HOME at B-18 (§ C, art. I(f)). The 9th Circuit Court of Appeals in *General Accident Ins. Co. v. Namesnik* held that the existence of an attorney-client relationship was not dispositive of the question whether the conduct in dispute was "professional services" as defined by the malpractice insurance contract. 790 F.2d 1397, 1399 (9th Cir. 1986) (citing *Bank of California, N.A. v. Opie*, 663 F.2d 977, 981-82 (9th Cir. 1981), *reh'g denied*, 799 F.2d 539 (9th Cir. 1986)).

213. *See* *Bank of California, N.A. v. Opie*, 663 F.2d 977, 982 (9th Cir. 1981) (mortgage banker's act of managing loan proceeds were "professional services" within the meaning of the "errors and omissions" provision in the policy). On the other hand, the Ninth Circuit Court of Appeals held that "[t]he lack of fees directly traceable to the disputed transaction, at a time when fees were billed for legal services, while not dispositive, is one such piece of objective evidence." *General Accident Ins. Co. v. Namesnik*, 790 F.2d 1397, 1399 (9th Cir. 1986), *reh'g denied*, 799 F.2d 539 (9th Cir. 1986) (citations omitted).

214. *Infra* Appendix B, CNA at B-28 ("Lawyers Agreement," art. II(A)(1) & (2)).

*legal or notary services.*"<sup>215</sup> It seems clear that the policy will not cover any insider-related claims, other than those directly related to the rendering of professional services.

A typical insider-related claim is a suit for wrongful termination of employment. Even though the St. Paul policy does not include an explicit exclusion of coverage for such a complaint, it is not likely that a court would find the alleged wrongful acts to be within the definition of professional or legal services. An example of such a construction can be found in *Propis v. Fireman's Fund Insurance Co.*<sup>216</sup> where a New York intermediate appeals court stated:

In the complaint against [the defendant], the alleged acts relating to the hiring and firing of [the plaintiff] are non-professional business activities which "set the state for performance" but which do not involve professional services to clients and are not themselves acts "inherent in the practice of [the] particular profession. . . ."<sup>217</sup>

Interestingly, this limiting interpretation was preceded by a recitation of the typical court-made rules in insurance cases which tend to favor the insured: "[T]he duty of the insurer to defend is broader than its duty to indemnify and the policy must be construed liberally in favor of the insured and strictly against the

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215. *Infra* Appendix B, ST. PAUL at B-32 ("What This Agreement Covers") (emphasis added). For authority that absent a specific exclusion, a professional liability policy covers claims by insiders, see *Lyons v. American Home Assurance Co.*, 354 N.W.2d 892, 895 (Minn. Ct. App. 1984) (court ruled that a claim brought against an attorney by former law partners for recovery of fees after dissolution of the partnership was within the coverage of his professional liability insurance policy where the dispute arose over the amount he charged for his services in representing a client — deemed an act of rendering professional services in insured's capacity as a lawyer).

216. 112 A.D.2d 734, 492 N.Y.S.2d 228 (1985), *aff'd*, 66 N.Y.2d 828, 489 N.E.2d 250, 498 N.Y.S.2d 363 (1985). *Propis* involved declaratory actions brought by both parties to determine whether the insurers under a professional liability policy covering an insurance agency and its successor were obligated to furnish the agency and its members with a defense in separate lawsuits brought against them by a former employee. *Propis v. Fireman's Fund Ins. Co.*, 112 A.D.2d 734, —, 492 N.Y.S.2d 228, 230 (1985). The claims against the insured agency were based on acts and statements made by the insured in the hiring and discharge of the former employee/agent. *Id.* at —, 492 N.Y.S.2d at 230.

217. *Id.* at —, 492 N.Y.S.2d at 231 (citing *Shiff Assoc. v. Flack*, 51 N.Y.2d 692, 700, 417 N.E.2d 84, 88, 435 N.Y.S.2d 972, 976 (1980)). Under the policy at issue, the insurers agreed to cover the insured for any claim arising out of any "negligent act, error, or omission in rendering or failing to render professional services." *Id.* at —, 492 N.Y.S.2d at 230. "Professional services" was defined in the policy as "those services, activities, hazards, performed by the insured fee based or not, for insured's activities as a life underwriter. . . ." *Id.* at —, 492 N.Y.S.2d at 230. This provision was followed by a specific, nonexclusive list of typical life underwriter services. *Id.* at —, 492 N.Y.S.2d at 230. For another example of a wrongful termination case where the court found that the alleged wrongful conduct did not come within scope of professional duty, see *Richards v. Fireman's Fund Ins. Co.*, 417 N.W.2d 663, 667-68 (Minn. Ct. App. 1988).

insurer."<sup>218</sup>

The Ninth Circuit Court of Appeals has also narrowly defined the term "professional services" within a professional liability insurance policy.<sup>219</sup> The court of appeals agreed with the trial court holding that determination of this issue was to be characterized as a question of law.<sup>220</sup> The court of appeals affirmed the trial court's granting of summary judgment for the insurer on the basis that, as a matter of law, the insured was acting as a business agent, and not an attorney, and therefore, the alleged wrongful conduct was not "professional services" as defined by the insurance policy.<sup>221</sup>

Similar analysis has also been applied to determine whether injury suffered by wrongful termination is covered under a general liability policy.<sup>222</sup> The court in *Aetna Casualty & Surety Co. v. First Security Bank*<sup>223</sup> held: "As a matter of substantive Montana law, the court concludes that the policy in question does not provide coverage for Ervin's allegations against the bank (and its employee Wheeler) because Ervin does not allege any 'bodily injury' or 'property damage' within the meaning of the policy."<sup>224</sup>

218. *Propis*, 112 A.D.2d at —, 492 N.Y.S.2d at 230 (citations omitted).

219. *See* *General Accident Ins. Co. v. Namesnik*, 790 F.2d 1397, 1399-1400 (9th Cir. 1986) (tax attorney was acting as business agent rather than attorney in soliciting client's investments in corporations and partnerships). *Namesnik* involved an attorney, who was also a certified public accountant, who gave investment advice to several clients which resulted in losses approaching millions of dollars. *Id.* at 1398. The clients had invested in corporations which the insured attorney/CPA had formed and operated. *Id.* The insured did not charge for the work performed in the transactions in dispute. *Id.*

220. *Id.* at 1399 (citing FED. R. CIV. P. 56(e)).

221. *Id.* at 1399, 1400 (uncontroverted evidence established that, as to the transactions in question, the insured acted as a business agent rather than an attorney). For another interpretation by the Ninth Circuit Court of Appeals of the definition of "professional services" within a professional liability insurance policy, see *Bank of California, N.A. v. Opie*, 663 F.2d 977, 980 (9th Cir. 1981) (mortgage banker's acts of managing loan proceeds were "professional services" within the meaning of the "errors and omissions" section of the policy). *Opie* was also on appeal from summary judgment. *Id.* at 979. The issue was characterized as a question of law, subject to *de novo* review, because both parties acknowledged that the underlying facts were uncontroverted. *Id.* at 979-80.

222. *See* *Aetna Casualty & Surety Co. v. First Security Bank*, 662 F. Supp. 1126 (D. Mont. 1987). *Aetna* was a declaratory action brought by the insurer against the insured, a bank, to determine whether the policy covered damages for wrongful termination. *Id.* at 1130. The plaintiff in the underlying action was a former employee of the bank. *Id.* at 1131. The insurer moved for summary judgment on the grounds that the injuries alleged by the plaintiff in the underlying action did not fall within the policy definitions of "bodily injury," "property damage," or "occurrence." *Id.* at 1130. There was no factual dispute, and therefore, the court decided a purely legal issue — the interpretation of the relevant policy provisions. *Id.* at 1132.

223. 662 F. Supp. 1126 (D. Mont. 1987).

224. *Aetna Casualty & Surety Co. v. First Security Bank*, 662 F. Supp. 1126, 1130 (D. Mont. 1987). In *Aetna* the court referred to the definitions of the terms "bodily injury," "property damage," "occurrence," and "personal injury," which were enumerated in the policy. *Id.* at 1128, 1129, 1130, 1131. The definitions in the policy, set by contract, were drafted much narrower than the ordinary meaning of the terms. *See id.* at 1128. For instance, the term "personal injury" was limited to defamation torts. *Id.* at 1131. Since the

In light of the narrow language of the St. Paul policy and narrow construction by courts of the language in the above cases, it seems difficult to envision a court concluding that the St. Paul coverage is any different than that offered by ALPS, CNA, or Home, even with their specific exclusions.

### 9. *Discrimination*

The ALPS and Home policies contain specific exclusions relating to claims of discrimination by the insured, including those based on race, color, creed, age, sex, nationality, marital status, or sexual preference.<sup>225</sup> The CNA and St. Paul policies contain no such specific exclusions. The same analysis seems appropriate here as was applied in the preceding section. Under any of the four policies examined, there seems little likelihood of coverage for claims of discrimination by insiders against the insured because even under the St. Paul and CNA policies, the acts of discrimination can rarely be shown to arise from "the performance of professional service."

### 10. *Sexual Harassment or Misconduct*

Among the four policies, only ALPS has a specific exclusion for sexual harassment or misconduct.<sup>226</sup> These kinds of claims appear to be on the rise, and the exclusion provides a clear understanding that no coverage exists for these claims. Nevertheless, the exclusion is probably surplusage since alleged acts of sexual harassment generally will not fall in the classification of "professional service" or "personal injury" as those terms are defined by the ALPS policy.<sup>227</sup> Additionally, since most acts of sexual harassment are

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plaintiff in the underlying action did not allege any defamation torts in her complaint, no coverage was available to the insured bank. *Id.* at 1131. The court also held that plaintiff's allegation of emotional distress did not constitute "bodily injury" as defined in the policy. *Id.* at 1128-29. Furthermore, the court in *Aetna* concluded that plaintiff's allegations of lost wages, diminished earning capacity, and loss of good reputation did not come within the policy's definition of "property damage" which required physical injury or loss of use to "tangible" property. *Id.* at 1129-30.

225. *Infra* Appendix B: ALPS at B-7 ("Exclusions," (m)); HOME at B-18 (§ C, art. I(g)).

226. *Infra* Appendix B, ALPS at B-7 ("Exclusions," (n)).

227. *Id.* at B-7, B-8 ("Conditions," art. I(g) & (k)). If the sexual harassment or misconduct occurs in relation to an insider or employee, it is unlikely that such conduct will be construed as within the definition of legal or professional services because in the usual case, no attorney-client relationship will be present. For a discussion of insider claims, see *supra* notes 211-24 and accompanying text. It is also unlikely that a claim of sexual harassment or misconduct made by a client would come within the definition of "professional services" in the legal malpractice context because it would be very difficult to characterize such conduct as within the scope of legal services. It should be noted, however, that there are medical malpractice and psychiatric malpractice cases which have found sexual misconduct to be within the definition of "professional services." See, e.g., *Vigilant Ins. Co. v. Employers Ins. of Wausau*, 626 F. Supp. 262, 269 (S.D.N.Y. 1986)



intentional and in many cases criminal, the "intentional and criminal acts" exclusion should come into play.<sup>228</sup>

### 11. *Prior Acts*

All four policies contain "prior acts" coverage to some degree and exclude any claim arising out of an act, error, or omission which occurred prior to the effective date of the policy if the insured, at the effective date, knew or could have reasonably foreseen that such act, error or omission might be the basis of a claim or suit.<sup>229</sup> No insurer is going to buy a loss that is known to the

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(psychiatrist's malpractice policy covered sexual activities with patients which, in light of the "transference" phenomenon, were related to therapy); *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565, —, 720 P.2d 540, 542 (Ariz. Ct. App. 1986) (physician's alleged intentional manipulations during gynecological examinations were covered by his professional liability policy); *Vigilant Ins. Co. v. Kambly*, 114 Mich. App. 683, —, 319 N.W.2d 382, 383 (1982) (insurer was required to provide coverage where the plaintiff patient alleged that the defendant psychiatrist induced her to engage in a sexual relationship with him as part of her prescribed therapy); *L.L. v. Medical Protective Co.*, 122 Wis. 2d 455, —, 362 N.W.2d 174, 175 (Wis. Ct. App. 1984) (psychiatrist was acting in the course of his professional services when he engaged in sexual activity with his patient). Other courts have denied medical malpractice liability coverage for sexual misconduct. *See, e.g., Standlee v. St. Paul Fire & Marine Ins. Co.*, 107 Idaho 849, —, 693 P.2d 1101, 1103 (Idaho Ct. App. 1984) (neither physician's professional liability policy nor his office liability policy covered the physician's liability for sexually molesting a young male patient); *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, —, 683 P.2d 440, 448 (Idaho Ct. App. 1984) (sexual assault by a doctor upon a patient did not constitute "professional services" within the meaning of the medical malpractice policy); *Smith v. St. Paul Fire & Marine Ins. Co.*, 353 N.W.2d 130, 131 (Minn. 1984) (doctor's acts of sexual contact with minor patients were not covered by the professional liability policy because such acts were not medical treatment and therefore not professional services as defined by the policy).

In *Vigilant Insurance Co. v. Employers Insurance of Wausau* the court discussed the "transference" phenomenon which derives from the psychiatrist-patient relationship. 626 F. Supp. 262, 266 (S.D.N.Y. 1986). The court recognized that the trust which develops from this relationship tends to render a patient particularly vulnerable to the psychiatrist's actions and behavior. *Id.* Therefore, the court ruled that sexual misconduct by a psychiatrist may be within the definition of "professional services" of a professional liability policy if it is related to therapy. *Id.* at 265. It is plausible that a creative court might analogize from such cases when addressing sexual misconduct in an attorney-client relationship. Domestic relations attorneys often attain a high level of trust with their clients, which, when combined with an attorney's image as an authority figure, may justify application of the "transference" theory. If the sexual conduct in such a case was given in exchange for the legal services rendered, a professional liability insurer may be ordered to provide coverage for sexual misconduct if it can be characterized as "professional services."

228. *Infra* Appendix B, ALPS at B-6 ("Exclusions," (a)). *But see* *Vigilant Ins. Co. v. Employers Ins. of Wausau*, 626 F. Supp. 262, 267 (S.D.N.Y. 1986) (if one intended the act, but did not intend it to cause injury, indemnity is allowed); *L.L. v. Medical Protective Co.*, 122 Wis. 2d 455, 362 N.W.2d 174, 179 (Wis. Ct. App. 1984) (exclusion in the medical malpractice policy for criminal acts was ambiguous and insurance exists for the benefit of the victim; therefore, the psychiatrist's sexual misconduct with the client was held by the court to be within the coverage).

229. *Infra* Appendix B: ALPS at B-4 ("Insuring Agreements," art. I); HOME at B-14 (§ B, art I(b)(2)); CNA at B-29 ("Lawyers Agreement," art. II(j)); ST. PAUL at B-33 ("When A Claim Is Covered," "1. Prior acts"). The ALPS policy uses the term "loss inclusion date," and in its underwriting guidelines, reserves the right to limit the prior acts coverage for any insured with significant prior loss experience or who has gone without coverage for any period of time prior to obtaining insurance with ALPS.

insured when they purchase a policy.<sup>230</sup> If the insured previously held a policy with another company, coverage might continue under the old policy even after expiration if they have filed a notice of claim within the time provided in the policy.<sup>231</sup>

What constitutes notice becomes particularly important when the insured changes companies.<sup>232</sup> Even where the insured knew or should have reasonably foreseen a claim, any communication with the prior insurer might constitute notice.<sup>233</sup> The policy provisions effecting receipt of notice will determine whether coverage under a prior policy can be brought into effect for losses which materialize after the policy expiration date.<sup>234</sup> For example, if the insured, exercising privileges under a claims repair program<sup>235</sup> with the insurer, seeks the insurer's advice on how to avoid a claim even though it is not reported to the insurer's claims department, the insurer nevertheless has notice of the occurrence and the prior policy should cover any loss.<sup>236</sup>

As a consequence of the open-ended nature of the "knew or

230. See Cline, *Professional Liability Insurance: Retiring Lawyers*, 35 FED'N INS. COUNS. Q. 255, 271-73 (1985). Cline discussed *Gulf Insurance Co. v. Dolan, Fertig and Curtis*, 433 So. 2d 512 (Fla. 1983), in his article. Cline, *supra*, at 271-73. In *Gulf Insurance* the insured had two different claims-made professional liability insurance policies in force during the period when the alleged negligent act occurred and when the claim was made. *Gulf Insurance*, 433 So. 2d at 513-14. The court held that the insured was not covered by either policy because the insured switched policies before making a claim and began the second policy with knowledge of the prior claim. *Id.* at 513.

231. See Mallen, *supra* note 3, at 35 ("Potential Claims"). See generally Dumont, *What Every Professional Should Know Before Buying Claims-Made Liability Insurance*, 35 FED'N INS. COUNS. Q. 363 (1985) (fulfilling notice requirement extends coverage of policy).

232. See Gereboff v. Home Indemnity Co., 383 A.2d 1024, 1025-28 (R.I. 1978) (accounting firm purchased three different policies consecutively, yet none of the "claims-made" policies covered the claim because of their various notice and prior acts provisions). See also Dumont, *supra* note 231, at 378 (claims-made policies cover claims if notice is given to insurance company).

233. See Dumont, *supra* note 231, at 374-75 (discussing *Phillips v. Transamerican Ins. Co.*, 107 Misc. 2d 162, 433 N.Y.S.2d 555 (N.Y. Sup. Ct. 1980)). See also, *Hoyt v. St. Paul Fire & Marine Ins. Co.*, 607 F.2d 864 (9th Cir. 1979); *Ohio Casualty Ins. Co. v. Ryhearson*, 507 F.2d 573 (7th Cir. 1974); *Cornell, Howland, Hayes & Merryfield, Inc. v. Continental Casualty Co.*, 465 F.2d 22 (9th Cir. 1972); *Lapierre, Litchfield & Partners v. Continental Casualty Co.*, 32 A.D.2d 353, 302 N.Y.S.2d 370 (1969); *Oregon Automobile Ins. Co. v. Fitzwater*, 271 Or. 894, 531 P.2d 894 (1975).

234. *Infra* Appendix B: ALPS at B-9 to 10 ("Conditions," art. VI.); HOME at B-20 (§ F, art. I); CNA at B-31 ("Lawyers Agreement," art. V(C)(8)(b)); ST. PAUL at B-33 ("When A Claim Is Covered").

235. A "claims repair" program is a service set up by bar associations or insurance companies by which attorneys can report potential problems and receive assistance in resolving them before they get out of control. Mossner, *supra* note 13, at 552.

236. Spies, *The "Claims Made" General Liability Policy: An Examination of Public Policy and Notice Issues*, 54 DEF. COUNS. J. 482, 485-86 (1987) (discussing *Continental Casualty Co. v. ENCO Assoc. Inc.*, 66 Mich. App. 46, 238 N.W.2d. 198 (1975)). But see Dumont, *supra* note 231, at 381. Dumont noted that courts have been giving insureds extensions on reporting time when an insured receives a "last minute" claim. *Id.* Three of the four policies discussed in this article require written notice of claims. *Infra* Appendix B: ALPS at B-9 to 10 ("Conditions," art. VI.); HOME at B-20 (§ F, art. I); CNA at B-31 ("Lawyers Agreement," art. V(C)(8)(b)).

should have reasonably foreseen" type language, frequent litigation arises to determine the insured's knowledge of potential claims.<sup>237</sup> Often the representations of the insured are essential in deciding the issue; the insured's application is generally made a part of the policy. All four companies' applications inquire about prior claims history and potential claims in order to assist in making an actuarial determination of the appropriate rate. This information sets a bench mark for determining falsification or misrepresentation in the application.

In *Estate of Logan v. Northwestern National Casualty Co.*<sup>238</sup> the malpractice insurer, as a defense to an estate's action against the attorney and insurer, relied on the policy provision which incorporated the attorney's application to determine the scope of its responsibility under the policy.<sup>239</sup> The insured admitted that when he applied for coverage he was aware that the estate and inheritance tax returns at issue were past due and that penalties and interest continued to accrue.<sup>240</sup> The court remanded the matter for a determination by the trial court on the general question of whether the attorney made misrepresentations in the application.<sup>241</sup> In its decision, the intermediate court of appeals noted:

Northwestern issued its policy in reliance upon the statement in the application attached hereto and made a part hereof. . . . The application inquired into Dowling's state of mind. It sought his personal judgment or opinion. The answer, therefore, is not measured by the objective test of what Dowling should have known or believed, but by what he actually knew or believed.<sup>242</sup>

A further appeal was taken and the Wisconsin Supreme Court disagreed with the standard used by the court of appeals.

Northwestern agreed to insure Dowling with the exception that it would not insure him for past breaches that, prior to applying for insurance, he had a basis to believe he had committed. Although this exclusion may limit the Estate's recovery, the Estate is no worse off than a client who retains an attorney who has no insurance at

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237. See Dumont, *supra* note 231, at 375-78 (discussing prior knowledge of claims).

238. 140 Wis. 2d 71, 409 N.W.2d 391 (1987).

239. *Estate of Logan v. Northwestern Nat'l Casualty Co.*, 140 Wis. 2d 71, —, 409 N.W.2d 391, 392-93 (Ct. App. 1987), *rev'd on other grounds*, 144 Wis. 2d 318, 424 N.W.2d 179 (1988).

240. *Id.* at —, 409 N.W.2d at 394.

241. *Id.* at —, 409 N.W.2d at 395.

