Homeward Bound 2013-2014: Insurance & Indemnification in Commercial Real Estate Transactions

Cosponsored by the Real Property Law Section of the State Bar of Michigan

The Institute of Continuing Legal Education

The State Bar of Michigan
The University of Michigan Law School
Wayne State University Law School
The Thomas M. Cooley Law School
The University of Detroit Mercy School of Law
Michigan State University College of Law

Web Site: http://www.icle.org/

2014 20 7163

About the Institute

The Institute of Continuing Legal Education (ICLE) was founded in 1959 by the University of Michigan Law School, Wayne State University Law School, and the State Bar of Michigan. In 1981, the Thomas M. Cooley Law School and the Detroit College of Law joined as cosponsors. The University of Detroit Mercy School of Law joined as co-sponsor in 1997. The Institute is a self-supporting, nonprofit organization serving the continuing education needs of the Michigan bench and bar. The Institute is governed by an executive committee made up of representatives of the six cosponsoring organizations, thus merging the interest and efforts of practicing lawyers and the academic community.

Each year, over 13,000 registrants attend Institute seminars. This enthusiastic response has helped establish the Institute as one of the most effective and respected CLE programs in the nation. This success is due largely to the outstanding practitioners, judges, and law professors who generously contribute their time, talent, and energy to the Institute's seminars and publications.

Most Institute seminars are scheduled three years in advance. However, when major legal developments require that Michigan lawyers achieve competence quickly in specific areas, seminars may be presented on very short notice. Most seminars offered by the Institute consist of lectures or panel discussions which are followed by question-and-answer periods. Other educational techniques are used when appropriate to the subject. For example, the Institute frequently uses demonstrations to teach trial skills and offers workshops to allow learning-by-doing.

At every seminar, registrants receive seminar materials to complement lectures and discussions. These materials generally include speaker outlines, legal forms, citations to or copies of leading cases, statutes and regulations, and pertinent articles from bar journals and law reviews.

In order to serve the continuing education needs of as many members of the bar as possible, the Institute often presents its seminars as video replays. At the majority of these state wide presentations, a commentator is on hand to answer questions. Some seminars are also available on CD.

Through its publications program, the Institute further serves the educational needs of the Michigan bench and bar. Essential legal tools published by ICLE include Michigan Model Civil Jury Instructions, Michigan Criminal Jury Instructions, and the Court Rules of Michigan service. ICLE also publishes textbooks, practice handbooks, form books and legal assistant manuals on a wide range of legal topics. These publications reflect the knowledge, expertise, and invaluable practical experience of many members of the Michigan bar.

ICLE is pleased to have the cooperation and assistance of sections of the State Bar of Michigan as well as local bar associations.

Homeward Bound 2013-2014: Insurance & Indemnification in Commercial Real Estate Transactions

Date ________________________

Location __________________________________

2014CR7163

We value your comments. Please rate each speaker and the entire seminar.

Overall Seminar Rating

Please circle the rating for the seminar.

Poor						Excellent
1	2	3	4	5	6	7

Overall Seminar Comments:

Please provide suggestions for future topics/speakers:

Please circle the rating for each person.

Moderator

	Poor						Excellent
Mark S. Allard	1	2	3	4	5	6	7

Comments:

Presenters

Please circle the rating for each speaker.

An Insurance Primer: How it Works and Why We Care

		Poor						Excellent
Mark S. Allard	Presentation	1	2	3	4	5	6	7
	Material Content	1	2	3	4	5	6	7

Comments:

Questions Continue on Back

Gaps in Property and Casualty Insurance

Michael S. Hale

	1	2	3	4	5	6	7
Presentation	1	2	3	4	5	6	7
Material Content	1	2	3	4	5	6	7

Comments:

Common Issues Related to Insurance and Indemnity in Litigation

Mark G. Cooper

	1	2	3	4	5	6	7
Presentation	1	2	3	4	5	6	7
Material Content	1	2	3	4	5	6	7

Comments:

Optional Information:

Name: ____________________ E-mail address: ______________________________

Address and Phone #: ____

Homeward Bound 2013-2014: Insurance & Indemnification in Commercial Real Estate Transactions