242. *Id.* at —, 409 N.W.2d at 394.

all. We do not impose liability on professional liability insurers merely because they are in the business of insuring. The reason for that is obvious — they have not contracted to accept such a risk. Under the facts of this case, sound public policy requires that we decline to impose liability on Northwestern for a risk it specifically declined to insure.<sup>243</sup>

Most courts agree with the holding of the Wisconsin Supreme Court that an objective standard is appropriate for determining whether the insured had prior knowledge of a claim.<sup>244</sup> In *American Home Assurance Co. v. Ingeneri*,<sup>245</sup> a case which illustrates the insurer's burden of proof, the insurer relied on the application to seek relief from any duty to defend or indemnify the insured because of a material omission or misrepresentation in the application.<sup>246</sup> The court in *Ingeneri* held that a single misrepresentation made in an application, when the attorney knew or should have known that he had missed a deadline for filing a complaint on behalf of a client, did not automatically absolve the insurer of its obligations to defend or indemnify.<sup>247</sup> The rationale of the case turned on the fact that there was no evidence that the insurer would have offered either no coverage or different coverage had proper disclosures been made on the application.<sup>248</sup> An exclusion, such as the ones found in the four examined policies which deny coverage of claims the insured had knowledge of when applying for a policy, would have probably produced a different result.<sup>249</sup>

*Fogelson v. The Home Insurance Co.*<sup>250</sup> demonstrates the effect of such an exclusion.<sup>251</sup> In *Fogelson* the court held that the insurer had no obligation to defend or indemnify its insured in an action instituted during the coverage period where the insured

243. *Estate of Logan v. Northwestern Nat'l Casualty Co.*, 144 Wis. 2d 318, —, 424 N.W.2d 179, 191 (1988).

244. *Dumont*, *supra* note 231, at 376.

245. 479 A.2d 987 (Me. 1984).

246. *American Home Assurance Co. v. Ingeneri*, 479 A.2d 897, 899 (Me. 1984).

247. *Id.* at 899, 901. The court concluded that the statute governing misrepresentations in insurance applications required the insurer to prove fraud, materiality, and actual reliance in order to be relieved of its obligations under the policy. *Id.* at 901. Since the insurer did not offer any evidence supporting reliance, the court concluded that the insurer remained obligated per the terms of the policy. *Id.*

248. *Id.* at 901.

249. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (j)); HOME at B-14 (§ B, art. I(b)(2)); CNA at B-29 ("Lawyers Agreement," art. II(J)); ST. PAUL at B-33 ("When A Claim Is Covered," "1. Prior acts").

250. 129 A.D.2d 508, 514 N.Y.S.2d 346 (1987).

251. *Fogelson v. The Home Ins. Co.*, 129 A.D.2d 508, —, 514 N.Y.S.2d 346, 348-49 (1987).

was advised by the plaintiff of a possible claim six months before the coverage began.<sup>252</sup> Accordingly, in *Stiefel v. Illinois Union Insurance Co.*<sup>253</sup> the court held that the insured, at the time of application, should have reasonably foreseen a potential lawsuit where the claimants had sent a letter to the insured eight months before the inception date of the policy, which unmistakably stated the intention of the claimants to file a malpractice claim.<sup>254</sup> In both these cases, a "prior acts" exclusion provided the evidence that coverage would have been denied had proper disclosures been made.

## 12. Penalties, Fines and Punitive Damages

The ALPS, Home, and CNA policies all exclude coverage for fines, penalties, and punitive damages, while the St. Paul policy is silent on these topics.<sup>255</sup> The ALPS policy contains a unique feature in that it provides an exception for sanctions imposed under Rule 11 of the Federal Rules or any state code compliment.<sup>256</sup> The ALPS underwriting guidelines recognize the need for attorneys to aggressively represent their clients and that such aggressive representation may on occasion offend judges. This provision is radical in the industry and is being scrutinized by the company to determine if it can, and should, be kept in its policy.

The courts have split on the issue of whether punitive damages, fines, and penalties should be covered unless specifically included by policy language.<sup>257</sup> Many courts and legislatures, particularly in this era of "tort reform," have held that to require companies to cover punitive damages violates public policy and mitigates or diminishes the intended effect of fines, penalties, or punitive damage awards.<sup>258</sup> In a contrary decision, the court in *Dayton Hudson Corp. v. American Mutual Insurance Co.*<sup>259</sup> held that protection "for all sums which the insured had become legally obligated to pay" was sufficiently broad enough to include liability

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252. *Id.* at —, 514 N.Y.S.2d at 349.

253. 116 Ill. App. 3d 352, 452 N.E.2d 73 (1983).

254. *Stiefel v. Illinois Union Ins. Co.*, 116 Ill. App. 3d 352, —, 452 N.E.2d 73, 76 (1983).

255. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (g)); HOME at B-15 (§ B, art. I); CNA at B-29 ("Lawyers Agreement," art. II(H)).

256. *Infra* Appendix B, ALPS at B-6 ("Exclusions," (g)).

257. 44 AM. JUR. 2D *Insurance* § 1557, at 560 (1982). For cases in which courts have held that coverage for punitive damages violates public policy, see *id.* n.60. For cases finding no limitation on insurance coverage for punitive damages, see *id.* n.61.

258. *Id.*

259. 621 P.2d 1155 (Okla. 1980).

for punitive damages.<sup>260</sup> While the absence of this exclusion leaves the issue open for judicial interpretation, it certainly should not control in the selection of a policy.

### 13. *Investment Advice*

While all four policies' insuring agreements implicitly exclude activities related to other occupations, only the ALPS policy includes a specific exclusion for claims arising out of activities generally considered to be functions of another occupation, such as investment advice in connection with the purchase or sale of any investment or property.<sup>261</sup>

The Home, CNA, and St. Paul policies contain no specific exclusion similar to the one contained in the ALPS policy "investment advice" exclusions. In spite of their silence, the rendering of investment advice or other non-legal related services may still be excluded, as these activities likely will not be construed as "professional services" of an attorney. The cases in this area focus on the conduct of the attorney and the general nature of the services provided.<sup>262</sup> In other words, would the public and the courts consider the service to be those generally performed by an attorney?

The court in *Smith v. Travelers Indemnity Co.*<sup>263</sup> held that the plaintiff's claims against the insured were not covered under the attorney's professional liability policy.<sup>264</sup> In *Smith* the plaintiff sued the insured and the insurer seeking the return of \$15,000 which the plaintiff had given the insured to invest in return for a six-month demand note for the same amount.<sup>265</sup> The attorney purportedly made only two interest payments and then failed to make any further payments.<sup>266</sup> The court's rationale in ruling on these facts is clear:

Certainly, it is sometimes difficult to draw a line between the practice of law and non-legal services since the field of law encompasses such a large area, and the

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260. *Dayton Hudson Corp. v. American Mutual Ins. Co.*, 621 P.2d 1155, 1158 (Okla. 1980).

261. *Infra* Appendix B, ALPS at B-7 ("Exclusions," (o)). The ALPS policy refers to investment advice including, but not limited to, securities, real property, commodities, or franchises, or based upon or arising out of the insured's services or capacity as a broker, dealer, investment adviser, accountant, real estate broker, or real estate agent.

262. For a discussion of liability insurance covering the professional services of an attorney, see *supra* notes 215-21 and accompanying text.

263. 343 F. Supp. 605 (M.D. N.C. 1972).

264. *Smith v. Travelers Indemnity Co.*, 343 F. Supp. 605, 610 (M.D. N.C. 1972).

265. *Id.* at 605-06.

266. *Id.* at 606.

attorney is called upon to use his legal background in many situations.

....

... [T]he controlling test should be whether the attorney was engaged for his legal services or for work which is not inherently the practice of law, and if it is the latter, it is non-legal services even if his knowledge of the law came into play during the transaction.

Applying this test to the instant case, it does not appear that the plaintiff employed [the insured] for the purposes of obtaining any legal assistance. In fact from the plaintiff's own testimony it is clear that [the insured], through a mutual acquaintance, approached the plaintiff at the plaintiff's place of business and suggested to the plaintiff that he could invest the plaintiff's money for him. This is certainly not the usual method employed for entering into an attorney-client relationship.<sup>267</sup>

Further, in *General Accident Insurance Co. v. Namesnik*<sup>268</sup> a malpractice insurer brought a declaratory judgment action to determine if the insurer was required to defend an action against an insured who had allegedly given investment advice.<sup>269</sup> The court held that the tax attorney was acting as a business agent rather than an attorney in soliciting client's investments in corporations or partnerships formed and operated by the attorney.<sup>270</sup> Therefore, the insured's activity did not fall within the meaning of "professional services" as contemplated by the policy's insuring agreement.<sup>271</sup>

If the attorney is reputed in the community for expertise as an investment advisor and it constitutes a substantial portion of his or her practice, the argument for exclusion weakens, especially if the nature of the practice is fully disclosed in the application for insurance. Producing a somewhat supportive result, the court in *American Home Assurance Co. v. Wiseman*<sup>272</sup> required the insurer to defend its insured against an investor's allegation that the insured induced investment in a second mortgage owned by a syndicate

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267. *Id.* at 609 (citing *Ellenstein v. Herman Body Co.*, 23 N.J. 348, 129 A.2d 268 (1957)).

268. 790 F.2d 1397 (9th Cir. 1986).

269. *General Accident Ins. Co. v. Namesnik*, 790 F.2d 1397, 1398 (9th Cir. 1986).

270. *Id.* at 1400.

271. *Id.* at 1400.

272. 79 A.D.2d 923, 434 N.Y.S.2d 410 (1981).

which subsequently defaulted.<sup>273</sup> The court ruled that there was at least a colorable claim that some of the acts with which the attorney was charged were those of an attorney, rather than an investment advisor, and thus fell within the scope of coverage.<sup>274</sup> While the decision turned on specific facts and circumstances, it is apparent that where any facts exist to support the presence of coverage, the courts are inclined to rule accordingly.

#### 14. *Damage to the Environment*

The Home policy excludes coverage for the insured's act, error, or omission while acting as an attorney, officer, director, partner, trustee, or employee of a business enterprise which is liable or may be held liable for contamination or pollution of the environment.<sup>275</sup> While the ALPS, CNA, and St. Paul policies contain no such exclusions, any activities by an insured as a partner, officer, director, or trustee would be excluded under the omnibus officers and directors exclusions contained in these policies.<sup>276</sup> The distinction then remains that the ALPS and CNA policies will cover an insured's involvement, *acting as an attorney*, while the Home and St. Paul policies will not (concerning the officers and directors exclusion).

The Home and CNA policies also contain an exclusion for any loss under any circumstances due to nuclear reaction, radiation, or contamination, regardless of the cause.<sup>277</sup> The ALPS and St. Paul policies deal with the issue by endorsement, and therefore may or may not include it on a case-by-case basis. The ALPS underwriting guidelines require its inclusion in order to keep the policies in conformity with their re-insurance treaties.

#### D. DEFENSE AND SETTLEMENT OF CLAIMS

Under all the examined policies, the insurer assumes the duty of defending the insured against claims which arise from covered acts as defined by the policies' insuring agreements and the various exclusions, even where the allegations of the claim prove groundless, false, or fraudulent.<sup>278</sup> The Home insurance policy

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273. *American Home Assurance Co. v. Wiseman*, 79 A.D.2d 923, —, 434 N.Y.S.2d 410, 412 (1981).

274. *Id.* at —, 434 N.Y.S.2d at 412.

275. *Infra* Appendix B, HOME at B-18 (§ C, art. I(i)).

276. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (f)); CNA at B-28 ("Lawyers Agreement," art. I(D)(1)(a)); ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover").

277. *Infra* Appendix B: HOME at B-22 ("Nuclear Energy Liability Exclusion Endorsement"); CNA at B-28 ("Lawyers Agreement," art. II(f)).

278. *Infra* Appendix B: ALPS at B-4 ("Insuring Agreements," art. II); HOME at B-15



specifically permits the insurer to select defense counsel.<sup>279</sup> The ALPS policy, however, specifically requires that the insurer consult with the insured in making the selection.<sup>280</sup> The ALPS claims procedures mandate, where time permits, that the insureds be given the opportunity to select their own counsel from a panel of approved defense counsel.<sup>281</sup> This procedure intends to assure, as much as possible, that the insureds have counsel with whom they are comfortable. While none of the other carriers have published procedures,<sup>282</sup> industry experience indicates that the insured does not get to choose their counsel unless they raise the issue and object to the prior appointment.

### 1. *Duty to Defend*

In cases where there may be a dispute over the applicability of an exclusion, the insurer faces the choice of denying coverage and a bill for defense costs and potential bad faith damages, or accepting the defense under a "reservation of rights." In any case, the insurer may well initiate a declaratory judgment action to determine the issue of coverage before investing significant amounts in defense.

*Guarantee Insurance Co. v. Saltman*<sup>283</sup> illustrates the risk an insurer runs by denying coverage and defense without immediately seeking a declaratory judgment.<sup>284</sup> The court in *Saltman* ruled that the insurer breached its obligation to defend and awarded the insured reasonable attorney fees incurred in defending the original action, as well as fees incurred by the insured in bringing the action against the company to determine coverage.<sup>285</sup>

In *St. Paul Mercury Insurance Co. v. Ralee Engineering Co.*<sup>286</sup> the company properly handled the situation. The insurer, at the inception of the action alleging the wrongful termination of an employment contract and intentional infliction of emotional dis-

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(§ B, art. II); CNA at B-28 ("Lawyers Agreement," art. I(C)); ST. PAUL at B-32 ("Additional Benefits," "Defending lawsuits").

279. *Infra* Appendix B, HOME at B-15 (§ B, art. II).

280. *Infra* Appendix B, ALPS at B-4 ("Insuring Agreements," art. II).

281. *Id.*

282. To the author's knowledge, no published procedures governing a client's choice of defense counsel are publicly available from Home, CNA, and St. Paul.

283. 217 N.J. Super. 604, 626 A.2d 731 (App. Div. 1987).

284. *Guarantee Ins. Co. v. Saltman*, 217 N.J. Super. 604, —, 526 A.2d 731, 735 (App. Div. 1987). For a discussion of declaratory judgment actions in insurance defense cases, see *supra* note 24 and accompanying text.

285. *Saltman*, 217 N.J. Super. at —, 526 A.2d at 736.

286. 804 F.2d 520 (9th Cir. 1986).

stress, accepted the duty to defend, but, by letter to the insured, reserved its right to deny coverage and withdraw from defense at a later date.<sup>287</sup> In this action for declaratory judgment filed by the company, the court found no coverage for wrongful termination of employment or intentional infliction of emotional distress under the policy.<sup>288</sup> In affirming the company's right to withdraw from coverage and defense where it had undertaken the defense originally under a "reservation of rights" letter, the court noted that the language of the letter was adequate:

For the foregoing reasons, in undertaking your defense, or conducting any investigation, it is to be clearly understood we are not waiving any right we have to deny coverage or refuse to defend you further at any future time, and we hereby specifically reserve our right to do so without prejudice to any other rights you or we may have under the policy.<sup>289</sup>

On a related issue, the court did not allow the insurer to be reimbursed for the costs of defense incurred prior to the resolution of the declaratory judgment action.<sup>290</sup>

## 2. *Consent to Settle*

The issue of consent by the insured represents one of the most divergent differences in the four policies. The issues revolve around who makes the settlement decision — the insured or the insurer? The Home, CNA, and St. Paul policies utilize the more conventional approach and require the consent of the insured to settle.<sup>291</sup> If, however, the insured refuses to settle, the Home, CNA, and St. Paul policies indicate that the company may limit its liability under the policy to the amount for which the claim could have been settled.<sup>292</sup> The loss of the upper end of the limits of liability is an excessively high price to pay for the right to approve a settlement. The ALPS policy adopts a concept, in part borrowed from the TLIE.<sup>293</sup> Under the ALPS policy, the company makes

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287. St. Paul Mercury Ins. Co. v. Ralee Engineering Co., 804 F.2d 520, 522 (9th Cir. 1986).

288. *Id.* at 522.

289. *Id.* at 522 (quoting the letter the insurer had previously sent to the insured).

290. *Id.*

291. *Infra* Appendix B: HOME at B-15 (§ B, art. II); CNA at B-28 ("Lawyers Agreement," art. I(C)); ST. PAUL at B-32 ("Additional Benefits," "Defending lawsuits").

292. For provisions of the Home, CNA, and St. Paul policies pertaining to settlement, see *supra* note 291.

293. TLIE is the acronym for Texas Lawyers Insurance Exchange, the attorney-owned reciprocal insurance company originally formed and sponsored by the Texas Bar.

the decisions on settlement.<sup>294</sup> In cases where the insured does not agree with the decision, a peer review panel reviews the settlement proposal and makes a final and binding decision.<sup>295</sup> If the panel agrees with the company, the case settles.<sup>296</sup> If it agrees with the insured, the company continues to defend, and the case goes forward with the entire policy limit of liability intact.<sup>297</sup>

This concept recognizes that emotions often interfere with common sense when an insured looks at settling a case of questionable liability. The company, on the other hand, has an obligation to its other policyholders to get out of cases as economically as possible, while at the same time recognizing the need to understand and deal with the insured's feelings.

### E. LIMITS OF LIABILITY

While most attorneys think that they can speak knowledgeably about professional liability insurance policy limits, few truly understand how much their insurer will pay and for what. The declaration page of the policy generally provides the most information by specifying the stated limits of liability and the deductible. The declaration page, however, will not answer the following:

- 1) What do the terms "defense cost" or "claims expense" mean?
- 2) Are defense costs or claims expenses included within the limits of liability?
- 3) Does the policy provide for first dollar defense costs, or does the insured pay them out of the deductible?
- 4) Are the limits of liability stated on the declaration page as a per firm aggregate amount, per occurrence amount, or per claim amount?
- 5) What happens to the limits of liability where there are multiple claims arising out of a single occurrence?
- 6) Does the policy provide for a per claim deductible, and if so, is there any limit on the number of deductibles that the insured must pay in a year?

#### 1. *Claim Expenses*

The ALPS, Home, and CNA policies all define "claim

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294. *Infra* Appendix B, ALPS at B-4 ("Insuring Agreement," art. II).

295. *Id.*

296. *Id.*

297. *Id.*

expenses" in roughly the same manner.<sup>298</sup> They include fees charged by the attorney appointed by the company to defend the insured, together with any other fees, costs, and expenses which result from the investigation, adjustment, defense, and appeal of a claim.<sup>299</sup> They will not include any salary charges for regular employees or officials of the insurance company,<sup>300</sup> or under the Home policy, any fees and expenses of any retained supervisory counsel.<sup>301</sup> One would not generally expect expenditures for salaries of the insured's or the insurer's employees to be included in claim expenses, but exclusion of the cost of outside adjusters seems reasonable. The St. Paul policy does not specifically define claim expenses but does provide for paying the costs of investigating and defending the lawsuit.<sup>302</sup> In addition, the St. Paul policy will pay up to \$100 per day for the insured's actual loss of earnings in assisting the company in investigating or defending a claim or suit.<sup>303</sup> This seems a minor concession in light of the actual value of the insured attorney's time, but to some degree, it provides some value not found in the other three policies.

The ALPS, Home, and CNA policies include claims expense within the limits of liability.<sup>304</sup> In contrast, the St. Paul policy provides for payment of claims expense in addition to the policy limits, up to an amount for claims expense equal to the limits of liability found on the declaration page of the policy.<sup>305</sup> In effect, the St. Paul policy provides a larger pool of money from which to pay indemnity losses. This provision becomes particularly important to those attorneys who purchase low limit policies. With the rising cost of defense in the case of a per claim policy limit of one hundred thousand dollars (\$100,000), the entire limit could be eaten up by the cost of defense. Conversely, the effect becomes almost *de minimis* where the policy provides significantly higher limits. In any case, the price of higher limits for the Home or ALPS policies may not significantly differ from the price of the

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298. *Infra* Appendix B: ALPS at B-7 ("Conditions," art. I(b)); HOME at B-20 (§ E, art. V); CNA at B-25 ("General Conditions," art. V).

299. For provisions of the ALPS, Home, and CNA policies pertaining to "claim expenses," see *supra* note 298.

300. For provisions of the ALPS, Home, and CNA policies pertaining to "claim expenses," see *supra* note 298.

301. *Infra* Appendix B, HOME at B-20 (§ E, art. V).

302. *Infra* Appendix B, ST. PAUL at B-33 ("Additional Benefits," "Expenses related to defense."

303. *Id.*

304. *Infra* Appendix B: ALPS at B-5 ("Conditions," art. II); HOME at B-19 (§ E, art. I); CNA at B-29 ("Lawyers Agreement," art. III(B) & (C)).

305. *Infra* Appendix B, ST. PAUL at B-32, B-33 ("Additional Benefits").

CNA or St. Paul policies with lower indemnity limits. What the future holds for attorneys on these issues may well rest in the hands of the reinsurance markets, because most reinsurance treaties are moving toward mandating claims expenses being included within the policy limits.

## 2. *Single Limit vs. Split Limit Policies*

Attorneys' professional liability insurance policies offer limits of liability in either of two ways — single limit or split limit.<sup>306</sup> Under a single limit policy, the entire limit of liability is available for any one claim or for the aggregate of all claims reported during the policy year. For example, a five million dollar (\$5,000,000), single limit policy could cover a single claim of five million dollars (\$5,000,000) or several smaller claims totaling five million dollars (\$5,000,000) during the policy year. A split limit policy specifies a separate limit of liability for each claim and an aggregate limit for the total of all claims reported during the year. For example, a split limit policy might be referred to as a one million/five million dollar policy, meaning simply that the policy will pay up to one million dollars (\$1,000,000) per claim and a total of five million dollars (\$5,000,000) in the aggregate for all claims during the year. It is difficult to compare the two types from a pricing standpoint, but generally, with all other factors being equal, a one million/five million (\$1,000,000/\$5,000,000) split limit policy should cost approximately 110% more than a one million dollar single limit policy.

All four policies specify the per claim limit on the declaration page.<sup>307</sup> However, the policies differ significantly in the area of aggregate limits, especially as it relates to firm size. The ALPS, Home, CNA, and St. Paul policies all specify the total aggregate limit of liability, whether split or single limit, on the declaration page of the policy.<sup>308</sup> This is the total amount that the company will pay on behalf of all members of the firm for all claims filed during the policy year. Thus, if it is a one million/three million dollar policy, the company will pay up to three million dollars (\$3,000,000) if the firm has three or more one million dollar

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306. The various companies offer different selections of limit options. There is no consistency except to say that the split limit option seems to be more prevalent at the lower limits of liability.

307. *Infra* Appendix B: ALPS at B-8 ("Conditions," art. II); HOME at B-19 (§ E, art. I); CNA at B-29 ("Lawyers Agreement," art. III(B)); ST. PAUL at B-34 ("Limits Of Coverage").

308. *Infra* Appendix B: ALPS at B-8 ("Conditions," art. II); HOME at B-19 (§ E, art. II); CNA at B-29 ("Lawyers Agreement," art. III(B)); ST. PAUL at B-34 ("Limits Of Coverage").

(\$1,000,000) claims. A significant point of interest is that it makes no difference whether the firm has one attorney or fifty.

In the situation where multiple claimants exist arising out of a single occurrence, the single limit policy provides better coverage for the price. All four of the examined policies treat all claims arising out of a single occurrence or act as a single claim for policy limit purposes.<sup>309</sup> In a situation where five purchasers of securities from the same offering sue a firm alleging professional negligence in the preparation of the offering, the firm with a one million/three million dollar split limit policy is no better off than the insured with a one million dollar single limit policy. All of the claims fall within the per claim limit under either policy, illustrating how a higher single limit policy may well be more economical for a firm that engages in multiple risk transactions. As a complement to the multiple claim single occurrence provision, the policies also specify that if claims arising out of a single occurrence are made during more than one policy year, the limits in effect when the first claim is made will control for all subsequent claims.<sup>310</sup>

When more than one firm insured by the same company becomes involved in a claim, the Home policy provides that the highest limit of liability will be the aggregate limit for the group of insured firms.<sup>311</sup> Simply stated, there is no stacking of limits so as to give the claimant access to a greater pool of funds. The company's rationale here seems illogical, as it seems unfair to impose this arbitrary limit when both firms have paid the appropriate premium for the limits of liability purchased. While these circumstances seem limited, this limitation gives the ALPS, CNA, and St. Paul policyholders a significant economic advantage from an ultimate coverage standpoint.

### 3. *Deductibles*

All of the examined policies provide for a per claim deductible, as specified on the policy's declaration page.<sup>312</sup> Only the ALPS policy contains an aggregate deductible clause charging only two deductibles per firm in any policy year.<sup>313</sup> With more

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309. *Infra* Appendix B: ALPS at B-8 ("Conditions," art. II); HOME at B-19 (§ E, art. II); CNA at B-29 ("Lawyers Agreement," art. III(B)); ST. PAUL at B-34 ("Limits Of Coverage").

310. For the provisions of the ALPS, Home, CNA, and St. Paul policies pertaining to liability limits, see *supra* note 309.

311. *Infra* Appendix B: HOME at B-19 (§ E, art. IV).

312. *Infra* Appendix B: ALPS at B-8 ("Conditions," art. II); HOME at B-19 (§ E, art. I); CNA at B-29 ("Lawyers Agreement," art. III(D)(1)); ST. PAUL at B-34 ("Limits Of Coverage").

313. *Infra* Appendix B: ALPS at B-8 ("Conditions," art. II).

firms attempting to self-insure by retaining higher deductibles, this can become a significant economic consideration.

## F. OTHER CONDITIONS AND POLICY CONSIDERATIONS

Each of the policies contain numerous other conditions and limitations. These generally come in the form of a condition precedent to the insurer's obligation to provide a defense or make an indemnity payment under the terms of the policy.

### 1. *Effective and Timely Notice*

Policies will include a notice provision, typically requiring an insured to give the insurer timely notice of all claims or potential claims. The ALPS, Home, and CNA policies all specify that written notice be given "as soon as practicable."<sup>314</sup> The St. Paul policy simply requires that the insured notify the company while the agreement is in effect.<sup>315</sup>

The cases interpreting the effect of policy notice provisions generally seem to be based on a common sense interpretation of the policy language. The court in *Walker v. Larsen*<sup>316</sup> held that the client effectively made a claim against the insured within the meaning of the policy by filing a complaint with the Commission on Practice and advising both the insured and insurance company of the complaint.<sup>317</sup> In a case involving timeliness, the court in *Felice v. St. Paul Fire & Marine Insurance Co.*<sup>318</sup> held that a six-month delay in notifying the insurer, after service of the original summons and complaint, constituted an unreasonable delay and therefore did not comply with the policy requirement of timely notice.<sup>319</sup> The court's decision is consistent with the notion that the longer the insured delays in getting the insurer involved, the less likely that a reasonable settlement can be accomplished.

### 2. *Assistance and Cooperation*

The "assistance and cooperation" clauses found in all the policies require the insured to work with the insurer by making

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314. *Infra* Appendix B: ALPS at B-9 to 10 ("Conditions," art. VI); HOME at B-20 (§ F, art. I); CNA at B-31 ("Lawyers Agreement," art. V(C)(8)(b)).

315. *Infra* Appendix B, ST. PAUL at B-33 ("When A Claim Is Covered," "2. Reported acts").

316. — Mont. —, 727 P.2d 1321 (1986).

317. *Walker v. Larsen*, — Mont. —, —, 727 P.2d 1321, 1323 (1986).

318. 42 Wash. App. 352, 711 P.2d 1066 (1985).

319. *Felice v. St. Paul Fire & Marine Ins. Co.*, 42 Wash. App. 352, —, 711 P.2d 1066, 1070 (1985).

records and documents available, assisting counsel with the preparation of the defense, and cooperating with the company and assisting in making settlements.<sup>320</sup> The ALPS, Home, and CNA policies additionally require the insured to attend hearings and trials and assist in trial preparation at their own expense.<sup>321</sup> The St. Paul policy pays reasonable costs incurred by the insured at the company's request while helping the company investigate or defend a claim, and as previously noted, pays the insured one hundred dollars (\$100) per day to attend trial.<sup>322</sup>

### 3. *Self-Help and Claims Repair*

Insurers continually face the problems of insureds independently attempting to resolve claims. "Claims repair," one of the new buzzwords in the industry, reflects the efforts of insurance companies and bar associations to control claim expenses by developing programs to assist insureds in dealing with potential claims before they become irreparable.<sup>323</sup> Firms need to work with their insurers early on in the claims repair process instead of hoping that the problem will go away. Today's insurance policies demonstrate some of the industries past frustration with insureds' independent settlement efforts. The ALPS, Home, and CNA policies all prohibit an insured, except at the insured's own cost, from making any payment, admitting liability, settling any claims, or assuming any obligation or incurring any expense without the written consent of the company.<sup>324</sup> The court in *American Fire & Casualty Co. v. Kaplan*<sup>325</sup> created a judicial exception to the consent requirement where an insurance company refused to negotiate any type of settlement.<sup>326</sup> The court reasoned as follows:

We think Kaplan's step in honoring the claim against

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320. *Infra* Appendix B: ALPS at B-10 ("Conditions," art. VII); HOME at B-20 (§ F, art. II); CNA at B-31 ("General Conditions," art. VI(D)); ST. PAUL at B-33 ("Additional Benefits," "Expenses related to defense").

321. For the provisions of ALPS, Home, and CNA policies pertaining to "assistance and cooperation," see *supra* note 320.

322. *Infra* Appendix B, ST. PAUL at B-33 ("Additional Benefits," "Expenses related to defense").

323. For a discussion of "claims repair," see *supra* note 235.

324. *Infra* Appendix B: ALPS at B-10 ("Conditions," art. VII); HOME at B-20 (§ F, art. II); CNA at B-28 ("Lawyers Agreement," art. I(C)).

325. 183 A.2d 914 (D.C. 1962).

326. *American Fire & Casualty Co. v. Kaplan*, 183 A.2d 914, 915 (D.C. 1962). The lawyer in *Kaplan* counseled both parties in a real estate sale. *Id.* at 914-15. He assured the parties that he would place fire insurance on the premises, but failed to do so. *Id.* at 915. When the premises were damaged by fire, the lawyer contacted his malpractice insurer. *Id.* On several occasions the insurer rejected the claim. *Id.* The lawyer therefore paid for the repairs and then sued his insurer. *Id.*



him cannot be characterized as 'voluntary,' so as to defeat his resultant claim against the insurer. He had an interest of his own to protect. He had both a moral and a legal obligation on which he had been threatened with suit. Furthermore, when read in context, the provisions as to 'voluntary' settlements, contained in Condition No. 3 of the policy, contemplated a situation where the insurer is actively engaged in negotiating a settlement or defending a suit. It does not cover a situation where the insurer rejects the claim in advance and says it will not pay under any circumstances.<sup>327</sup>

Cases such as *American Fire* demonstrate a fairly uniform disdain by the courts of insurance company activities that may unjustly utilize conditions in a policy to avoid coverage.<sup>328</sup>

#### 4. Subrogation

The subrogation rights of the insurer to recover from others differs widely among the policies. The ALPS, Home, and CNA policies provide for subrogation rights against anybody but the insured.<sup>329</sup> However, the ALPS and Home policies state that subrogation will extend even to an insured in cases of dishonest, fraudulent, criminal, or malicious acts committed by the specific insured.<sup>330</sup> With the language in these policies, it is clear that the insurer's rights of subrogation can not be interfered with by the insured.<sup>331</sup> In contrast, the St. Paul policy remains silent as to the insurer's subrogation rights.

The Supreme Court of Minnesota has addressed the subject of subrogation in relation to a St. Paul policy which did contain a subrogation clause. In the recent case of *St. Paul Fire & Marine Insurance Co. v. Perl*<sup>332</sup> the court ruled that absent policy language to the contrary, an insured could waive subrogation rights and bind its insurer.<sup>333</sup> This case purported to end almost nine years of litigation arising out of the attorney Perl's alleged breach of a fiduci-

327. *Id.* at 915.

328. *See Id.*

329. *Infra* Appendix B: ALPS at B-10 ("Conditions," art. IX); HOME at B-20 (§ F, art. III); CNA at B-26 ("General Conditions," art. VIII).

330. For the provisions of the ALPS and Home policies pertaining to subrogation rights, see *supra* note 329.

331. All three policies (ALPS, Home, and CNA) require that the insured cooperate with the insurance company in securing its subrogation rights and refrain from any acts which might interfere with subrogation. See *supra* note 329.

332. 415 N.W.2d 663 (Minn. 1987).

333. *St. Paul Fire & Marine Ins. Co. v. Perl*, 415 N.W.2d 663, 667 (Minn. 1987).

ary duty owed to his clients.<sup>334</sup>

The 1987 case concerned the interrelation between a clause in the firm's insurance policy in which St. Paul expressly reserved the right to be subrogated to any rights of the firm against any person covering the loss, and an indemnification clause in the firm's (a professional corporation) bylaws which stated that the firm would indemnify and hold harmless all employees for all costs in connection with the defense of any claim.<sup>335</sup> The court addressed the issue of whether the firm's indemnification and "hold harmless" agreement entered into between the non-insured attorney and his firm (the insured) may extinguish the subrogation rights of the insurer for claims paid as a result of an attorney's breach of a fiduciary duty.<sup>336</sup> The court stated:

As a general rule, an insurer has the right to pursue any rights which its insured may have against a party causing the loss. It is well settled, however, that an insurer, as a subrogee, is entitled to no greater rights than those possessed by its insured, the subrogor. The insurer does not possess any independent rights, but merely "steps into the shoes" of the subrogor.<sup>337</sup>

The attorney in these cases was found to have breached his fiduciary duty to several clients by settling their claims with an adjustor who was simultaneously employed by the attorney's firm as an investigator.<sup>338</sup> As damages, the trial court awarded the client a refund of attorneys' fees paid.<sup>339</sup> In the 1984 decision the court held that malpractice insurance coverage which purported to cover a fee forfeiture by an individual attorney for his or her own breach of a fiduciary duty was contrary to public policy and hence unenforceable.<sup>340</sup> Therefore, in relation to this claim, the attorney Perl was considered uninsured.<sup>341</sup> However, the court held that the attorney's law firm, a professional corporation, was still covered by the St. Paul professional liability policy because its liability was merely vicarious as an employer.<sup>342</sup> In the 1987 decision the court concluded that the insured firm had waived its sub-

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334. *Id.* at 664 n.1, 667.

335. *Id.* at 664.

336. *Id.* at 665-66.

337. *Id.* at 665 (citations omitted).

338. *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982).

339. *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 211 (Minn. 1984).

340. *Id.* at 215-16.

341. *Id.* at 217.

342. *Id.* at 216.

rogation rights against Perl and that this waiver thus bound the insurance company as well.<sup>343</sup>

### 5. Cancellation

The insurer's right to cancel coverage will generally be governed by the language of the policy and the insurance laws of the state in which the insured resides.<sup>344</sup> The ALPS, Home, and CNA policies permit a company to cancel any policy by sending written notice to the named insured at least thirty (30) days prior to the intended date of cancellation.<sup>345</sup> These policies further provide that the company may cancel the policy for nonpayment of the premium by sending ten days written notice of cancellation.<sup>346</sup> Only the ALPS policy details reasons under which the company may cancel,<sup>347</sup> while the other policies are governed by the common law.

The Home policy contains the following unique provision: "If an insured shall commit fraud in proffering any claim as regards amount or otherwise this insurance shall become void as to such insured from the date such fraudulent claim is proffered [sic]."<sup>348</sup>

The St. Paul policy contains no provisions relative to the company's right of cancellation, and therefore, none exist except those established by the common law. However, the St. Paul policy is subject to cancellation, just as the others are. It is just more susceptible to judicial review as a result of its silence.

### 6. Other Insurance

The existence of other insurance always muddies the waters in determining which insurer carries the primary responsibility to defend and indemnify. In most cases, policies have provisions, like those of ALPS, Home, and CNA, which provide coverage in excess of any other valid and collectible insurance.<sup>349</sup> This creates a

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343. St. Paul Fire & Marine Ins. Co. v. Perl, 415 N.W.2d 664, 667 (Minn. 1987).

344. Concerning an insurer's right to cancel, ALPS falls in a different category than the other three policies due to its status as a risk retention group. It was formed under the Risk Retention Act of 1986 which preempts the jurisdiction of state insurance commissioners to regulate the operations of the company except in limited circumstances. ALPS' cancellation rights are governed by its policy provisions and the laws of Nevada, its state of domicile.

345. *Infra* Appendix B: ALPS at B-11 ("Conditions," art. XIII); HOME at B-21 (§ G, art. V); CNA at B-31 ("General Conditions," art. XII).

346. For the provisions of the ALPS, Home, and CNA policies dealing with cancellation, see *supra* note 345.

347. *Infra* Appendix B, ALPS at B-11 ("Conditions," art. XIII).

348. *Infra* Appendix B, HOME at B-20 (§ F, art. V).

349. *Infra* Appendix B: ALPS at B-9 ("Conditions," art. V); HOME at B-21 (§ G, art. II); CNA at B-26 ("General Conditions," art. VII).

“which came first — the chicken or the egg” problem, leaving the court to resolve the issue. The St. Paul policy adopts a proration approach where other insurance is available to pay a claim.<sup>350</sup> It will divide the total coverage limit under its policy by the total of all insurance available.<sup>351</sup> It then pays no more than its pro rata share, less the deductible.<sup>352</sup> This approach eliminates the “chicken and egg” problem but may well leave the firm with less coverage than anticipated. Pay close attention to this problem, especially in the area of multiple claimants arising out of a single occurrence.

### G. REINSURANCE CONSIDERATIONS

While the topic of reinsurance is like a foreign language to most, a basic understanding is imperative as the issues of policy terms and coverage stability are addressed. All insurers utilize the reinsurance markets to expand their ability to effect coverage for a larger group of risks or to expand into other lines of insurance. All of the commercial carriers, and most of the captives, utilize a form of reinsurance contract (Treaty) that is known as “excess of loss” for their primary layers of reinsurance. Simply stated, the company sells off to the reinsurers all of its risks over a specified threshold. For example, ALPS offers coverage limits up to five million dollars (\$5,000,000), but retains only the first one hundred thousand dollars (\$100,000) of each loss. In effect, it has sold its risk to the reinsurance market for all losses over that threshold. Some other captives handle their reinsurance under a contract form known as a “quota share” arrangement. In this scenario, the company shares the losses with the reinsurers on a pre-established pro rata basis. A typical quota share treaty might provide that the company cover twenty percent (20%) of each loss, and the reinsurers the remaining eighty percent (80%). The effect, being that the reinsurance kicks in on each loss at some level, thus reduces the company’s risks on smaller claims, which are more frequent, and increases them on the larger ones which happen less frequently, but individually have a greater effect on the company’s bottom line.

Reinsurance relationships can expand a company’s ability to provide flexibility to insureds with special needs in the areas of policy limits. ALPS, for example, projected that it needed to offer

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350. *Infra* Appendix B, ST. PAUL at B-35 (“Other Insurance”).

351. *Id.*

352. *Id.*

limits of up to five million dollars (\$5,000,000) in order to meet the needs of its constituency. It found, however, that there are a few firms that want higher limits. Negotiations are presently underway to establish a facultative reinsurance agreement with brokers at Lloyds of London which will allow ALPS to offer liability limits on its own policy form up to a level of perhaps fifteen million dollars (\$15,000,000). Facultative reinsurance, unlike treaty reinsurance, must be negotiated on a policy by policy basis. It entails a reinsurer doing its own underwriting review (deciding if it wants the specific risk), and in essence, writing an excess policy above the company's primary coverage using the company's policy form so as to provide the insured the total continuity of coverage. Typically, using facultative reinsurance means higher cost to the insured, and therefore, most companies will not keep a facultative facility unless they can not get anything else or do so solely to offer significantly higher limits to a very few insureds.

The requirement of higher limits can also be handled by the insurance broker who can secure excess policy coverage where a second insurer issues a separate policy of insurance on its own form with a deductible equal to the policy limits of the underlying policy. Again, this coverage generally costs much more than if it could be offered through the primary carrier under a conventional reinsurance treaty. Additionally, the insured has the problem of checking the coverage to make sure that there are no discrepancies in the two policy forms that could lead to gaps in coverage if a claim brings both policies to bear.<sup>353</sup>

#### H. CUSTOM FITTING COVERAGE

Buying your malpractice coverage is not much different from buying a suit. You can walk in off the street and pick out the cheapest one you see with a tag on it that says that it is your size. If you shop for malpractice coverage the same way, you get the same result; a policy that reads "Lawyers Professional Liability Insurance Policy" with policy limits that you specified. Alternatively, you can buy a suit that has been tailored to fit, and an errors and omissions policy that responds to the specific needs of your firm. Thinking about the comparisons found in the prior sections of this article, it should be obvious that all policies will not fit your

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353. Differences in the definition of "insured" and "policy exclusions" can cause real problems. Particular review of predecessor firm issues and exclusions relating to directors and officers' liability and outside business interests is required where an excess carrier provides coverage on its own form.

firm's needs equally. The smart shopper will analyze their firm's needs and look at all the policies and options available. It is possible that what appears to be the most expensive policy will in the end be competitive when the actual effect of deductibles, defense cost inclusions, and policy limit options are properly considered.

Unfortunately, the suit analogy stops here. Insurance policies are agreements with years of history, and, frankly, the terms of most are inevitably non-negotiable.<sup>354</sup> The custom fitting comes in with knowing what options are available to you in the policy forms provided by the various companies in your market place, and how to pick the appropriate deductibles and policy limits to meet a particular firm's needs. Additionally, the policy which provides the best definitions of "insured," as they relate to the firm's history, and perhaps retiring partners who hang around the office and serve as "Of Counsel" for appearances, may be the best choice.

The problem of retired partners who serve as "Of Counsel" faces more and more firms as the cost of insuring them rises. Often they are the founders of the firm and their presence serves to both enhance the firm's public image and to serve as advisor and teacher to other lawyers in the firm.<sup>355</sup> Most policies require that they be named insureds to be covered and hence charge an additional full premium for the coverage to afford full coverage for current work performed. Look beyond the obvious and see what exactly they are doing for the firm. If they perform public relations functions and are in fact no longer considered patterns for compensation purposes, they may be covered without additional premium.<sup>356</sup> The critical issue becomes: what do they do. If they perform only non-lawyer functions such as marketing, providing advice to other lawyers in the firm, and have no client contact in the sense of providing representation or giving advice and only draft documents under the supervision of and for the use of other

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354. It is possible to negotiate some endorsements which limit or delete some exclusions or modify the definitions to cover additional insureds. An example would be as in the case of title examiners and insurers liability, obtaining coverage for an occupation outside the scope of coverage defined in the policy. No carrier, to the author's knowledge, will offer a pure manuscript (totally negotiated) form of Lawyers' Professional Liability Insurance. Even if they wanted to, the companies are constrained to deviate very far from the policy form by the terms of their reinsurance treaties.

355. A detailed review of the manner in which various policies treat "Of Counsel" retired partners is found in the "Policy Comparison" section of this article. See *supra* notes 63-64 and accompanying text. For a discussion of liability insurance and the retired attorney, see Cline, *supra* note 230, at 279-87.

356. Of counsel attorneys cannot be sharing in profits and losses from firm activity, but may be receiving ownership buy out payments or a salary for specific non-attorney services, such as those ordinarily provided by legal assistants or advisors.

lawyers in the firm, look at the definitions of "other employees" in the policy. Several of the compared policies will provide coverage as long as the client does not deem them to be representing them as a lawyer. It is critical to establish in the mind of the client that the firm and some current partner or associate are providing the legal representation, not the retired partner. Again this issue will turn on the language of the various policies, and a detailed study of the options may well save premium dollars for firms that take the time to perform review functions.

Firm composition and areas of practice also affect substantially which policy best serves the needs of a firm. A profile detailing the areas of expertise among the lawyers and an areas of practice checklist are essential in completing this review process. If one exists, the firm's resume can serve as the framework for the expertise profile. It should contain areas of practical expertise developed during the years of practice, teaching experiences, courses of post graduate study, seminars attended, and any other items that the firm feels give it depth. Appendix C to this article contains a sample form for the areas of practice checklist.<sup>357</sup> It is intended to be a generic form and should be modified to add areas and delete others to make it representative of the firm's practice.