Seminar Schedule

Moderator

Mark S. Allard
Varnum LLP
Grand Rapids

2:00pm - 2:40pm	**An Insurance Primer: How it Works and Why We Care** * duty to indemnify * duty to defend Mark S. Allard Varnum LLP Grand Rapids
2:40pm - 3:35pm	**Gaps in Property and Casualty Insurance** * major coverage gaps * what you can do about it for your clients Michael S. Hale Clairmont Advisors Northville
3:35pm - 3:45pm	**Break**
3:45pm - 4:40pm	**Common Issues Related to Insurance and Indemnity in Litigation** * insurance coverage and related matters * indemnity clauses and related matters Mark G. Cooper Jaffe Raitt Heuer & Weiss PC Southfield
4:40pm - 5:00pm	**Questions and Answers**

Adjourn

Homeward Bound 2013-2014: Insurance & Indemnification in Commercial Real Estate Transactions

Thursday, February 6, 2014

The Inn at St. John's, Plymouth

Seminar Handbook

Cosponsored by the Real Property Law Section of the State Bar of Michigan

The Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, Michigan 48109-1444
(877) 229-4350
FAX (877) 229-4351
http://www.icle.org

Copyright © 2014
The Institute of Continuing Legal Education

The Institute of Continuing Legal Education offers an educational program for lawyers in practice. Course materials prepared by speakers are published in furtherance of that goal at the time of the live program. These materials are not edited, and case citations are neither checked nor Shepardized. Certain statutes, etc., may be amended or overruled following a course presentation and/or purchase of these materials. Lawyers should use the materials as a starting point for their research; the primary source, i.e., the case, statute, or court rule should be consulted. Course material authors are free to express legal interpretations and opinions; however, accuracy may vary. These interpretations and opinions do not reflect in any way a position of the Institute, its Executive Committee, or its sponsoring organizations – the State Bar of Michigan, the University of Michigan Law School, Wayne State University Law School, the Thomas M. Cooley Law School, The University of Detroit Mercy School of Law, and Michigan State University College of Law.

The Institute of Continuing Legal Education

2013-2014 Executive Committee

Lawrence Shoffner	Lawrence Shoffner Esq., Detroit **(Chairperson)**
Laura B. Bartell	Professor of Law, Wayne State University Law School, Detroit
Professor Edward R. Becker	Clinical Professor & Assistant Director, Legal Practice Program, University of Michigan Law School, Ann Arbor
William Burnham	Professor of Law, Wayne State University Law School, Ann Arbor
Charles Patrick Cercone	Associate Dean of Faculty, Thomas M. Cooley Law School, Lansing
Sheila Robertson Deming	Deming & Maurer PLLC, Grand Ledge
Philip M. Frost	Clinical Professor of Law, University of Michigan Law School, Ann Arbor
John W. Reed	Professor Emeritus of Law, University of Michigan Law School, Ann Arbor
Paul D. Reingold	Clinical Professor of Law & Director, Clinical Office, University of Michigan Law School, Ann Arbor
Michael R. Shpiece	Kitch Drutchas Wagner Valitutti & Sherbrook, Detroit
Howard T. Spence	Spence & Associates Consultants, Lansing
Professor Charles Ten Brink	Associate Dean, Library & Technology Services, Michigan State University College of Law, East Lansing
Virginia Thomas	Director, Arthur Neef Law Library, Wayne State University Law School, Detroit
Janet K. Welch	Executive Director, State Bar of Michigan, Lansing
Pamela A. Wilkins	Associate Dean for Academic Affairs, University of Detroit Mercy School of Law, Detroit
Eric C. Williams	Director, Program for Entrepreneurship and Business Law, Wayne State University Law School, Detroit

Lynn P. Chard, Ex Officio
Director

The State Bar of Michigan
The University of Michigan Law School
Wayne State University Law School
The Thomas M. Cooley Law School
The University of Detroit Mercy School of Law
Michigan State University College of Law