These tools will give you a documentable handle on the firm's practice and the areas where it may have exposures.<sup>358</sup> At this point a close review of the exclusions and available endorsements making up the available policies should disclose any areas where the firm might be left uncovered. Some of the common exclusions include securities work, issuance of title insurance, outside business interests, and directors and officers' liability. None of the reviewed policies cover acts of a director or officer, and most exclude, to some degree, a named insured's liability to owned or controlled companies.<sup>359</sup> This is a particularly good example to illustrate some of the subtle differences in coverage. Take for example the situation where one of the partners is on the board of directors of a bank or a company. The amount of stock or other ownership interest clearly affects the degree of coverage under some of the policies. Further assume that an associate in the firm does some collection or contract work for the same company. Is

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357. See *infra* Appendix C.

358. In examining Appendix C, pay particular attention to the areas which the checklist marks as those identified by the ABA National Data Center.

359. *Infra* Appendix B: ALPS at B-6 ("Exclusions," (h)); HOME at B-18 (§ C, art. I(b) & (c)); CNA at B-28 ("Lawyers Agreement," art. II(D)(2)); ST. PAUL at B-34 ("Exclusions — Claims We Won't Cover").

there coverage for acts of malpractice that the associate may commit in rendering these services? Note the specific reference in the ALPS policy to unrelated legal services found in both the "directors and officers" and "owned and controlled business" exclusions.<sup>360</sup> Look also at the example in the St. Paul policy pertaining to a director performing other legal services.<sup>361</sup> These policies afford some degree of coverage, while others either do not, or leave the issue ambiguous. This issue alone does not disqualify any policy from contention, as there are many more issues to examine where they may be stronger or offer a different advantage.

A firm must also examine the profitability of each segment of its fee base to consider if eliminating some less profitable areas of practice might afford additional protection under existing policies or those under consideration. Most small-to-mid-sized firms should examine any securities practice in this light and pay particular attention to those policies that provide this coverage and the relative cost of the additional coverage. In all high risk areas of practice, firms need to consider the limits of liability necessary to cover the cases or projects they handle, as well as the additional cost of coverage, if any.

It makes no sense to carry too little insurance, particularly where, as in partnership situations, all the partner's personal assets may be exposed to judgment. On the other hand, how much coverage is offered by the various policies? Firm size plays a big part in this determination. In a solo practice situation, a single-limit policy for one million dollars (\$1,000,000) may well be adequate, where the same policy might not for a five-person firm, and clearly would not be for a ten-person firm. Why? The firm's aggregate coverage in all three situations is the same — one million dollars (\$1,000,000) per firm, per year. Here, clearly the CNA policy seems to provide the best coverage, assuming that the cost is the same. Herein lays the rub — price. If one policy is less expensive than the other at identical coverage levels, a firm can get very creative by increasing the coverage, at perhaps a similar cost to provide more protection per occurrence and at the same time bring the firm's aggregate to a comfortable level given the size of the firm.

Deductibles also can give some cause to pause when comparing policies. How much flexibility does the firm have in selecting

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360. *Infra* Appendix B, ALPS at B-6 ("Exclusions," (f) & (h)).

361. *Infra* Appendix B, ST. PAUL at B-35 ("Exclusions — Claims We Won't Cover").



its own deductible? Here, the answer can be found by examining the application form and having a frank discussion with the agent. Philosophically, a firm should carry as high a deductible as possible. As rule of thumb, a solo practitioner should maintain a minimum deductible of two thousand five hundred dollars (\$2,500), while small-to-medium sized firms should consider maintaining a level of one to two thousand dollars (\$1,000-\$2,000) per insured lawyer. This, of course, will vary from firm to firm depending on location and type of practice, but it should be high enough to be just uncomfortable if a claim occurs. Carriers, right or wrong, like to feel that their insureds are participating in their own coverage. Such insureds tend to be more careful, and as experience proves, when the companies forced higher deductibles during the recent hard market cycle, most attorneys paid attention.

Another price and policy limits consideration is whether or not defense costs are included within the policy's limits of liability. If so, a firm must consider that factor in determining the adequacy of coverage. Simply stated, except where the limits of liability are over one million dollars (\$1,000,000), even the solo practitioner should consider increasing limits to counteract the effect of defense costs. Where defense costs are included, no lawyer should even consider purchasing a policy with an occurrence and aggregate limit of less than five hundred thousand dollars (\$500,000). Here the compared policies vary significantly and close review is essential to understanding the extent of coverage.

Deductible selection also provides a firm with another vehicle to manipulate their coverage. A slightly higher deductible may enable the firm to increase its policy limits, or if the firm feels its present limits are adequate, reduce its cost of insurance. Additionally, a firm should consider whether its defense costs are included in the deductible and whether the policy enables them to reduce premiums by including them.<sup>362</sup>

Perhaps the most important and least quantifiable consideration is stability of the coverage. Note that the word "coverage" here was used and not "company." In the now volatile "claims-made" insurance environment in which attorneys find themselves, a company's history of mobility in and out of the market has to be considered. Be aware that many companies will not write coverage if a policy with another carrier has been cancelled. In a tight

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362. The ALPS policy gives the insured the option of including defense costs in the deductible and receiving a credit against the base rate premium. All applications are quoted both ways to enable the insured to compare the savings.

market situation, this may also include situations where a firm is non-renewed because a carrier pulls out of a particular state. Face it, insurance companies operate under both internally and externally imposed limitations on their capacity (the number of policies that they can issue and the aggregate limits that they offer). The reinsurance market, both domestic and foreign, affects all company's capacity by pricing and imposing limitations on how much of a risk they are willing to accept.<sup>363</sup>

Most multi-line companies (virtually all the commercial carriers) restrict the percent of their assets that they will commit to support their various lines of coverage. Given that lawyers malpractice is, at best, a volatile line, most of them keep the percentage low to protect the security and viability of their other lines.

Captive insurers, on the other hand, generally only have one line of business, as in the ALPS case where the only line is insuring lawyers against malpractice claims. With good reinsurance treaties, a captive can offer insurance coverage which equals or exceeds the quality offered by the commercial markets.<sup>364</sup> In fact, they offer some distinct advantage in the area of stability and continuity of coverage. Captives are not mobile and with the single line format can be counted on to be in the marketplace when some of the commercials leave.<sup>365</sup>

While it can be generally stated that malpractice insurers won't issue a pure manuscript policy, the insurance market is highly competitive right now and it may be possible to get consideration of special endorsements. There is great value in the old adage "There's no harm in asking." If a special provision or available endorsement from some other carrier's policy form has some appeal, submit a copy to the opposing carrier or agent and see if it can be obtained. It may cost something, and they may say no, but if the application is submitted to a carrier early enough it will probably be considered and not dismissed out of hand.<sup>366</sup>

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363. A company's capacity is generally considered to be its ability to offer a policy, with given limits to a certain number of insureds without violating both statutory and industry standards, with regard to premium-to-surplus ratios.

364. In evaluating the security of the various companies, you must add the total net enrolled surplus or capital of the company itself and total net enrolled surplus or capital of the various reinsurers to obtain a realistic number (company value). Any comparison of other numbers will be distorted and will not permit a fair comparison.

365. Historically, in smaller markets such as North Dakota where premiums are low (by comparison to the rest of the country), when the cost and availability of reinsurance has negatively affected the profitability of Lawyers' Professional Liability Insurance, the carriers have pulled out and placed their available capacity in other lines of insurance or in lawyers markets where the premiums are higher and the profitability greater.

366. Obtaining special endorsement is an option that may not be available very long.

#### IV. OBSERVATIONS AND CONCLUSIONS

This article attempted to handle an enormous subject by comparing four highly technical policy forms, incorporating common law reasoning, and giving insights into choosing the right policy by custom-fitting coverage. For editorial reasons, it proved impossible to address every policy provision and case that shed light on the interpretation of each of the areas discussed. This effort must be viewed as a primer designed to advance understanding of the general subject matter to a level that permits a more detailed study of source materials. As attorneys' malpractice litigation develops, the policy forms and coverages will change, making it essential that firms keep current on their coverage. Firms and attorneys, without this degree of understanding, may well find that their policies compare to a manual typewriter in an age of computer-assisted word processing.

APPENDIX "A"  
POLICY COMPARISON CHART

POLICY COMPARISON CHART

	<u>ALPS</u>	<u>HOME</u>	<u>CNA</u>	<u>ST. PAUL</u>
<b>A. The Insured</b>				
1. Named Insured and Predecessor Firm	yes	yes	yes	yes
2. Attorneys or Professional Firm, former partners, shareholders or employees of the firm or predecessor firm	yes	yes	yes	yes
3. Non-attorney employees who did, do or will work for the firm	yes	yes	yes	yes
4. Attorney "of counsel"	yes	yes	yes	yes
5. Heirs, executors, administrators, legal representatives and assigns of insured	yes	yes	yes/ no with regard to heirs	yes
<b>B. Coverage</b>				
1. Professional Services as attorney or notary	yes	yes	yes, also includes real estate title insurance professional services	yes
2. Attorney or non-attorney who causes personal injury	yes	silent	yes	silent
3. Attorney as trustee or executor	yes	yes	yes	yes
4. Pre or post judgment interest, appeal bonds, and miscellaneous costs	yes	yes	yes	yes
5. Claims made and reported during policy period	yes	yes	yes	yes
6. Claim survives policy expiration limit	yes	yes	yes	yes
7. Extended reporting endorsement	yes	yes	yes	yes

C. Exclusions	<u>ALPS</u>	<u>HOME</u>	<u>CNA</u>	<u>ST. PAUL</u>
1. Dishonest Acts	excluded	excluded	excluded	excluded
a. exclusions not apply to innocent parties	excluded	excluded	excluded	excluded
2. Claims connected with business enterprise wh/ insured owns or controls	excluded	excluded	excluded	excluded
3. Attorney as officer, director, partner trustee or employee of business not named in policy	excluded	excluded	excluded	excluded
4. ERISA	excluded	excluded	excluded	not excluded
5. Insured as elected public official	excluded	excluded	excluded	silent
6. Bodily injury or property damage	excluded	excluded	excluded	excluded
7. Notarized certificate without physical appearance of signet	excluded	excluded	not excluded	excluded
8. Past or present insiders	excluded	excluded	excluded	not excluded
9. Discrimination	excluded	excluded	silent	silent
10. Sexual harassment	excluded	silent	silent	silent
11. Prior acts where insured knew or should have foreseen claim	excluded	excluded	excluded	excluded
12. Punitive damages.	excluded	excluded	excluded	not excluded
13. Investment advice	excluded	silent	silent	silent
14. Fines, statutory penalties, sanctions	excluded except Rule 11 Sanctions	excluded	excluded	excluded
15. Business enterprises liable for contamination or pollution of the environment	silent	excluded	silent	silent

	<u>ALPS</u>	<u>HOME</u>	<u>CNA</u>	<u>ST. PAUL</u>
16. Loss due to nuclear reaction, radiation or contamination	silent	excluded	excluded	silent
D. Defense and Settlement				
1. Selection of Defense attorney by insurer	yes, only after consultation with insured	yes	yes	yes
2. Insured may elect to defend	no	no	no	no
3. Limit of payment for refusal to settle	Peer review committee decision binds	no	no	no
E. Limits of Liability				
1. Claim expenses included in limits of liability	yes	yes	yes	no
2. Limits of liability for each claim	yes	yes	yes	yes
3. Aggregate liability on firm basis	yes	yes	yes	yes
4. Two or more claims from one error considered one act	yes	yes	yes	yes
a. policy year act reported governs	yes	yes	yes	yes
5. Limit on deductible for multiple claims	yes	yes	no	yes
F. Conditions				
1. Timely notice of all claims	yes	yes	yes	yes
2. Assistance and cooperation of insured	yes	yes	yes	yes
3. Subrogation	yes	yes	yes	silent

	<u>ALPS</u>	<u>HOME</u>	<u>CNA</u>	<u>ST. PAUL</u>
4. Cancellation provisions of insurance policy by insurer	yes	yes	yes	silent
5. Coverage where other insurance	excess	excess	excess	prorata



## POLICY PROVISION INDEX

	ALPS	HOME	CNA	ST. PAUL
<u>A. Definition of Insured</u>	*	*	*	*
1 Names Insured and Predecessor Firm	* *P.3, Art.IV * *P.6, *Art. I(j)	* *P. 1, §A, *Art.I *P.2, Art.I	* *P.3, Art.IV * *P.5, Art. IV *A, B	* *P.2, Col.1 * *"Changes" § *
2 Attorneys or Professional Firm former partners, shareholders or employees of the firm or predecessor firm	*P.3, *Art. IV(b) * * * * * *	*P.1, §A, *Art.I(c) * * * * * *	*P.6, Art. IV *C., D. * * * * * *	*P.2, Col.1 *"Changes" § * * * * * *
3 Non-attorney employee who did, do or will work for the firm	*P.3, *Art.IV(e) * * * *	*P.1, §A *Art.I(d) * * * *	*P.6, Art. IV *D * * * *	*P.2, Col. 1 *"Indivi- *ual" *Section *
4 Attorney "Of Counsel"	*P.3 *Art.IV(g) * *	*P.1, §A *Art.I(f) * *	*P.6, Art.IV *C. 3. * *	*P.2, Col. 1 *"Employed *Lawyers" § *
5 Heirs, executors, administrators, legal representatives and assigns of insured	*P.3, *Art.IV(f) * * * * *	*P.1, §A *Art.I(e) * * * * *	*P.6, Art.IV *B. 2. * * * * *	*Silent * * * * * *
<u>B. Coverage</u>	*	*	*	*
1 Professional services as attorney or notary	*P.2, *Art.I(a) * * * * *	*P.1, §B *Art.I * * * * *	*P.4, Art.I, *P.5, Art.IV *"Profession- *al Services" *"Wrongful *Act" *	*P.1, Col. 1 * * * * * *
2 Attorney or non-attorney who causes personal injury	*P.2, *Art.I(b)(c) *Def. Pers. *Injury: P.5 *Art.I(g) *	*Silent * * * * *	*Silent * * * * *	*Silent * * * * *

	ALPS	HOME	CNA	ST. PAUL
3 Attorney as trustee or executor	*P.2, *Art.I(a) * * *	*P.2, §B *Art.I * * *	*P.5, Art.IV *"Profession- *al Services" *p.4, Art.II, *D.5. * *	*P.1, Col. 1 * * * *
4 Pre and post judgment interest, appeal bonds and miscellaneous costs	*P.3, Art.II * * * *	*Silent * * * *	*Silent * * * *	*P.1, Col. 2 * * * *
5 Claims made and reported during policy period	*P.2, Art.I * *	*P1, §B *Art.I * *	*P.3, Art.I *B. * *	*P.1, "When *A Claim is *Covered" * *
6 Claim survives policy expiration	*P.1, Art.VI * *	*P.2, §B *Art.I * *	*P.4, Art.I *B. * *	*P.2, "When *A Claim is *Covered" * *
7 Extended reporting endorsement	*P.7, Art.IIV * * * * * *	*P.2,3, Art. *IV,V * * * * *	*P.7, Art.V *C. 9. * * * * *	*P.3, Col. 1 *"Optional *Reporting *Endorse- *ment" * * * *
<u>C. Exclusions</u>				
1 Dishonest Acts	*P.4(a) * *	*P.5, §C1(a) * *	*P.4, Art. II *C. D. 3 * *	*P.3, "Ex- *clusions" § * *
a. exclusion not apply to innocent parties	*P.7, Art.III * * * *	*P.6, Art.II * * * *	*P.7, Art.V, *C. 4. * * *	*P.3, "Ex- *clusions" * * * *
2 Claims connected with business enterprises wh/ insured owns or controls	*P.4(h) * * * * * *	*P.5, §C1(b) * * * * * *	*P.4, Art.II *D. 2. * * * * *	*P.3, "Ex- *clusions" § * * * * *
3 Attorney as officer, partner, trustee or employee of business not named in policy	*P.4(f) * * * * * *	*P.5, (c)(1) * * * * * *	*P.4, Art.II *D., 1.a. * * * * *	*P.3, "Ex- *clusions" § * * * * *
4 ERISA	*P.4(L) * *	*P.5, §C *(c)(3) * *	*P.4, Art.II *D. 1.b * *	*Silent * *

	ALPS	HOME	CNA	ST. PAUL
5 Insured as elected public official	*P.4(k) * * *	*P.5, §C *(c)(2) * * *	*P.4, Art.II *D. 1.b * * *	*Silent * * *
6 Bodily injury or property damage	*P.4(c) * * *	*P.5, §C(d) * * *	*P.4, Art.II *E.; P.5, Art. *IV * *	*P.3, "Ex- *clusions" § * *
7 Notarized certificate without physical appearance of signet	*P.4(i) * * * * *	*P.5, §C(f) * * * * *	*P.4, Art.II *A * * * *	*Silent * * * * *
8 Past or present insiders	*P.4(e) * *	*P.5, §C(f) * *	*Silent * *	*Silent * *
9 Discrimination	*P.4(m) *	*P.5, §C(g) *	*Silent *	*Silent *
10 Sexual Harassment	*P.5(n) * *	*Silent * *	*Silent * *	*Silent * *
11 Prior acts where insured knew or should have foreseen claim	*P.4(j) * * * * *	*P.1, §B *(b)(2) * * * *	*P.5, Art.II, *J. * * * *	*P.2, Col.2 *"Prior Acts * § * * *
12 Punitive damages	*P.4(g) * *	*P.2, §B *Art.1, Col.1 *	*P.5, Art.II, *H *	*Silent * *
13 Investment advice	*P.4(o) * *	*Silent * *	*Silent * *	*P.1, Col.1 * *
14 Fines, statutory penalties, sanctions	*P.4(g) * *	*P.2, §B *Art.I, Col.1 * *	*P.4, Art.II *G * *	*Silent * * *
15 Business enterprises liable for contamination or pollution of the environment	*Silent * * * * * *	*P.1, §C(i) * * * * * *	*Silent * * * * * *	*Silent * * * * * *
16 Loss due to nuclear reaction, radiation or contamination	*Silent * * * * *	*P.9, *"Nuclear *Energy Liabi- *lity Exclu- *sion Endorse- *ment *	*P.4, Art.II, *F * * * *	*Silent * * * * *

	ALPS	HOME	CNA	ST. PAUL
<u>D. Defense and Settlement</u>	*	*	*	*
	*	*	*	*
	*	*	*	*
1 Selection of defense attorney by insurer	*P.2, Art.II	*P.2, Art.II	*P.4, Art.I, *C	*P.1 *"Defending *Lawuits"
	*	*	*	*
	*	*	*	*
2 Insured may elect to defend	*P.2, Art.II	*P.2, Art. II	*P.4, Art.I, *C	*P.1 *"Defending *Lawuits"
	*	*	*	*
	*	*	*	*
3 Limit of payment for refusal to settle	*P.2, Art.II	*P.2, Art.II	*P.4, Art.I, *C	*P.1 *"Defending *Lawuits"
	*	*	*	*
<u>E. Limits of Liab.</u>	*	*	*	*
	*	*	*	*
1 Claim expenses included in limits of liability	*P.6, Art.II	*P.6, §E, *Art.I	*P.5, Art.III *C.	*P.1, *"Additional *Benefits"
	*	*	*	*
	*	*	*	*
2 Limits of liability for each claim	*P.6, Art.II	*P.6, §E,1	*P.5, Art.III *A	*P.3, *"Limits of *Coverage" §
	*	*	*	*
	*	*	*	*
3 Aggregate liability on firm basis	*P.6, Art.II	*P.6, §E II	*P.5, Art.III *B	*P.3 *
	*	*	*	*
	*	*	*	*
4 Two or more claims from one error considered one act	*P.6, Art.II	*P.6, §E IV	*P.6, Art.III *A	*P.3, *"Series of *Acts"
	*	*	*	*
	*	*	*	*
a. policy year act reported governs	*P.6, Art.II	*P.6, §E IV	*P.5, Art.III *B	*P.3, *"Series of *Acts"
	*	*	*	*
	*	*	*	*
5 Limit on deductible for each claim	*P.6, Art.II	*P.6, §E III	*P.5, Art.III *D.1	*P.3, "De- *ductible"
	*	*	*	*
	*	*	*	*
<u>F. Conditions</u>	*	*	*	*
	*	*	*	*
1 Timely notice of all claims	*P.7,8, Art.VI	*P.7, §F I	*P.2, Art.VI *A	*P.2, "When *a Claim is *Covered"
	*	*	*	*
	*	*	*	*
2 Assistance and cooperation of insured	*P.8, Art.VII	*P.7, §F II	*P.2, Art. VI *D	*P.2, "Ex- *penses *Related to *Defense"
	*	*	*	*
	*	*	*	*

	ALPS	HOME	CNA	ST. PAUL
3 Subrogation	*P.8,9, Art.IX	*P.7, §F III	*P.6, Art.V	*Silent
	*	*	*B	*
	*	*	*	*
4 Cancellation	*P.9, Art.XIII	*P.8, §G V	*P.3, Art.XII	*Silent
provisions of	*	*	*	*
insurance	*	*	*	*
policy by	*	*	*	*
insurer	*	*	*	*
	*	*	*	*
5 Coverage where	*P.7, Art.V	*P.8, §G II	*P.6, Art.V,	*P.4, "Other
other insurance*	*	*	*B.3.	*Insurance"

APPENDIX "B"

REPRODUCTIONS OF POLICIES COMPARED



Attorneys Liability Protection Society, Inc.,  
a Risk Retention Group  
Professional Liability Policy.

Executive Office:  
Glacier Building  
P.O. Box 9169  
Missoula, Montana 59807-9169  
1-406-728-3113

Administrative Office:  
505 Sansome Street  
San Francisco, California 94111  
(P.O. Box 7601, San Francisco, California 94120)  
1-800-367-2577

## ATTORNEYS PROFESSIONAL LIABILITY POLICY

## NOTICE

THIS IS A CLAIMS MADE FORM. EXCEPT TO SUCH EXTENT AS MAY OTHERWISE BE PROVIDED HEREIN, THE COVERAGE OF THIS POLICY IS LIMITED GENERALLY TO LIABILITY FOR ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY WHILE THE POLICY IS IN FORCE. PLEASE REVIEW THE POLICY CAREFULLY AND DISCUSS THE COVERAGE THEREUNDER WITH YOUR INSURANCE AGENT OR BROKER.

THIS POLICY INCLUDES CLAIM EXPENSES WITHIN THE LIMITS OF LIABILITY. THE PAYMENT OF CLAIM EXPENSES WITH RESPECT TO A CLAIM WILL REDUCE THE AMOUNT AVAILABLE TO PAY DAMAGES.

THIS POLICY IS ISSUED BY YOUR RISK RETENTION GROUP. YOUR RISK RETENTION GROUP MAY NOT BE SUBJECT TO ALL OF THE INSURANCE LAWS AND REGULATIONS OF YOUR STATE. STATE INSURANCE INSOLVENCY GUARANTY FUNDS ARE NOT AVAILABLE FOR YOUR RISK RETENTION GROUP.



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**ATTORNEYS LIABILITY PROTECTION SOCIETY, INC.,**  
**a Risk Retention Group,**  
**(A mutual insurance company, herein called the Company)**

agrees with the Insured named in the Declarations (The Named Insured) made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the application, to the following:

**INSURING AGREEMENTS**

**I. Coverage**

Subject to the limits of liability, exclusions, conditions and other terms of this policy, the Company agrees to pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages resulting from **CLAIMS FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD:**

(a) by reason of any act, error or omission in Professional Services rendered or that should have been rendered by the Insured or by any person for whose acts, errors or omissions the Insured is legally responsible, and arising out of the conduct of the Insured's profession as an attorney, notary public or personal representative, administrator or executor of any estate for which the Insured also serves as the estate's attorney; or

(b) because of Personal Injury and arising out of the Professional Services of the Insured as an attorney or personal representative, administrator or executor of any estate for which the Insured also serves as the estate's attorney; or

(c) by reason of any act, error, omission or Personal Injury committed by any non-Lawyer employee of the Named Insured but solely if arising out of services rendered within the scope of such person's employment by the Named Insured and arising out of the Named Insured's Professional Services.

Provided that such act, error, omission or such Personal Injury happens on or subsequent to the Loss Inclusion Date set forth in the Declarations.

**II. Defense and Settlement, Consent to Settle**

For any Claim seeking damages with respect to such insurance as is afforded by the policy, the Company shall have the right to appoint counsel after consultation with the Insured, when practicable, and shall have the duty to defend such Claim even if any or all of the allegations of the Claim are groundless, false or fraudulent. It is further agreed that the Company may make such investigations, undertake settlement negotiations and make such settlements as it deems appropriate and expedient; provided however, that the Company shall consult with the Insured regarding any proposed settlement, and if the Company and Insured cannot agree on the appropriateness of the settlement, the matter shall be submitted to peer review in the following circumstances and manner. If the decision to settle a Claim is reached by the Company more than fifteen (15) days before a trial setting for such Claim, and if the Insured shall disagree with the Company's decision, the Insured may within three (3) days after notification of the decision, appeal to a peer review committee composed of not less than three (3) members of the Board of Directors of the Company or other individuals, each of whom is appointed by the President, and who shall review the matter. If time permits the President may in his sole discretion consult with the Insured regarding the composition of the panel. Upon completion of the review, the peer review committee shall determine whether the proposed settlement is reasonable, and it shall immediately advise the Company and the Insured of its decision. The decision of the peer review committee shall be final and binding on both the Insured and the Company.

It is further provided that the Company shall not be obligated to pay any damages or Claim Expenses, or continue to undertake defense of any Claim after the applicable limits of liability have been exhausted by payments of damages and Claim Expenses, or after deposit with a court of competent jurisdiction of an amount equal to the applicable limit of liability minus damages and Claim Expenses previously paid in trust for the benefit of claimants and that, in such a case, the Company shall have the right to withdraw from further defense thereof by tendering control of the defense to the Named Insured and the Named Insured agrees, as a condition to the issuance of this policy to accept such tender. The Company shall have no obligation to apply for or furnish, or provide collateral for, attachment or appeal bonds.

### III. Claim Expenses

Subject to the limits of liability, the Company shall pay Claim Expenses.

### IV. Insured

The Insured: The word "Insured," whenever used in this policy, means:

(a) the Named Insured, defined as the partnership, professional corporation or individual named in item 1 of the Declarations;

(b) any attorney or professional corporation who is a partner of, stockholder in or employee of the Named Insured at the Effective Date of this policy, for so long as such attorney or professional corporation remains a partner of, stockholder in or employee of the Named Insured and solely with respect to acts on behalf of the Named Insured or Predecessor Firm(s). The individuals listed in item 2 of the Declarations will be conclusively presumed to constitute all such individuals at the Effective Date of this policy;

(c) any attorney or professional corporation which, during the Policy Period, becomes a partner, officer, director or employee of the Named Insured and solely with respect to acts on behalf of the Named Insured or Predecessor Firm(s);

(d) any attorney or professional corporation who was a former partner, officer, director or employee of the Named Insured or Predecessor Firm(s) solely while acting in a professional capacity on behalf of such firms;

(e) any non-attorney who was, is now or hereinafter becomes an employee of the Named Insured or Predecessor Firm(s) solely while acting within the scope of such person's duties as an employee of the Named Insured or Predecessor Firm(s);

(f) as respects the liability of each Insured as is otherwise covered herein, the heirs, executors, administrators, assigns and legal representatives of each Insured in the event of death, incapacity or bankruptcy;

(g) any attorney acting as "of counsel," but only while performing services on behalf of the Insured, any employed attorney or any other employee.

### V. Policy Territory

This policy applies to any act, error or omission occurring anywhere in the world provided a Claim is made or suit is brought within the United States of America, its territories or possessions, or Canada, prior to the end of the Policy Period, if a Claim is first made and reported to the Company during the Policy Period or an Extended Reporting Period purchased in accordance with Condition VI — "Notice of Claim or Suit."

## EXCLUSIONS

This policy does not apply:

(a) to any Claim based upon or arising out of any dishonest, intentional, fraudulent, criminal, malicious or intentional wrongful acts, errors or omissions committed by the Insured. However, notwithstanding the foregoing, the Company will provide a defense for any such Claims without any liability on the part of the Company to pay such sums as the Insured shall become legally obligated to pay as damages;

(b) to any Claim made by an employer against an Insured who is a salaried employee of such employer;

(c) to any Claim arising out of bodily injury to, or sickness, disease or death of any person, or to injury to or destruction of any property, including the loss of use thereof;

(d) to any loss sustained by the Insured as the beneficiary or distributee of any trust or estate;

(e) to any Claim made by any Insured or a present, former or prospective employer, partner, officer, director, owner, stockholder or employee or related individual of any Insured;

(f) to any Claim based on or arising out of any Insured's act, error or omission as an officer, director, partner, trustee or employee of a business enterprise or charitable organization or of a pension, welfare, profit sharing, mutual or investment fund or trust; provided however, that this exception shall not apply where an Insured is providing incidental legal services to any such business enterprise in the ordinary course of the Named Insured's daily business activities, and for which a fee, other than a directors' fee, is charged and collected;

(g) to any punitive or exemplary damages, fines, penalties (other than those imposed under Rule 11 of the Federal Rules of Civil Procedure or any comparable state statute), or other damages in addition to actual or compensatory damages;

(h) to any Claim based on or arising out of or in connection with conduct of any business enterprise (including the ownership, maintenance or care of any property in connection therewith) owned by any Insured or in which any Insured is a partner, or which is directly or indirectly controlled, operated or managed by any Insured either individually or in a fiduciary capacity; provided however, that this exception shall not apply where an Insured is providing incidental legal services to any such business enterprise in the ordinary course of the Named Insured's daily business activities, and for which a fee, other than a directors' fee, is charged and collected;

(i) to any Claim based on or arising out of notarized certification of acknowledgment of a signature without the physical appearance before such Notary Public as an Insured hereunder of the person who is or who claims to be the person signing said instrument;

(j) to any Claim based on or arising out of any act, error or omission occurring prior to the Effective Date of this policy if the Insured at the Effective Date knew or could have reasonably foreseen that such act, error or omission might be expected to be the basis of a Claim or suit; to any Claim where there is a prior policy which provides insurance for such liability or Claim resulting from such act, error or omission whether or not the available limits of liability of such prior policy are sufficient to pay any liability or Claim or whether or not the deductible provisions and limits of liability of such prior policy are different from this policy; or to any Claim arising out of any act, error or omission occurring prior to the Effective Date of this policy unless such Claim would have been covered by a prior policy of insurance but for the fact that the time within which to report a Claim thereunder had expired;

(k) to any Claim based on or arising out of any Insured's capacity as an elected public official or as an employee of a governmental body, subdivision, or agency thereof unless the Insured is

deemed an employee solely by virtue of rendering legal services to such governmental body, the remuneration for which services inures to the benefit of the Named Insured:

(l) to any Claim based on or arising out of any Insured's activities or capacity as a fiduciary under the Employee Retirement Income Security Act of 1974, as amended, or any regulation or order issued pursuant thereto, except if the Insured is deemed to be a fiduciary solely by reason of legal advice rendered with respect to any employee benefit plan;

(m) to any Claim based upon or arising out of alleged discrimination by the Insured including those based on race, color, creed, age, sex, nationality, marital status or sexual preference;

(n) to any Claim based upon or arising out of alleged sexual harassment or misconduct by the Insured;

(o) to any Claim based upon or arising out of the rendering of investment advice by any Insured to any person in connection with the purchase or sale of any investment or property, including but not limited to, securities, real property, commodities or franchises, or based upon or arising out of any Insured's services or capacity as a broker, dealer, investment advisor, accountant, real estate broker or real estate agent.

## CONDITIONS

### I. Definitions

As used in this policy:

(a) "Claim" means a demand received by an Insured for money or services, including the service of suit or institution of arbitration proceedings against an Insured.

(b) "Claim Expense" means (1) fees charged by an attorney designated by the Company and (2) all other fees, costs, and expenses resulting from the investigation, adjustment, defense and appeal of a Claim, suit or proceeding arising in connection therewith, if incurred by the Company, or by the Insured with prior written consent of the Company; provided however, the term "Claim Expense" does not include salaries or expenses of regular employees or officials of the Company.

(c) "Effective Date" as used in this policy means the effective date of this policy as set forth in the Declarations.

(d) "Extended Reporting Endorsement" means an endorsement issued by the Company providing for an Extended Reporting Period.

(e) "Extended Reporting Period" means that period or those periods of time after the end of the Policy Period for reporting Claims, suits or proceedings arising out of an act, error or omission which occurred prior to the end of the Policy Period and which would have been insured by this policy but for its termination.

(f) "Loss Inclusion Date" as used in this policy means the loss inclusion date of this policy as set forth in the Declarations.

(g) "Personal Injury" as used in subparagraph (b) of Insuring Agreements I—"Coverage" means:

1. False arrest, detention or imprisonment, wrongful entry or eviction or other invasion of private occupancy, malicious prosecution or humiliation, except that maliciously inflicted by, at the direction of, or with the consent of an Insured.

2. The publication or utterance of a libel or slander or other defamatory or disparaging material, or a publication or an utterance in violation of an individual's right of privacy, except that which is maliciously published or uttered by, at the direction of, or with the consent of an Insured.

(h) "Policy Period" means the period of time between the inception date shown in the Declarations and the effective date of termination, expiration or cancellation of coverage and specifically excludes any Extended Reporting Period or periods thereunder.

(i) "Policy year" means each annual period of the policy.

(j) "Predecessor Firm" means any attorney, law firm or professional corporation engaged in the private practice of law to whose financial assets and liabilities the firm listed as Named Insured in the Declarations is the majority successor in interest.

(k) "Professional Services" or "Professional Activities" shall be deemed, for the purposes of this policy, to include all services or activities performed by an Insured attorney in an attorney-client relationship on behalf of one or more clients.

## II. Limits of Liability

The limits of liability stated in the Declarations as applicable to "all Claims arising out of the same, related or continuing Professional Services" is the limit of the Company's liability for all damages and Claim Expenses including interest, arising out of the same or related Professional Services without regard to the number of Claims, demands, suits, proceedings or claimants.

If additional Claims are subsequently made which arise out of the same or related Professional Services as a Claim already made, all such Claims, whenever made, shall be considered first made within the Policy year or Extended Reporting Period in which the earliest Claim arising out of such Professional Services was first made and all such Claims shall be subject to the same limits of liability.

If the Named Insured applies for an Extended Reporting Endorsement, the limits of liability stated in the Declarations as applicable to "all Claims arising out of the same, related or continuing Professional Services," at the time the policy is terminated, are the limits of the Company's liability for damages and Claim Expenses with respect to all Claims arising out of the same, related or continuing services which are first made during the Extended Reporting Period.

Subject to the above provisions respecting "all Claims arising out of the same, related or continuing Professional Services," the limits of liability stated in the Declarations as "aggregate" represent the total limits of the Company's liability for all damages and Claim Expenses arising out of the Claims first made during each Policy year or during each Extended Reporting Period.

The inclusion in the policy of more than one Insured shall not operate to increase the limits of the Company's liability.

Claim Expenses shall be paid and applied first and shall reduce the limits of liability for all Claims arising out of "the same, related or continuing Professional Services" and the "aggregate" limits of liability. The difference between either applicable limits and Claim Expenses, if any, shall be the amount available to pay damages.

*Deductible.* The deductible will be subtracted from the total amount of damages and Claim Expenses resulting from each Claim reported to the Company during the Policy Period, subject to an annual aggregate deductible equal to twice the deductible amount stated in the Declarations.

*Reimbursement to the Company.* If the Company has paid any amounts in settlement or satisfaction of Claims, judgments or awards, including interest, or for Claim Expenses in excess of the applicable limits of liability, or within the amount of the applicable deductible or if the Company has paid any amounts for which the Company has no liability under this policy, the Insureds shall be jointly and severally liable to the Company for any and all such amounts and, upon demand, shall pay such amounts to the Company.

### III. Waiver of Exclusion and Breach of Conditions

Whenever coverage under any provision of this policy would be excluded, suspended or lost because of any exclusion or condition relating to a dishonest, fraudulent, malicious or criminal act, error or omission by any Insured or employee of an Insured, and with respect to which any other Insured did not personally participate or personally acquiesce or remain passive after having personal knowledge thereof, the Company agrees that such insurance as would otherwise be afforded under this policy shall continue in effect with respect to each and every Insured who did not personally commit or personally participate in committing, or personally acquiesce in or remain passive after having personal knowledge of one or more of the acts, errors or omissions described in any such exclusion or condition; provided further, that if the condition be one with which such Insured can comply, after receiving knowledge thereof, the Insured entitled to the benefit of this Waiver of Exclusions and Breach of Conditions shall comply with such condition promptly after obtaining knowledge of the failure of any other Insured or employee to comply therewith.

### IV. Extended Reporting Endorsement

In case of cancellation or nonrenewal of the policy by either the Named Insured or the Company, the Named Insured shall have the right, upon payment of an additional premium not more than thirty (30) days after termination of the policy or any subsequent Extended Reporting Period, to have an Extended Reporting Endorsement issued on a guaranteed annual renewable basis, providing coverage for Claims first reported subsequent to the end of the Policy Period of any act, error or omission occurring prior to the end of the Policy Period and after the Loss Inclusion Date and otherwise covered by the policy. The additional premiums for such Extended Reporting Endorsements shall be computed from the following table in accordance with the Company's rules, rates, rating plans and premiums in effect on the effective date of each applicable guaranteed annual endorsement.

Number of Years Following The Termination of the Policy	Percentage of Current Years Premium
FIRST .....	95%
SECOND .....	75%
THIRD .....	55%
FOURTH .....	35%
FIFTH and subsequent years .....	0%

The right to an Extended Reporting Endorsement under this section shall not be available to any Insured where cancellation by the Company is for failure of the Insured to pay the premium when due or for failure to pay all other amounts due to the Company.

The Extended Reporting Period Endorsement shall provide a separate aggregate limit of coverage equal to that under this policy for Claims first reported during the Extended Reporting Period.

### V. Other Insurance

This insurance shall be in excess of any other valid and collectible insurance whether such insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over and above the limits of liability provided in this policy.

### VI. Notice of Claim or Suit

Upon an Insured's becoming aware of any act, error or omission which happens before the end of the Policy Period and which could reasonably be expected to be the basis of a Claim or suit covered hereby, written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable, together with the fullest information obtainable. If a Claim is

made or a suit is brought against an Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

If during the Policy Period or any Extended Reporting Period, the Company shall be given written notice of any act, error or omission which happens before the end of the Policy Period and after the Loss Inclusion Date which could reasonably be expected to give rise to a Claim against an Insured under this policy, any Claim which subsequently arises out of such act, error or omission shall be deemed to be a Claim made and reported during the Policy Period or Extended Reporting Period in which the written notice was received, provided that such Claim is in fact asserted against the Insured within five (5) years after the end of the Policy Period.

#### **VII. Assistance and Cooperation of the Insured**

All Insureds shall cooperate with the Company and, upon the Company's request, assist in making settlements, in defending suits, and in enforcing any right of contribution or indemnity against any person or organization, other than an employee of any Insured, who may be liable to the Insured because of any act, error or omission with respect to which insurance is afforded under this policy; and the Insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses.

The Insured shall notify the Company of the Insured's right to demand arbitration of a Claim and shall exercise the Insured's right to demand or to reject the arbitration of any Claim made against the Insured in accordance with the written instructions of the Company.

The Insured shall not make any payments, admit any liability, settle any Claims, assume any obligation or incur any expense without the prior written consent of the Company.

#### **VIII. Action Against Company**

No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, and until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured or by written agreement of the Insured, the claimant and the Company.

Any person or organization not insured hereunder or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the Company as a party to any action against the Insured to determine the Insured's liability, nor shall the Company be impleaded by the Insured or his legal representative. Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations hereunder.

#### **IX. Subrogation**

In the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after a Claim is made or settled to prejudice such rights.

The Company shall not exercise any such rights against any persons, firms or corporations included in the definition of "Insured." Notwithstanding the foregoing, however, the Company reserves the right to exercise any rights of subrogation against an Insured in respect of any Claim brought about or contributed to by the intentional, dishonest, fraudulent, criminal or malicious act or omissions of such Insured.

Any amount so recovered shall be apportioned as follows:



Any recovery shall first be used for the repayment of expenses incurred toward subrogation; second, to any loss and expense payments by the Insured in excess of any deductible(s); third, to any loss and expense payments by an excess carrier on behalf of the Insured; fourth, to any loss and expense payments by any primary carrier on behalf of the Insured; and last, to repayment of the Insured's deductible.

#### **X. Changes**

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or stop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by an officer of the Company.

#### **XI. Additions or Deletions of Attorneys Insured**

All additions or deletions of attorneys insured by the Company during the Policy year must be reported to the Company within thirty (30) days after the time such additions or deletions occur. The Company will neither require additional premium payments for any additions of attorneys to the Insured's policy during the Policy year nor refund, on a pro rata basis or otherwise, premium for any deletions of attorneys from the Insured's policy during the Policy year.

#### **XII. Assignment**

The interest hereunder of any Insured is not assignable. If an Insured shall die or be adjudged incompetent, this policy shall cover the Insured's legal representative as the Insured with respect to liability previously incurred and covered by this policy.

#### **XIII. Cancellation or Nonrenewal**

This policy may be canceled by the Insured by surrender thereof to the Company or any of its authorized agents or by mailing or hand delivery to the Company written notice stating when, thereafter, the cancellation shall be effective. This policy may be canceled by the Company by mailing first-class postage prepaid to the Insured, at the address shown in this policy, written notice stating when, not less than thirty (30) days thereafter, such cancellation shall be effective, but only where such cancellation is based upon any one of the following specific bases: the Insured's failure to pay a premium when due or, after demand, to make any reimbursement owed to the Company under the terms of this policy; conviction of the Insured of a crime arising out of acts increasing the hazard insured against; discovery of fraud or material misrepresentation in the obtaining of the policy or in the presentation of a claim thereunder; discovery of (1) an act or omission, or (2) a violation of any condition of the policy, which occurred after the first effective date of the current policy and substantially and materially increases the hazard insured against; a material change in the nature or extent of the risk, occurring after the first effective date of the current policy, which causes the risk of loss to be substantially and materially increased beyond that contemplated at the time the policy was issued or last renewed; a determination by the Commissioner of Insurance of the State of Nevada ("Commissioner") that continuation of the Company's present volume of premiums would jeopardize the insurer's solvency or be hazardous to the interests of policyholders of the Company, its creditors or the public; or a determination by the Commissioner that the continuation of the policy would violate, or place the Company in violation of, any provision of the Nevada Insurance Laws. However, if the Company cancels this policy because the Insured has failed to pay a premium when due, this policy may be canceled by the Company by mailing first-class postage prepaid or by hand delivery to the Insured, at the address shown in this policy, written notice stating when, not less than ten (10) days thereafter, such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancellation stated in the notice shall become the end of the Policy Period. In the event the Company intends not to renew this policy, the Company shall mail by

first-class mail to the Insured or deliver to the Insured at the address shown in this policy, not less than thirty (30) days prior to the expiration of this policy, written notice of nonrenewal.

If the Insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedures. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

**XIV. Entire Contract**

By acceptance of this policy, the Insured agrees that the statements in the Declarations and in the Insured's application for this policy are true and correct, that the Declarations and the Insured's application form a part of this policy, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between the Insured and the Company relating to this insurance.

**XV. Mutual Policy Conditions: Dividends**

The Named Insured is a member of the Company and shall participate to the extent and upon the conditions fixed and determined by the Board of Directors in accordance with the provisions of law in the distribution of dividends so fixed and determined.

**XVI. Mutual Policy Conditions: Voting**

The Named Insured is a member of the Company and is entitled to vote, either in person or by proxy, at any and all meetings of the Company, pursuant to the Bylaws and Articles of Incorporation thereof.

**XVII. Mutual Policy Conditions: Nonassessable Policy**

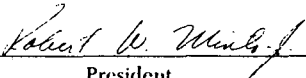
This policy is not assessable.

**XVIII. Special Statutes**

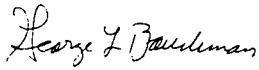
Any and all provisions of this policy which are in conflict with the statutes of the state wherein this policy is issued are understood, declared and acknowledged by this Company to be amended to conform to such statutes.

In witness whereof, the Company has caused this policy to be signed by its President and Secretary and Countersigned on the Declaration page by a duly authorized representative of the Company.

ATTORNEYS LIABILITY  
PROTECTION SOCIETY, INC.,  
a Risk Retention Group

  
\_\_\_\_\_  
President

ATTEST:

  
\_\_\_\_\_  
Secretary

**Professional Liability Insurance  
Policy  
Lawyers**



<b>THE HOME INSURANCE COMPANIES</b>		
<b>BUSINESS AUTO POLICY</b>	<b>GOLD KEY® HOMEOWNERS POLICY</b>	<b>PETRO</b>
<b>WORKERS' COMPENSATION POLICY</b>	<b>CRAFT MASTER POLICY</b>	<b>COMM</b>
<b>COMMERCIAL UMBRELLA</b>	<b>EXCESS CASUALTY</b>	<b>BUILDERS' RISK</b>
<b>PERSONAL PROPERTY FLOATER</b>	<b>GOLD KEY® AUTOMOBILE POLICY</b>	<b>FIRE POLICY</b>
<b>YACHT MASTER POLICY</b>	<b>PETROCHEMICAL</b>	<b>EXTRA STRENGTH™ BUILDERS' RISK</b>
<b>TRUCKERS POLICY</b>	<b>CASUALTY SPECIALTY LINES</b>	<b>WOR</b>
<b>CASUALTY BUFFER PROTECTION™</b>	<b>PROFESSIONAL LIABILITY</b>	<b>OCEAN CARGO</b>
<b>GARAGE POLICY</b>	<b>MANUSCRIPT ALL-RISK POLICY</b>	<b>INSTITUTIONAL POLICY</b>
<b>OWNERS', LANDLORDS' AND TENANTS'</b>	<b>INSTALLATION FLOATER</b>	<b>ELECT</b>
<b>ELECTRONIC DATA PROCESSING POLICY</b>	<b>COMMERCIAL HULL</b>	
<b>GOLD KEY® MOBILE HOMEOWNERS POLICY</b>	<b>BOILER AND MACHINERY POLICY</b>	
<b>CONDOMINIUM PACKAGE POLICY</b>	<b>INLAND MARINE POLICY</b>	<b>MANUFACTUR</b>
<b>BLANKET CRIME POLICY</b>	<b>MARINA POLICY</b>	<b>DIFFERENCE IN CONDITIONS POL</b>
<b>INDUSTRIAL POLICY</b>	<b>MANUFACTURER'S AND CONTRACTOR'S LIABIL</b>	
<b>CUSTOM COVER® POLICY</b>	<b>MONEY &amp; SECURITIES POLICY</b>	
<b>HOSPITALITY POLICY</b>	<b>GROUP ACCIDENT PLANS</b>	<b>COMPREHENSIVE</b>
<b>COMPREHENSIVE GLASS POLICY</b>	<b>BAILEES CUSTOMERS POLICY</b>	<b>APARTM</b>
<b>APARTMENT OWNER'S POLICY</b>	<b>PROTECTION AND INDEMNITY</b>	<b>MONEY &amp; SECURITIES</b>
<b>VALUABLE PAPERS AND RECORDS</b>	<b>MANUFACTURER'S OUTPUT POLICY</b>	<b>GLA</b>
<b>GOLD KEY HOMEOWNERS ELITE POLICY</b>	<b>COMPETITOR POLICY</b>	

The services shown above are a partial list of The Home's extensive product line. Some services shown may not be available in all states. Contact your agent or broker for further information.

**Provisions**

(A stock insurance company, hereinafter called the Company)

In consideration of the undertaking of the Named Insured to pay, when due, the premium and the deductible as described herein and in the amounts stated in the Declarations, and in reliance upon the statements in the application attached hereto and made a part hereof, and subject to the limits of liability shown in the Declarations, and subject to all of the terms of this insurance, the company agrees with the Named Insured as follows:

**This is a Claims Made Policy — Please Read Carefully****Section A — Insured**

**I. The Insured:** The word "Insured," whenever used in this policy, means:

- (a) The Named Insured firm or persons named in the Declarations, or any lawyer or professional legal corporation who during the policy period becomes a partner, officer, director or employee of the firm;
- (b) any lawyer or professional legal corporation who was a former partner, officer, director or employee of the firm or predecessor firm(s) solely while acting in a professional capacity on behalf of such firms;
- (c) any lawyer or professional legal corporation who was a partner, officer, director or employee of the firm or predecessor firm(s) who has retired from the practice of law, but only for those professional services rendered prior to the date of retirement from the Insured firm;
- (d) any non-lawyer who was, is now, or hereinafter becomes an employee of the firm or predecessor firm(s) solely while acting within the scope of such person's duties as an employee;
- (e) as respects to the liability of each Insured as is otherwise covered herein, the heirs, executors, administrators, assigns and legal representatives of each Insured in the event of death, incapacity or bankruptcy;
- (f) any lawyer acting as "of counsel," but only while performing services on behalf of the Insured, any employed lawyer or any other employee.

**II. Firm Changes:** Any material change among the partners or stockholders of the Named Insured during the policy period should be reported to the Company immediately, and the Company given the right to decline to continue coverage or to charge an additional premium therefor.

**Section B — Coverage**

**I. Professional Liability and Claims Made Clause:** To pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages as a result of CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD caused by any act, error or omission for which the Insured is legally responsible, and arising out of the rendering or failure to render professional services for others in the Insured's capacity as a lawyer or notary public.

It is a condition precedent to coverage under this policy that all claims be reported in compliance with the Section F CLAIMS I. NOTICE OF CLAIMS.

PROVIDED ALWAYS THAT such act, error or omission happens:

- (a) during the policy period; or,
- (b) prior to the policy period, provided that prior to the effective date of the first Lawyers Professional Liability Insurance Policy issued by this Company to the Named Insured or predecessor law firm and continuously renewed and maintained in effect to the inception of this policy period:
  - 1) The Insured did not give notice to any prior insurer of any such act or error, and
  - 2) the Named Insured, any partner, shareholder, employee, or where appropriate the Named Insured's management committee or any member thereof, had no reasonable basis to believe that the Insured had breached a professional duty or to foresee that a claim would be made against the Insured; and
  - 3) there is no prior policy or policies which provide insurance for such liability or claim, unless the available limits of liability of such prior policy or policies are insufficient to pay any liability or claim, in which event this

policy will be excess over any such prior coverage, subject to this policy's terms, limits of liability, exclusions and conditions.

When the Insured renders or fails to render services as an administrator, conservator, receiver, executor, guardian, trustee, or in any similar fiduciary capacity, the Insured's acts and omissions in such capacity shall be deemed for the purpose of this section to be the performance of professional services for others in the Insured's capacity as a lawyer, provided that this coverage shall not apply to any loss sustained by the Insured as the beneficiary or distributee of any trust or estate.

Services performed by the Insured in a lawyer-client relationship on behalf of one or more clients shall be deemed for the purpose of this section to be the performance of professional services for others in the Insured's capacity as a lawyer, although such services could be performed wholly or in part by non-lawyers.

It is a condition precedent to coverage under this policy that all claims be reported in compliance with the Section F CLAIMS I. NOTICE OF CLAIMS.

Claim, whenever used in this policy, means a demand received by the Insured for money or services, including the service of suit or institution of arbitration proceedings against the Insured.

Damages, whenever used in this policy, means a monetary judgement or settlement, including any such judgement or settlement for personal injury, and does not include fines or statutory penalties, or sanctions whether imposed by law or otherwise, nor the return of or restitution of legal fees, costs and expenses.

Predecessor Firms, whenever used in this policy, means any lawyer, law firm or professional legal corporation engaged in the practice of law to whose financial assets and liabilities the firm listed as Named Insured in the Declarations is the majority successor in interest.

Policy Period, whenever used in this policy, means the period from the inception date of this policy to the policy expiration date as set forth in the Declarations or its earlier termination date, if any.

**II. Consent to Settle, Defense:** With respect to the insurance afforded by this policy, the Company shall defend any claim against the Insured including the appeal thereof seeking damages to which this insurance applies even if any of the allegations of the suit are groundless, false, or fraudulent. The Company shall not settle any claim without the consent of the Insured unless otherwise agreed between the Insured and the

Company. If the Insured shall refuse to consent to any settlement or compromise recommended by the Company and acceptable to the claimant and shall elect to contest the claim or proceeding, then the Company's liability under this policy shall not exceed and shall be limited to the amount for which the claim or proceedings could have been settled or compromised. It is further agreed that the Company may make such investigation of any claim as it deems expedient, but the Company shall not be obligated to pay any claim or judgement or to defend or to continue to defend any claim after the limits of the Company's liability have been exhausted. Thus, when the claims expenses equal the amount for which the case could have been settled or compromised, the Company shall have the right to withdraw from the further investigation and/or defense thereof by tendering control of such investigation or defense to the Insured, and the Insured agrees, as a condition of the issuance of this policy, to accept such tender.

**III. Discovery Clause:** If, during the policy or any optional Reporting Period purchased hereunder, the Insured first becomes aware that an Insured has committed a specific act, error or omission in professional services for which coverage is otherwise provided hereunder, and if the Insured shall during the policy period or the optional Reporting Period purchased hereunder give notice to the Company of:

- (a) the specific act, error or omission; and
- (b) the injury or damage which has or may result from such act, error or omission; and
- (c) the circumstances by which the Insured first becomes aware of such act, error or omission

then any claim that may subsequently be made against the Insured arising out of such act, error or omission shall be deemed for the purposes of this insurance to have been made during the policy period or the optional Reporting Period purchased hereunder. The Insured shall cooperate fully with the Company as provided in Section F CLAIMS I. and II. and any investigation conducted by the Company or its representatives shall be subject to the terms set forth in this policy.

**IV. Options to Extend Claims Reporting Period:** If the Named Insured does not renew this policy after complying with all the terms and conditions thereof, including the payment of all premiums and/or deductibles when due, or if the Company shall cancel or refuse to renew the policy for reasons other than the Named Insured's non-payment of premiums and/or deductibles or non-compliance with the terms and conditions of

this policy, then the Named Insured upon payment of an additional premium as set forth herein shall have the option to extend the insurance afforded by this policy subject otherwise to its terms, limit of liability, exclusions and conditions, to apply to CLAIMS FIRST MADE AGAINST THE INSURED DURING (a) 12 MONTHS, (b) 24 MONTHS, or (c) 36 MONTHS, as elected by the Named Insured, following immediately upon the effective date of such termination, but only by reason of any act, error or omission in professional services rendered before such effective termination date and otherwise covered by this insurance.

The extension of coverage for claims made subsequent to termination of the policy shall be endorsed hereto, if purchased, and shall hereinafter be referred to as the **OPTIONAL REPORTING PERIOD**.

The premium for the optional Reporting Period elected by the Named Insured shall be (a) 100% for 12 MONTHS, (b) 150% for 24 MONTHS, or (c) 185% for 36 MONTHS, of the full annual premium for this policy.

This coverage will be renewable annually at the expiration of the optional Reporting Period at the option of the Insured upon payment of an additional premium determined by the Company in accordance with the rates in effect at each annual renewal date.

At the commencement of any optional Reporting Period, the entire premium therefor shall be deemed earned, and in the event the Insured terminates the optional Reporting Period before its term for any reason, the Company shall not be liable to return to the Insured any portion of the premium for the optional Reporting Period.

The fact that the period during which claims must be first made against the Insured under this policy is extended by virtue of the optional Reporting Period shall not in any way increase the limits of liability of this policy.

**V. Option to Purchase Non-Practicing Reporting Period:** If any Insured retires or otherwise ceases the private practice of law during the policy period, then upon payment of an additional premium as set forth herein, the Insured shall have the option to extend the insurance afforded by this policy to apply to CLAIMS FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING (a) 12 MONTHS, (b) 24 MONTHS, (c) 36 MONTHS or (d) an unlimited period immediately following the expiration date of this policy as stated in the Declarations, but only by reason of any act, error or omission in professional services

rendered before the Insured's date of retirement or termination of private practice and otherwise covered by the insurance. PROVIDED there is no other insurance procured on or after the Insured's date of retirement or termination of practice which covers the Insured for such liability or claim. Such other insurance shall render this coverage inapplicable, even though the limits of liability of such other insurance may be inadequate to pay all losses and claim expenses and/or the deductible amount and deductible provisions of such other insurance may be different from those of this policy.

The extension of coverage elected by the Insured for claims made subsequent to the Insured's date of retirement or termination of private practice shall be endorsed hereto, if purchased, and shall hereinafter be referred to as the **NON-PRACTICING REPORTING PERIOD**.

The premium for the Non-Practicing Reporting Period elected by the Insured shall be (a) 100% for 12 MONTHS, (b) 150% for 24 MONTHS, (c) 185% for 36 MONTHS, or (d) 225% for an unlimited period of the full annual premium for this policy.

The deductible amount and deductible provisions of this policy will be waived with respect to claims first made against the Insured during the Non-Practicing Reporting Period purchased by the Insured.

The limits of liability stated in the Declarations and described in Section E LIMITS OF LIABILITY I. and II. shall not apply to the optional reporting period available herein. The limits of liability stated in the following schedule shall apply to claims first made against the Insured during the Non-Practicing Reporting Period, if purchased and shall apply as described in said schedule.

The limits of liability in effect at the inception of this policy as stated in the Declarations shall be used to compute the limits of liability provided during the Non-Practicing Reporting Period if purchased.

In the event of the death of an Insured or for those Insureds with three consecutive full years of coverage by the Company who become permanently, totally disabled preventing further practice of an Insured as defined by item (a) in Section A INSURED I. THE INSURED, such Insured shall be entitled, at no additional premium, to a Non-Practicing Reporting Period for all claims first made after the termination of the policy period arising out of any act, error or omission occurring prior to the termination of the policy period and otherwise covered by this policy. However, those

identified by items (b) thru (f) of Section A INSURED I. THE INSURED are specifically excluded from exercising this option.

"Totally and permanently disabled" means that the Insured has become so disabled as to be wholly prevented from rendering professional services for others in the capacity as a lawyer or notary public provided that such disability:

- A. has existed continuously for not less than 6 months; and
- B. is expected to be continuous and permanent.

"Totally and permanently disabled" shall not include any condition which:

- A. is a result of war or acts of war, whether or not declared;
- B. occurred during active service in the armed forces of any country; or
- C. results from:
  - 1. intentionally self-inflicted injuries;
  - 2. actual or attempted suicide, whether or not sane; or

3. the abuse or misuse of addictive chemical compounds or alcohol.

If the Insured exercises the Non-Practicing Reporting Period option:

- (a) The liability of the Company for each claim FIRST MADE AGAINST THE INSURED DURING THE NON-PRACTICING REPORTING PERIOD purchased by the Insured shall not exceed the amount(s) stated in the applicable schedule for "each claim"; and
- (b) Subject to the limits of liability for "each claim," the liability of the Company for all claims FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD INCLUDING THE NON-PRACTICING REPORTING PERIOD shall not exceed the amount(s) stated in the schedule below as "policy aggregate."

If any "aggregate" or "policy aggregate" limit of liability becomes exhausted by payment of claims expenses, judgments and/or settlements, this policy, including the Non-Practicing Reporting Period, may be cancelled by the Company. The Company also shall not be obligated to defend or continue to defend any claim for which the applicable "aggregate" or "policy aggregate" has been exhausted by payment of claims expenses, judgments or settlements.

**V (SCHEDULE)**

- 1. \$100,000 each claim/\$300,000 aggregate, then Column I of the following schedule applies.
- 2. \$200,000 each claim/\$600,000 aggregate, then Column II of the following schedule applies.
- 3. Other than those indicated in I or II, then such limits as shown in the Declarations shall also apply during the total Non-Practicing Reporting Period purchased and the "aggregate" limit shall be deemed the "policy aggregate" as referred to in subparagraph (b) above.

Effective as of  
and applicable to  
CLAIMS FIRST MADE  
AGAINST THE INSURED DURING

	I	II	
A. Each Claim:	\$100,000	\$ 200,000	First 12 month period immediately following expiration, if a 12 month extension is purchased.
Policy Aggregate:	300,000	500,000	
B. Each Claim:	110,000	220,000	Second 12 month period immediately following expiration, if a 24 month extension is purchased (Also subject to A);
Policy Aggregate:	350,000	600,000	
C. Each Claim:	120,000	240,000	Third 12 month period immediately following expiration, if a 36 month extension is purchased (Also subject to A and B);
Policy Aggregate:	400,000	600,000	
D. Each Claim:	130,000	260,000	Fourth 12 month period immediately following expiration, and thereafter, if the unlimited extension is purchased (Also subject to A, B and C).
Policy Aggregate:	500,000	500,000	
Each Claim:	140,000	280,000	
Policy Aggregate:	500,000	600,000	

**VI. Exercising The Options:** As a condition precedent to the Insured's right to exercise these options, the full annual premium of this policy and any deductibles that are due must have been paid. Neither the Optional Reporting Period nor the Non-Practicing Reporting Period shall be available when any Insured's license or right to practice his profession is revoked, suspended by or surrendered at the request of any regulatory authority.

The Insured's right to purchase any extension option must be exercised by notice in writing not later than thirty (30) days after the cancellation or termination date of this policy. Effective notice must indicate the total extension period desired AND MUST INCLUDE PAYMENT OF PREMIUM FOR SUCH EXTENSION PERIOD as well as all deductibles due the Company

If such notice, premium and deductible payment are not so given to the Company, the Insured shall not at a later date be able to exercise such rights.

### Section C — Exclusions

#### I. This policy does not apply:

- (a) to any judgement or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured;
- (b) to any claim made by or against any business enterprise not named in the Declarations which is owned by the Insured or in which the Insured is a partner or employee, or which is controlled, operated or managed by the Insured, either individually or in a fiduciary capacity, including the ownership, maintenance or use of any property in connection therewith, or to any claim made against the Insured solely because the Insured is a partner, officer, director, stockholder employee or employee of any firm or corporation not named in the Declarations;
- (c) to liability arising out of the Insured's services and/or capacity as:
  - 1) an officer, director, partner, trustee, or employee of a business enterprise or charitable organization or pension, welfare, profit sharing, mutual or investment fund or trust;
  - 2) a public official, or an employee of a governmental body, subdivision, or agency;
- 3) a fiduciary under the Employee Retirement Income Security Act of 1974 and its amendments or any regulation or order issued pursuant thereto, except if an Insured is deemed to be a fiduciary solely by reason of legal advice rendered with respect to an employee benefit plan;
- (d) to any liability for bodily injury, sickness, disease or death of any person, or injury to or destruction of any tangible property or loss of use resulting therefrom;
- (e) to any claims arising out of notarized certification or acknowledgement of a signature without the physical appearance before such notary public as Insured hereunder of the person who is or claims to be the person signing said instrument.
- (f) to any claim made by a present, former or prospective partner, officer, director, stockholder employee or employee of the Insured unless such claim arises out of the professional services of the Insured in a lawyer-client relationship except as otherwise excluded under Exclusion (h);
- (g) to any claim based upon or arising out of discrimination by the Insured on the basis of race, creed, age, sex or marital status;
- (h) to any claim based upon or arising out of the work performed by the Insured, with or without compensation, with respect to any corporation, fund, trust, association, partnership, limited partnership, business enterprise or other venture, be it charitable or otherwise, of any kind or nature in which any Insured has any pecuniary or beneficial interest, irrespective of whether or not an attorney-client relationship exists, unless such entity is named in the Declarations. For purposes of this policy, ownership or shares in a corporation shall not be considered a "pecuniary or beneficial interest" unless one Named Insured or members of the immediate family of the Named Insured own(s) 10% of the issued and outstanding shares of such corporation;
- (i) to any claim for property damage arising out of Insured's act, error or omission while acting as attorney, officer, director, partner, trustee or employee of a business enterprise which is liable or may be held liable for the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon



land, the atmosphere or any water course or body of water.

**II. Waiver of Exclusion and Breach of Conditions:** Whenever coverage under any provision of this policy would be excluded, suspended or lost

(a) because of exclusion (a) relating to any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, malicious or deliberately wrongful acts or omissions by any Insured, or

(b) because of noncompliance with Section F CLAIMS I NOTICE OF CLAIMS relating to the giving of notice to the Company with respect to which any other Insured shall be in default solely because of the default or concealment of such default by one or more partners or employees responsible for the loss or damage otherwise insured hereunder.

The Company agrees that such insurance as would otherwise be afforded under this policy shall apply with respect to each and every Insured who did not personally commit or personally participate in committing one or more of the acts, errors or omissions described in any such exclusion or condition; provided that if the condition be one with which such Insured can comply, after receiving knowledge thereof, the Insured entitled to the benefit of the Waiver of Exclusions and Breach of Conditions shall comply with such condition promptly after obtaining knowledge of the failure of any other Insured or employee to comply therewith. However, related acts, errors or omissions shall be treated as a single claim, and suits brought by more than one person or organization shall not operate to increase the Company's limit of liability.

With respect to provision II. (a) above, the Company's obligation to pay in the event of such waiver shall be in excess of the deductible and in the excess of the full extent of any assets in the firm of any Insured who is not a beneficiary to the waiver.

**Section D — Territory**

The insurance afforded applies worldwide.

**Section E — Limits of Liability**

**I. Limits of Liability — Each Claim:** The liability of the Company for each claim FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD, including the Optional Reporting Period, if such is purchased, shall not exceed the amount stated in the Declaration for each claim, and shall include

all claim expenses. If the limits of liability are exhausted prior to settlement or judgment of any pending claim or suit, the Company shall have the right to withdraw from the further investigation or defense thereof by tendering control of such investigation or defense to the Insured, and the Insured agrees, as a condition to the issuance of this policy, to accept such tender.

**II. Limits of Liability/Aggregate:** Subject to Section E I. LIMITS OF LIABILITY — EACH CLAIM, the liability of the Company shall not exceed the amount stated in the Declarations as aggregate as a result of all claims FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD including the Optional Reporting Period, if such is purchased.

**III. Deductible:** The deductible amount stated in the Declarations shall be paid by the Named Insured and shall be applicable to all damages and claim expenses, for each and every claim, whether or not loss payment is made for claims first made during the policy period. The deductible shall be deemed to be applied first to the damages and/or claim expenses.

If the Optional Reporting Period is purchased, the deductible will be applicable in the full amount shown in the Declarations and shall be applicable to all damages and claim expenses, for each and every claim whether or not loss payment is made, for all claims first made during the Optional Reporting Period.

Such amounts shall upon written demand by the Company be paid by the Named Insured within thirty (30) days regardless of the number of claims first made during the policy period.

The determination of the Company as to the reasonableness of the claim expenses shall be conclusive on the Named Insured.

**IV. Multiple Insureds, Claims and Claimants:** The inclusion herein of more than one Insured or the making of claims or the bringing of suits by more than one person or organization shall not operate to increase the Company's limit of liability. Related acts, errors or omissions shall be treated as a single claim. All such claims, whenever made, shall be considered first made during the policy period or optional Reporting Period in which the earliest claim arising out of such act, error or omission was first made, and all such claims shall be subject to the same limits of liability.

**V. Payment and Apportionment of Claim Expenses:** All claim expenses shall first be

subtracted from the limit of liability with the remainder, if any, being the amount available to pay as damages. If the limits of liability are exhausted prior to settlement or judgment of any pending claim or suit, the Company shall have the right to withdraw from the further investigation or defense thereof by tendering control of such investigation or defense to the Insured, and the Insured agrees, as a condition to the issuance of this policy, to accept such tender.

Claim expenses, whenever used in this policy, means

(a) fees charged by any lawyer designated by the Company;

(b) all other fees, costs and expenses resulting from the investigation, adjustment, defense and appeal of a claim, if incurred by the Company.

However, "claim expenses" does not include salary charges of regular employees or of the officials of the Company or any supervisory counsel retained by the Company.

#### Section F — Claims

**I. Notice of Claims:** As a condition precedent to the right to the protection afforded by this insurance, the Insured shall, as soon as practicable, give to the Company written notice of any claim made against the Insured.

In the event suit is brought against the Insured, the Insured shall immediately forward to the Company every demand notice, summons or other process received directly or by the Insured's representatives.

**II. Assistance and Cooperation of the Insured:** The Insured shall cooperate with the Company and upon the Company's request shall submit to examination and interrogation by a representative of the Company under oath if required, and shall attend hearings, depositions and trials, and shall assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits, as well as in the giving of a written statement or statements to the Company's representatives and meeting with such representatives for the purpose of investigation and/or defense, all without charge to the Company. The Insured shall further cooperate with the Company and do whatever is necessary to secure and effect any rights of indemnity, contribution or apportionment which the Insured may have. The Insured shall exercise the Insured's right to either reject or demand the arbitration of any claim made against the Insured in accordance with the written instructions of the

Company. The Insured shall not, except at the Insured's own cost, make any payment, admit any liability, settle any claims, assume any obligation or incur any expense without the written consent of the Company.

**III. Subrogation:** In the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization, and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing to prejudice such rights.

The Company shall not exercise any such rights against any persons, firms or corporations included in the definition of Insured.

Notwithstanding the foregoing, however, the Company reserves the right to exercise any rights of subrogation against an Insured with respect to any claim brought about or contributed to by the intentional, dishonest, fraudulent, criminal or malicious act or omission of such Insured.

Any amount so recovered shall be apportioned as follows:

Any recovery shall first be used for the repayment of expenses incurred toward subrogation; second, to loss and/or claim expenses paid by the Company; third, to any loss and expense payment by the Insured in excess of any deductible(s); fourth, to any loss and expense payments by an excess carrier on behalf of the Insured; fifth, to any loss and expense payments by any primary carrier on behalf of the Insured; and last, to repayment of the Insured's deductible.

**IV. Action Against the Company:** No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been fully and finally determined either by judgment against the Insured after a trial or by written agreement of the Insured, the Claimant and the Company.

Nothing contained in this policy shall give any person or organization the right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability. Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations hereunder.

**V. False or Fraudulent Claims:** If any Insured shall commit fraud in proffering any claim as regards

amount or otherwise, this insurance shall become void as to such Insured from the date such fraudulent claim is proffered.

Section G — Conditions

I. Application: By acceptance of this policy, the Insured agrees that the statements in the application are personal representations, that they shall be deemed material and that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between the Insured and the Company, or any of its agents, relating to this insurance.

II. Other Insurance: Subject to the limitation of coverage as set forth in Section B COVERAGE I. (b) for prior insurance, and Section B COVERAGE V. for insurance procured subsequent to termination of practice, this insurance shall be in excess of the amount of the applicable deductible of this policy and any other valid and collectible insurance available to the Insured whether such other insurance is stated to be primary, pro rata, contributory, excess, contingent or otherwise, unless such other insurance is written only as a specific excess insurance over the limits of liability provided in the policy.

III. Changes: Notice to any agent or knowledge possessed by any agent or other person acting on behalf of the Company shall not affect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of the policy, nor shall the terms of the policy be waived or changed, except by written endorsement issued to form a part of this policy.

IV. Assignment: Assignment of interest under this policy shall not bind the Company unless its consent is endorsed in writing hereon.

V. Cancellations: This policy may be cancelled by the Named Insured by surrender thereof to the

Company or by mailing to the Company written notice stating when thereafter such cancellation shall be effective. If cancelled by the Insured, the Company shall retain the customary short rate proportion of the premium.

This policy may be cancelled by the Company by mailing to the Named Insured in the Declarations written notice stating when, not less than thirty (30) days thereafter, such cancellation shall be effective. Such notice shall be conclusive on all Named Insureds.

However, if the Company cancels the policy because the Insured has failed to pay a premium or deductible when due, this policy may be cancelled by the Company by mailing a written notice of cancellation to the Insured stating when not less than ten (10) days thereafter such cancellation shall be effective. The mailing of notice as aforementioned shall be sufficient notice and the effective date of cancellation stated in any notices shall become the end of the policy period. Delivery of such written notice by the Named Insured or the Company shall be the equivalent to mailing.

If cancelled by the Company, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected or as soon as practicable thereafter.

Definitions-Reference

Certain words are specifically defined for the policy and the definitions are to be found in the sections set forth below:

(a) Claim, damages, policy period — see Section B COVERAGE I.

(b) Claim expenses — see Section E LIMITS OF LIABILITY V.

IN WITNESS WHEREOF, the Company has caused this policy to be executed and attested, but this policy shall not be valid unless countersigned by a duly authorized representative of the Company.

James J. McLaughlin
President
THE HOME INSURANCE COMPANY OF WISCONSIN

William L. Hanson
President
THE HOME INDEMNITY COMPANY

F. A. Mine
President
CITY INSURANCE COMPANY

Arthur Phillips
President
THE HOME INSURANCE COMPANY OF INDIANA
THE HOME INSURANCE COMPANY OF ILLINOIS

J. J. McHugh
Secretary
THE HOME INSURANCE COMPANY

James W. Trottinger
Secretary
THE HOME INDEMNITY COMPANY
CITY INSURANCE COMPANY

Mark L. Gardner
Secretary
THE HOME INSURANCE COMPANY OF INDIANA
THE HOME INSURANCE COMPANY OF ILLINOIS

Christine A. Chmielewski
Secretary
THE HOME INSURANCE COMPANY OF WISCONSIN

**Nuclear Energy Liability  
Exclusion Endorsement (BROAD FORM)**

This endorsement modifies the provisions of this policy.

It is agreed that:

**I. This policy does not apply:**

**(A)** Under any Liability Coverage, to bodily injury or property damage

1) with respect to which an Insured under this Policy is also an Insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an Insured under any such policy but for its termination upon exhaustion of its limit of liability; or

2) resulting from the hazardous properties of nuclear material and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the Insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

**(B)** Under any Medical Payments Coverage, or any Supplementary Payments provision relating to first aid, to expenses incurred with respect to bodily injury resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

**(C)** Under any Liability Coverage, to bodily injury or property damage resulting from the hazardous properties of nuclear material, if

1) the nuclear material (a) is at any nuclear facility owned by, or operated by or on behalf of an Insured or (b) has been discharged or dispersed therefrom;

2) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an Insured; or

3) the bodily injury or property damage arises out of the furnishing by an Insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if

such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to property damage to such nuclear facility and any property thereat.

**II. As used in this endorsement:**

"hazardous properties" include radioactive, toxic or explosive properties;

"nuclear material" means source material, special nuclear material or by-product material;

"source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor;

"waste" means any waste material (1) containing by-product material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof;

"nuclear facility" means

(a) any nuclear reactor,

(b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,

(c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the Insured at the premises where such equipment or device is located consists of or contains more than twenty-five (25) grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235.

(d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste.

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"property damage" includes all forms of radioactive contamination of property.

THE HOME  
INSURANCE  
COMPANIES



AMENDATORY ENDORSEMENT  
PROFESSIONAL LIABILITY INSURANCE POLICY - LAWYERS  
NORTH DAKOTA

H37028F  
Ed. 8-87

In consideration of the premium charged, it is hereby agreed and understood that the Cancellation section is amended by the addition of the following:

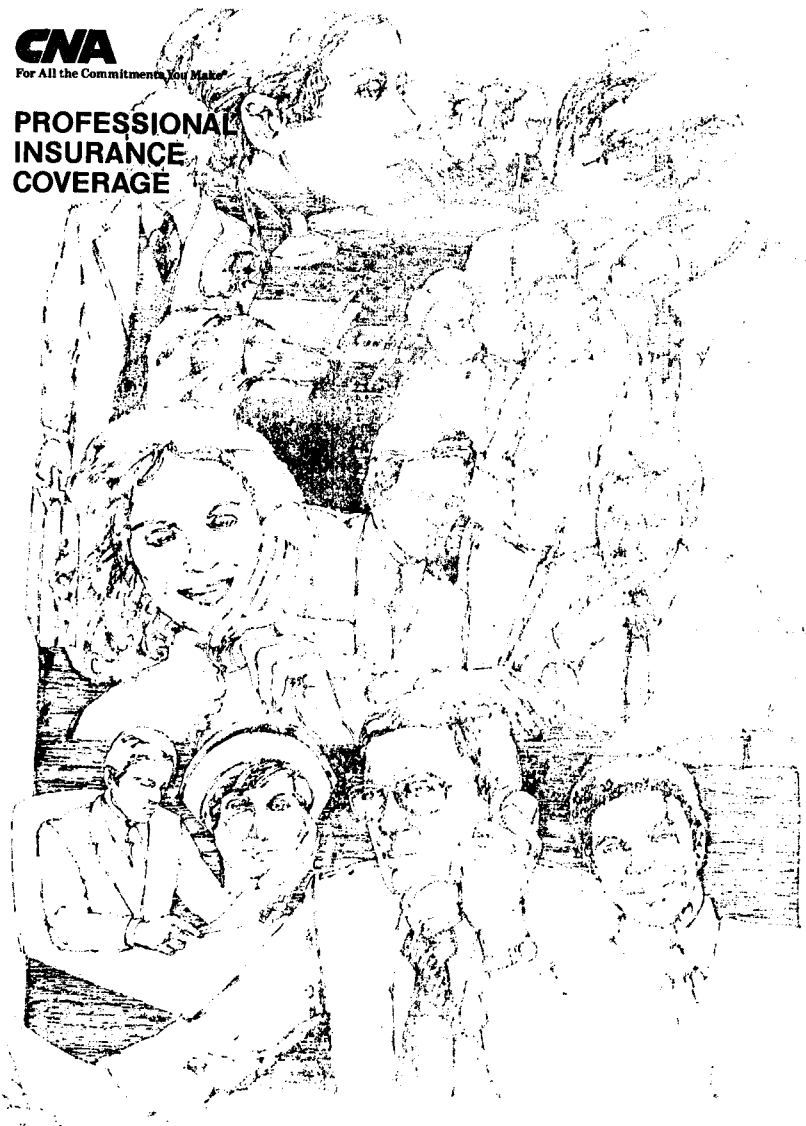
**CANCELLATION**

If this policy has been in effect for 90 days or more, the Company may cancel this policy only for one or more of the following reasons:

- a. Nonpayment of premiums;
- b. Misrepresentation or fraud made by or with the knowledge of the insured in obtaining the policy or in pursuing a claim under the policy;
- c. Actions by the insured that have substantially increased or substantially changed the risk insured;
- d. Refusal of the insured to eliminate known conditions that increase the potential for loss after notification by the insurer that the condition must be removed;
- e. Substantial change in the risk assumed, except to the extent that the insurer should reasonably have foreseen the change or contemplated the risk in writing the contract;
- f. Loss of reinsurance by the insurer;
- g. A determination by the Insurance Commissioner that the continuation of the policy could place the insurer in violation of the insurance laws of the state; or
- h. Nonpayment of dues to a non-insurance association or organization, where payment of dues is a prerequisite to obtaining or continuing such insurance.

**CNA**  
For All the Commitments You Make

**PROFESSIONAL  
INSURANCE  
COVERAGE**



G-41500-B (Rev.)  
(ED 02/85)

B-24

## GENERAL CONDITIONS

I. **Time of Inception; Policy Term**

This policy will begin at 12:01 A.M. on the effective date shown on the Declarations. The policy will continue to apply until 12:01 A.M. on the expiration date also shown on the Declarations. If we agree, the policy term may be extended.

II. **Policy Territory**

The coverage under this policy applies in the Territory designated in the Coverage Parts attached to this policy.

III. **Inspection and Audit**

You agree to let us inspect your property and business operations during normal business hours while this policy is in force. We are not, however, required to make inspections. Nor will we guarantee that your property or operations are safe, or that they conform to any laws, rules or regulations.

You also agree to allow us to examine and audit your financial books and records that relate to this insurance at any time up to 3 years after this policy ends.

IV. **Premium**

All premium charges under this policy will be computed according to our rules and rating plans which apply at the time of the charge. Premiums for this policy are payable to us in advance. They may be paid to us or our authorized representative. The first premium is due on the inception date of the policy.

You must keep accurate records of the information we will need to compute your premium. You agree to send us these records at the end of each policy term, or any other time we request them.

V. **Definitions**

If any of the following terms are used in this policy, they will only have the meaning shown.

**"Advertising Offense"** means injury happening in the course of your advertising activities. The injury must arise out of libel, slander, defamation, violation of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

**"Auto"** means a land motor vehicle, trailer or semi-trailer designed for use on public roads. Any attached apparatus or machinery is included. **Mobile Equipment** is not included.

**"Claims Expenses"** means:

- A. fees charged by an attorney we designate; and
- B. all other fees, costs and expenses which result from the investigation, adjustment, defense and appeal of a claim.

These expenses must be incurred by us, or by you with our prior written consent.

**"Claims Expenses"** does not include salary charges of our regular employees or Company officials, or fees and expenses of independent adjusters.

**"Completed Operations Hazard"** means injury or damage resulting from:

- A. your operations; or
- B. reliance upon a representation or warranty made at any time regarding the operations.

The injury or damage must occur after the operations have been completed or abandoned, and must occur away from the premises you own or rent. Materials, parts or equipment furnished as part of the operations are also included. Operations are considered completed at the earliest of the following:

- A. when all operations to be performed by or for you under the contract have been completed;
- B. when all operations to be performed by or for you at the site of the operations have been completed; or
- C. when the portion of the work out of which the injury or damage results has been put to its intended use by any person or organization. This does not include another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

An operation is still considered completed even if further service or maintenance work, correction, repair or replacement may be needed to fix any defect or deficiency.

**Injury or damage** arising out of:

- A. operations connected with the transportation of property, unless the injury or damage results from a condition in or on a vehicle created by loading or unloading of the vehicle; or
- B. the existence of tools, uninstalled equipment or abandoned or unused materials,

is not included in the **Completed Operations Hazard**.

**"Construction Operations"** means any alteration, construction or demolition operations.

**"Elevator"** means a hoisting or lowering device to connect floors or landings. It may or may not be in service. It may consist of several parts, such as: a car or platform; a shaft, hoistway, stairway, or runway; power equipment and machinery. For the purpose of this policy, elevator does not include:

- A. an auto servicing hoist;
- B. a hoist without a platform outside a building which does not have mechanical power or is not attached to a building wall;
- C. any hod or material hoist used in construction operations;
- D. an inclined conveyor used exclusively for carrying property; or

- E. a dumbwaiter used exclusively for carrying property and having a compartment height of 4 or less feet.

"Incidental Contract" means any:

- A. lease of premises;
- B. easement agreement, except in connection with construction operations on or next to a railroad;
- C. agreement to indemnify a municipality required by ordinance. This does not include an agreement connected with work for the municipality;
- D. sidetrack agreement; or
- E. elevator maintenance agreement.

"Injury" means bodily injury, sickness or disease which happens to a person. The injury must happen during the policy term. Death at any time as a result of the injury is also included.

"Mobile Equipment" means a land vehicle, whether or not self-propelled, not subject to motor vehicle registration, used primarily on your premises or designed principally for use off public roads;

"Named Insured" means the person or organization named on the Declarations of this policy as the Named Insured.

"Non-owned Auto" means an auto not owned, registered, hired, leased or loaned to you.

"Pollution" means the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, air or water;

"Products Hazard" means injury or damage arising out of:

- A. your products, or
- B. reliance upon a representation or warranty made about your products.

The injury or damage must occur away from your premises after you have given physical possession of such products to others.

"Your Products" means goods or products which you manufacture, sell, distribute or handle. This also includes other trading under your name. Any container of the product is also included. Your products does not include a vending machine or any property other than such container which is rented to or located for use of others but not sold.

#### VI. Your Duties

If there is a claim or you reasonably think there will be, you must do the following:

- A. notify us and your insurance agent in writing as soon as possible;
- B. specify the names and addresses of the injured people and any witnesses. Provide us with information on the time, place and nature of the event;
- C. immediately forward all documents which you receive in connection with the claim to us;
- D. fully cooperate with us or our designee in the making of settlements, the conduct of suits or other proceedings, enforcing any right of contribution or indemnity against another who may be liable to you because of injury, damage, loss or expense. You shall attend hearings and trials, assist in securing and giving evidence, and obtaining the attendance of witnesses;
- E. Refuse, except at your own cost to voluntarily make any payment, assume any obligation or incur any expense.

#### VII. Other Insurance

If you have other insurance which applies to the loss, the other insurance must pay first. It is the intent of this policy to apply to the amount of loss which is more than the limit of liability of the other insurance. We will not pay more than our limit of liability.

#### VIII. Rights of Recovery

If we make any payment, we are entitled to recover what we paid from other parties. Any person to or for whom we make payment must transfer to us their rights of recovery against any other party. This person must do everything necessary to secure these rights and must do nothing that would jeopardize them.

#### IX. Legal Action Limitation

You may not bring any legal action against us concerning this policy until:

- A. You have fully complied with all the provisions of this policy; and
- B. The amount of your obligation to pay has been decided. Such amount can be set by judgement against you after actual trial or by written agreement between you, us and the claimant.

Any person, organization, or their legal representative is entitled to recover under this policy after they have secured a judgement or written agreement. Recovery is limited to the extent of the insurance afforded by this policy. No person or organization has any right under this policy to include us in any action against you to determine your liability, nor will we be brought into such an action by you or your representative. If you or your estate becomes bankrupt or insolvent, it does not change any of our obligations under this policy.



**X. Changes**

Notice to any of our agents or knowledge possessed by any such agent or any other person shall not act as a waiver or change in any part of this policy. It also will not prevent us from asserting any rights under the provisions of this policy. None of the provisions of this policy will be waived, changed or modified except by written endorsement issued to form a part of this policy.

**XI. Transfer of Interest**

You must first obtain our written consent to transfer or assign this policy. If you die, the policy will continue for the remaining part of the policy term; first, for the benefit of your legal representative while acting within his duties as such, and second, for the benefit of anyone having proper temporary custody of your property until a legal representative is appointed.

**XII. Cancellation**

You may cancel this policy at any time. You can return the policy to us or any of our authorized agents, or

you can mail a written notice to us telling when you want the cancellation to be effective. We must receive the policy or written notice before the cancellation date. Delivery of a written notice is the same as mailing. If you cancel the policy, return premium shall be computed prorata, and 90% will be returned to you.

We can cancel this policy by delivering or mailing a written notice to you. We will give you this notice at least 30 days before the effective date of cancellation. If you have not paid the premium, we will only give you 10 days notice of cancellation. The date and hour of cancellation will be shown in the notice. Return premium shall be computed prorata.

We will make the premium adjustment with you at the time that cancellation is effective, or as soon as practicable after that time. However, this premium adjustment is not a condition of cancellation.

If there are more than one of you named in this policy, the first named insured shall act for all of you. Notice of Cancellation will only be sent to the named insured and will serve as notice to all of you.

This Policy shall not be valid unless countersigned on the Declarations by a duly authorized representative of this Company.

  
Corporate Secretary

  
Chairman of the Board



**PROFESSIONAL LIABILITY COVERAGE PART  
LAWYERS**

**YOUR PROFESSIONAL LIABILITY INSURANCE IS WRITTEN ON A "CLAIMS-MADE" BASIS AND ONLY APPLIES TO THOSE CLAIMS FIRST MADE AGAINST YOU WHILE THIS INSURANCE IS IN FORCE. NO COVERAGE EXISTS FOR CLAIMS FIRST MADE AGAINST YOU AFTER THE END OF THE POLICY TERM UNLESS AND TO THE EXTENT AN EXTENSION OF COVERAGE APPLIES.**

We are the stock insurance company named on the Declarations. We agree with you as follows:

**I. COVERAGE AGREEMENTS**

- A. We will pay all amounts, up to our limit of liability, which you become legally obligated to pay as a result of a wrongful act by you or by any entity for whom you are legally liable.
- B. The wrongful act, as described above, must happen before the end of the policy term stated on the Declarations and claim therefor must first be made against you and reported to us during that policy term.
- Any claim or claims arising out of the same or related wrongful acts, shall be considered first made during the policy term in which the earliest claim arising out of such wrongful acts was made.
- C. We have the right and will defend any claim. We will do this even if the charges of the claim are groundless, false, or fraudulent. We will investigate any claim we feel appropriate. We will not settle any claim without your consent. If we recommend a settlement to you, which is agreeable to the claimant, and you do not agree, our limit of liability is reduced to the total of the amount for which the claim could have been settled plus the amount of claim expenses up to the time we made the recommendation. You shall not enter into any agreement or settlement without our prior written consent.
- D. We have no duty to defend any claim not covered by this Coverage Part.

**II. EXCLUSIONS**

We will not defend or pay, under this Coverage Part for:

- A. any claim by:
1. any of your employees arising out of and in the course of their employment by you; or
  2. the spouse, child, parent, brother or sister of that employee as a consequence of 1. above;
- B. any amounts which you or any party must pay under any unemployment or Workers' Compensation, disability benefits, or other similar law;

- C. any liability resulting from owning, using, taking care of, loading or unloading of any auto, mobile equipment, boat or aircraft;
- D. any claim arising out of:
1. a wrongful act in your performance:
    - a. as an officer, director, or trustee of a:
      - (1) business enterprise other than as named on the Declarations;
      - (2) non-profit organization, except for services rendered in your capacity as a member, director or officer of any professional legal association; its governing board or any of its committees;
      - (3) pension, welfare, profit-sharing, mutual or investment fund or trust;
    - b. as a public official, salaried officer or employee of a governmental body, subdivision or agency;
 

unless such entity is a client of yours and the claim relates solely to such lawyer/client relationship;
  2. a wrongful act in your performance of professional services for a business enterprise other than as named on the Declarations, which is owned, controlled, managed or operated by you or your spouse, or in which either of you are a partner or employee;
  3. any dishonest, fraudulent, criminal or malicious act or omission by you or any of your partners, officers, stockholders or employees. This exclusion does not apply to an act or omission which is the basis of a malicious prosecution claim;
  4. actual or alleged violation of the Employee Retirement Income Security Act of 1974, or any of its amendments, unless such claim arises out of your professional services as counsel to a client;
  5. any loss sustained by you as the beneficiary or distributee of any trust or estate;
- E. any damage to property which:
1. you own;
  2. you occupy, use or rent;
  3. is in your care, custody or control; or
  4. you are exercising physical control over for any purpose;
- F. any loss, under any circumstances due to nuclear reaction, radiation or contamination, regardless of cause;
- G. any fine, penalty, or claim for return of fees;

- H. any punitive or exemplary amounts;
- I. any claim whose sole allegation is that of a willful violation of a statute, ordinance or regulation which imposes criminal penalties;
- J. any wrongful act which occurred prior to:
  1. the effective date of the first policy issued and continuously renewed by us; or
  2. the date you joined the named insured or a predecessor firm,
 if on such date you knew or could reasonably foresee that such wrongful act might be the basis for a claim.

### III. LIMITS OF LIABILITY

#### A. Each Claim

Subject to B. below, the limit of liability stated for "each claim" is the maximum we will pay for all claims and claim expenses arising out of, or in connection with, the same or related wrongful acts. All such claims whenever made, shall be considered first made during the policy term in which the earliest claim arising out of such same or related wrongful acts was made, and all such claims shall be subject to the same limit of liability. This limit applies regardless of the number of you who are insured under this policy or the number of claimants against you.

#### B. Aggregate

The maximum we will pay for all claims and claim expenses shall not exceed the limit of liability stated as "aggregate". All wrongful acts for which claims are made during the policy term are included. All such claims whenever made, shall be considered first made during the policy term in which the earliest claim arising out of such same or related wrongful acts was made, and all such claims shall be subject to the same limit of liability. This aggregate limit applies separately to each annual policy term.

#### C. Claim Expenses

Claim expenses are included within, and are not in addition to, the limit of liability.

#### D. Deductible

1. Our obligation to pay as a result of a claim and to pay related claim expenses, in excess of the applicable amount of the deductible. You shall pay all claims and claims expenses up to the amount of the deductible. The deductible applies separately to each claim.
2. The deductible amount shall be payable by you as claim expenses are incurred or a payment for claims is made.

#### E. Limitations on Our Duty to Defend.

If the limit applicable to claims and claim expenses is exhausted prior to the conclusion of any claim; we shall have the right to withdraw from the further defense of the claim. We can

do this by tendering control of the defense to you. Our payment of the limit of liability ends our duty to defend or settle.

### IV. DEFINITIONS

"Claim" means the receipt of a demand for money or services, naming you and alleging a wrongful act.

"Damages" means:

- A. partial or total physical damage to tangible property. Such damage must happen during the policy term. Loss of use of damaged property is also included;
- B. loss of use of undamaged tangible property. This loss of use must be caused during the policy term.

"Dissolution" means any event which is accomplished by, or results in, a change of the:

- A. name of the partnership or professional corporation; or
- B. status between the partnership and corporate designation.

"Predecessor Firm" means a partnership or professional corporation which has:

- A. undergone dissolution; and
- B. at least 50% of the lawyers in such firm are still affiliated with the named insured.

"Professional Services" means services rendered in your capacity as a lawyer, real estate title insurance agent or notary public. This also includes your acts as an administrator, conservator, executor, guardian, trustee, receiver, or in any other similar fiduciary activity.

"Totally and permanently disabled" means that you have become so disabled as to be wholly prevented from rendering professional services for others in your capacity as a lawyer, real estate title insurance agent or notary public provided that such disability:

- A. has existed continuously for not less than 6 months; and
- B. is expected to be continuous and permanent.

"Wrongful Act" means any negligent act, error or omission in:

- A. the rendering of or failure to render, professional services; or
- B. your capacity as a member, director, or officer of any professional legal association, its governing board, or any of its committees.

"Wrongful Act" also means:

- A. false arrest, detention, or imprisonment;
- B. wrongful entry or eviction, or other invasion of the right of private occupancy;
- C. libel, slander, or other disparaging materials;
- D. any writing or saying in violation of an individual's right to privacy;
- E. malicious prosecution;
- F. advertising offense, including:

1. infringement of copyright, title or slogan;
2. plagiarism, piracy or misappropriation of an idea;

in connection with the advertising of professional services.

"You" or "Your" means:

- A. the named insured and any predecessor firm;
- B. the lawyers named in item 3 on the Declarations;
- C. any lawyer:
  1. who becomes your partner, stockholder or employee during this policy term. Such affiliation must be reported to us in writing, not later than the next anniversary of this policy;
  2. previously affiliated with the named insured or a predecessor firm as a partner, stockholder or employee:
    - a. if they are in the active private practice of law, but only for services performed for the named insured or a predecessor firm at the time of such affiliation; or
    - b. if they are no longer in the active private practice of law, and if their license to practice law has not been revoked or suspended, including the estate of a deceased lawyer;
  3. retained as lawyer of counsel. This only applies to services rendered on behalf of the named insured or a predecessor firm.
- D. any person who is a former or current employee, other than an employed lawyer, of the named insured or any predecessor firm, but solely for services performed by such person within the course and scope of their employment on behalf of the named insured or any predecessor firm.

#### V. CONDITIONS

- A. General Condition III, Inspection and Audit, shall not apply.
- B. The following conditions replace the policy General Conditions having the same title, but only as respects your Professional Liability Coverage.
  1. Rights of Recovery
    - a. If we make any payment, we are entitled to recover what we have paid from other parties. Any person to or for whom we make payment must transfer to us their rights of recovery against any other party. This person must do everything necessary to secure these rights and must do nothing that would jeopardize them.
    - b. We will not exercise our right to recover against anyone insured by this policy unless the wrongful act was also a willful violation of a statute, ordinance or regulation imposing criminal penalties.

#### 2. Transfer of Interest

You must first obtain our written consent to transfer or assign this policy.

If you die, the policy will continue:

- a. for your executor or administrator while acting within the scope of their duties as such, but only with respect to professional services you performed prior to the date of your death, and only until the executor or administrator is discharged;
  - b. to anyone having proper temporary custody of your property until a legal representative is appointed.
3. Other insurance
- If you have other insurance which applies to the loss:
- a. on a claims-made basis, this policy shall apply to the amount of loss which is more than the limit of liability of the other insurance. We will not pay more than our limit of liability.
  - b. on an occurrence basis,
    - (1) this insurance shall be available to you in the amount by which the limit of liability for this Coverage part exceeds the applicable limit of liability of the other valid and collectible insurance. The difference shall be the maximum we will pay under this policy with respect to a claim.
    - (2) If the applicable limit of liability of the other valid and collectible insurance is equal to or greater than the maximum payable under this Coverage Part, then this Coverage Part shall not afford any insurance with respect to such claim.

The above provisions do not apply to excess insurance specifically written to be excess of this policy.

#### C. The following conditions are added to the policy:

##### 1. Reimbursement

While we have no duty to do so, if we pay any amounts in payment of a claim or claim expenses:

- a. within the amount of the applicable deductible; or
  - b. in excess of the applicable limit of liability;
- you shall jointly and severally be liable to us for such amounts. Upon demand, you shall repay such amounts to us.

##### 2. Application

By accepting this policy, you agree that the statements on the Declarations and application which are made a part of this policy:

- a. are your representations;

- b. that this policy is issued in reliance upon the truth of such representations; and
- c. that this policy includes all agreements existing between you and us, or any of our agents, relating to this insurance.
3. **Liberalization**  
If we adopt revised provisions for this policy:
- a. within 45 days prior to the beginning of this policy; or
- b. during the policy term,
- in order to give, without additional premium, broader insurance, this policy will be construed in accordance with the broader provisions.
4. **Innocent Partners**  
We agree that this policy will apply to any of you who do not agree to participate in, or remain passive, after learning about the failure to give us notice because of concealment by another who is also defined as you in this policy.  
All of you under this policy must immediately comply, to the extent possible, with all policy provisions upon learning of such concealment.
5. **Overlap of Insurance**  
If more than one coverage or Coverage Part of this policy applies to the same wrongful act, we will not, for any reason, pay more than the limits of liability applicable to the most specifically described coverage.
6. **Territory**  
This policy applies to a wrongful act taking place anywhere in the world; provided however, that claim is made and suit is brought against you in the United States of America, its territories or possessions or Canada.
7. **Non-Renewal**  
If we decide not to renew this policy, we will mail written notice to you at least 30 days before the end of the policy term. If you have not paid the premium, this non-renewal provision does not apply.  
The quotation of a different premium, limits of liability, deductible or scope of coverage by us at renewal shall not be considered a non-renewal of this policy.
8. **Your Duties**  
If during the policy term, or any applicable extended reporting period:
- a. you first become aware that a wrongful act has been committed, arising out of your professional services; and
- b. you give written notice to us of the:
- (1) specific wrongful act,
- (2) the injury or damage which has or may result from the wrongful act, and
- (3) the circumstances by which you first became aware of such wrongful act,
- then any subsequent claim made against you arising out of such wrongful act shall be deemed to have been made during the policy term or extended reporting period. No coverage for such claim shall exist under any subsequent policy written by us or our affiliates.
9. **Extended Reporting Coverage**
- a. If this policy is terminated for any reason other than :
- (1) failure to pay the premium, or repay to us any deductible when due, or
- (2) expired and renewed by us.
- you have the right to purchase an extended reporting period.
- b. In the event that you want to purchase this coverage, you must:
- (1) write to us within 30 days of the termination of this policy, telling us you want the extension, and
- (2) pay the premium to us promptly when due.
- c. If you die during this policy term or if, after having been insured by us for at least 3 consecutive years immediately prior to this policy term, you become totally and permanently disabled during this policy term, the period for reporting claims is extended until the executor or administrator is discharged, or until your disability ends. No additional premium shall be charged for this extension, nor will any premium be refunded.

**LAWYERS PROFESSIONAL LIABILITY PROTECTION - CLAIMS-MADE**



This agreement provides protection against professional liability claims which might be brought against you in your practice as a lawyer.

**Important Note:** This is a claims-made insuring agreement. Please read it carefully, especially the When A Claim Is Covered and Optional reporting endorsement sections.

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after the limit of coverage that applies has been used up in paying judgments or settlements.

**Defending lawsuits.** We'll defend any suit brought against you or any other protected person for covered claims, even if the suit is groundless or fraudulent. We have the right to investigate any suit or claim, but we can't settle or compromise a suit or claim without written consent from you or the protected person involved. If consent is refused, we won't pay more than we would have paid if consent had been given to the proposed written settlement agreement or compromise.

**What This Agreement Covers**

We'll pay amounts you and other protected persons are legally required to pay to compensate others for loss that results from an error, omission or negligent act committed in the performance of legal or notary services. This includes loss caused by any person for whose acts you're legally responsible. All such errors, omissions or negligent acts will be referred to as "wrongful acts" in this agreement.

We'll pay all costs of defending the suit, including interest on that part of any judgment that doesn't exceed the limit of coverage that applies.

**Suit** includes an arbitration proceeding to which you must submit or submit with our consent.

*Legal services* include those you perform while serving in a fiduciary capacity such as: Trustee. Executor. Administrator. Guardian. Or Conservator. But we'll only cover you to the extent you would be legally responsible as attorney for a fiduciary in the usual attorney-client relationship. For example:

**Prejudgment interest.** We'll pay the prejudgment interest awarded on that part of any judgment we pay. But if we make an offer to pay the limit of coverage that applies, we won't pay the prejudgment interest that accumulates after the date of our offer.

*While serving as a trustee you make two errors. You invest some funds for the trust. And you make a legal error on a tax form you file for the trust. We won't cover any liability resulting from your business judgment in investing the funds. But we will cover any liability you have for the legal error on the tax form.*

**Post-judgment interest.** We'll pay 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's within the limit of coverage that applies.

**Additional Benefits**

All of the following benefits are in addition to the limits of coverage. But these benefits end

**Legal bonds.** We'll pay premiums for appeal bonds, or bonds to release property that's being used to secure a legal obligation, that are required in a suit we defend. However, we'll only pay for bonds valued up to the limit of coverage that applies and we have no obligation to apply for or furnish these bonds.

**St. Paul**

**Expenses related to defense.** We'll also pay all reasonable costs that you or any protected person incur at our request while helping us investigate or defend a claim or suit. This includes up to \$100.00 per day for actual loss of earnings. For example, if someone sues you, we may ask you to be a witness in a trial. If you lose earnings as a result we'll pay up to \$100.00 per day for earnings you actually lose.

**Who Is Protected Under This Agreement**

*Protected persons* are people and organizations protected under this agreement.

Here's a list of protected persons and certain limitations on their protection. Each is protected separately. However, the limits of coverage shown in the Coverage Summary are shared by all protected persons. We explain how in the Limits Of Coverage section.

**Individual.** If you are an individual named in the Introduction, you are protected.

**Partnership or joint venture.** If you are a partnership or joint venture named in the Introduction, you are protected.

**Professional association or corporation.** If you are a professional association, corporation, or some other type of organization named in the Introduction, you are protected. Lawyers who are members of the organization are protected. And your stockholders are protected only in connection with their ownership of your stock.

**Employed lawyers.** Regardless of how your practice is owned, any lawyers you employ are protected.

**Changes.** This coverage applies even if you have changed your firm name from what it was or if you change your firm name in the future. We'll protect lawyers who join your firm later. Their coverage will begin on the date they join your firm. We'll also protect lawyers who leave your firm. But only for claims that result from wrongful acts prior to leaving your firm.

**When A Claim Is Covered**

We'll cover claims first made against a protected person while this agreement is in effect. The claim must be based on a wrongful

act that occurred while this agreement was in effect. We must also be notified of the claim while this agreement is in effect.

We'll also cover claims as explained in the following three sections.

**1. Prior acts.** We'll cover claims based on a wrongful act that occurred before the effective date of this agreement, but only if all the following conditions are met:

- The protected person involved had no knowledge of the prior wrongful act on the effective date of this agreement, nor any reasonable way to foresee that a claim might be brought.
- The claim is reported to us while this agreement is in effect. And
- Any other insurance covering the claim has been used up.

**2. Reported acts.** We'll cover claims first made against a protected person any time after this agreement ends, but only if all of the following conditions are met:

- The protected person involved has reasonable knowledge that a wrongful act occurred and a claim might be made. And
- The suspected wrongful act is reported to us while this agreement is in effect. We must also be told what loss or damage may result.

**3. Optional reporting endorsement.** This agreement may end because one of us chooses to cancel it or not renew it. If this is not the result of non-payment of the premium, you have the right to buy a reporting endorsement. It extends the time to report covered claims.

This endorsement applies to any covered claim that results from a wrongful act which occurs before this agreement ends. The claim must first be made against you or a protected person and reported to us after the agreement ends and while the endorsement is in effect.

To obtain this reporting endorsement you must request it in writing and pay the additional premium within 30 days after this agreement ends. If we don't receive written notice and payment within this period, you may not exercise this right at a later date.



The premium will be based on our rules and rating plans in effect on the day the endorsement begins. Once you pay the premium we can't cancel the endorsement.

### Where We Cover

We cover wrongful acts that happen anywhere in the world. But we only cover such wrongful acts if the suit is originally brought within the United States of America, its territories or possessions, Puerto Rico or Canada.

### Limits Of Coverage

The limits shown in the Coverage Summary and the information contained in this section fix the most we'll pay regardless of the number of:

- protected persons;
- claims made or suits brought; or
- persons or organizations making claims or bringing suits.

**Each wrongful act limit.** This is the most we'll pay for all claims that result from a single wrongful act or from a series of related wrongful acts.

**Total limit.** This is the most we'll pay for all wrongful acts reported in a policy year. By policy year, we mean each consecutive annual period of this agreement. If no limit is shown in the Coverage Summary, this limit is the same as the Each wrongful act limit.

**Series of acts.** Any damages incurred because of a wrongful act or a series of related wrongful acts occurring over more than one policy year shall be treated as a single claim. The claim will be subject to the limit in effect at the time of the first reported wrongful act.

**Reported acts.** A claim may be brought after this agreement ends under the Reported acts section. If this happens, the claim will be included in the limit applying to the policy year in which the act was reported.

**Optional reporting endorsement.** Separate limits apply to claims covered under the Optional reporting endorsement section. These limits are equal to the limits in effect when this agreement ended. The total limit applies to all claims covered under the reporting endorsement no matter how long it's in effect.

### Deductible

The deductible is shown in the Coverage Summary. You or the protected persons involved will be responsible up to the amount of the deductible for each wrongful act. If more than one claim results from a wrongful act or a series of related wrongful acts committed by one or more protected persons, the deductible will apply only once. We'll then pay covered claims over the deductible, up to the limit of coverage that applies.

The deductible won't apply to coverage provided by the Additional Benefits sections of this agreement. We can pay all or part of the deductible to settle a claim. If we do you, or the protected person involved agree to repay us as soon as we notify you of the settlement.

### Exclusions - Claims We Won't Cover

**Bodily injury or property damage.** We won't cover claims for bodily injury, sickness or death. Nor will we cover claims for damage to, loss of use or destruction of tangible property.

**Dishonest acts.** We won't cover claims that result from the dishonest, fraudulent or criminal act or omission of any protected person or of anyone for whose acts the protected person is legally responsible.

But this exclusion doesn't apply to any protected person who didn't:

- personally participate in committing any such act or omission; or
- remain passive after having personal knowledge of any such act or omission.

**Separate business activity.** We won't cover claims that result from the activity of any organization other than your law firm that is owned, operated or managed by any protected person or in which any protected person is a partner.

**Management activity.** We won't cover claims that result from any protected person's activity as both lawyer and manager in an organization other than your law firm.



**StPaul**

*Manager* means someone in a management position such as an officer, director or partner. For example:

*While serving on the Board of Directors of a client firm, you make two errors. You vote as a director approving the purchase of real property at a stated price. Prior to that vote you made a legal error in the title search of property. We won't cover any claim that results from your vote as a director to purchase the property. But we will cover your liability for the legal error in the title search.*

**Other Insurance**

Other insurance may be available to pay for a claim covered by this agreement. If so, we'll pay no more than our percentage of the total

amount of insurance covering the claim, less the deductible. For example:

*The limit of coverage under this agreement is \$100,000. Another insurance policy with a limit of \$25,000 also covers a claim covered by this agreement. We won't pay more than 80% (\$100,000/\$125,000) of the claim and expense, less the deductible.*

There is one exception to this rule. It applies when the claim is based on a wrongful act that occurred before this agreement began. We'll pay up to the limit of coverage that applies only after any other insurance covering the claim is used up.

APPENDIX "C"

AREAS OF PRACTICE CHECKLIST

AREAS OF PRACTICE CHECKLIST

AREA OF LAW	% GROSS INCOME	% TIME SPENT
Appellate		
Litigation-Negligence:		
Plaintiff *		
Defendant		
Litigation - Other		
Real Estate *		
Trusts & Estates		
Patents, Trademarks & Copyrights *		
Corporation Law		
Municipal Law		
Commercial Law:		
Non-Bankruptcy		
Bankruptcy		
Contracts		
Environmental Law		
Securities:		
Federal *		
State *		
Family Law		
International Law		
Tax:		
Income		
Estate *		
Other		
Criminal		
Admiralty		
Labor		
Pro Bono		
Other (Describe):		

\* High risk areas based on National Data Center statistics.