Real Property Law Advisory Board

William B. Acker	Kemp Klein Law Firm, Troy
M. Charles Etter	M. Charles Etter Attorney PC, Kalamazoo
Kary C. Frank	Kary C. Frank Law Offices, Rockford
Patrick A. Karbowski	McDonald Hopkins, Cleveland
Mark P. Krysinski	Jaffe Raitt Heuer & Weiss PC, Southfield
Jason C. Long	Steinhardt Pesick & Cohen PC, Birmingham
Willard G. Moseng	Michigan State Housing Development Authority, Lansing
Gregg A. Nathanson	Couzens Lansky Fealk Ellis Roeder & Lazar PC, Farmington Hills
Gregory K. Need	Adkison Need & Allen PLLC, Bloomfield Hills
Ronald E. Reynolds	Vercruysse Murray & Calzone PC, Bingham Farms
Lawrence Shoffner	Lawrence Shoffner Esq., Detroit
Sandra L. Sorini-Elser	Bodman PLC, Ann Arbor

Homeward Bound 2013-2014: Insurance & Indemnification in Commercial Real Estate Transactions

Thursday, February 06, 2014

The Inn at St. John's, Plymouth

Faculty List

Mark S. Allard — Moderator

Varnum LLP
333 Bridge Street NW
Grand Rapids, MI 49504
(616) 336-6562
Fax: (616) 336-7000
msallard@varnumlaw.com

Mark G. Cooper — Speaker

Jaffe Raitt Heuer & Weiss PC
27777 Franklin Rd Ste 2500
Southfield, MI 48034
(248) 351-3000
Fax: (248) 351-3082
mcooper@jaffelaw.com

Michael S. Hale — Speaker

Clairmont Advisors
39804 Rockcrest Cir
Northville, MI 48168
(248) 321-8941
mhale@clairmont-advisors.com

1/29/2014

Faculty Biographies

Homeward Bound 2013-2014: Insurance & Indemnification in Commercial Real Estate Transactions

Mark S. Allard
Varnum LLP
Grand Rapids, Michigan

Practicing in the area of litigation, Mark S. Allard focuses on litigation of insurance, ERISA, and commercial/business matters. He is a partner in the firm's Litigation Practice Group, and he is the practice area leader in insurance coverage litigation on behalf of insureds and ERISA litigation. Mr. Allard specializes in suing insurance companies when they have failed to pay valid claims pursuant to insurance coverage issued by the insurance company. Mr. Allard is also the firm's lead attorney in litigation matters dealing with employee benefit claims pursuant to ERISA. He is a member of the American Bar Association, the State Bar of Michigan, the Grand Rapids Bar Association, the Washington State Bar Association, and the Oregon State Bar Association. Mr. Allard is also the past president of the board of directors of the American Cancer Society.

Mark G. Cooper
Jaffe Raitt Heuer & Weiss PC
Southfield, Michigan

Mark G. Cooper is a partner and member of the firm's Litigation Practice Group. He handles complex commercial matters with a focus on construction defects, development and contract issues, real estate litigation, business torts and contract disputes, intellectual property and trade secrets litigation, and all aspects of insurance coverage, for both insurers and policyholders, including comprehensive opinion recommendations. He regularly litigates, tries, and arbitrates complex disputes and has extensive first-chair experience in all facets of litigation, including numerous trials, arbitrations, and other methods of alternative dispute resolution. He is a trained mediator and is selected by his peers to mediate disputes or to serve as an arbitrator. Mr. Cooper earned his bachelor's degree from the University of Missouri and is a graduate of Michigan State University Law School.

Michael S. Hale
Clairmont Advisors
Northville, Michigan

Michael S. Hale is the chief executive officer of Clairmont Advisors and Michael S. Hale and Associates. A graduate of the Detroit College of Law, he has served as an adjunct insurance faculty member at Lawrence Technological University. Mr. Hale has earned professional insurance designations including chartered property and casualty underwriter (CPCU), accredited advisor in insurance (AAI), and certified insurance counselor (CIC) and has served as an expert witness in nearly 200 insurance-related matters. In 2008, he was named as one of the in-house counsel leaders in the law by "Michigan Lawyers Weekly" and "Mid-West In-House Counsel." Mr. Hale has also authored many articles on insurance and risk management topics and is a contributing author to ICLE's "Michigan Insurance Law and Practice."

Homeward Bound 2013-2014: Insurance & Indemnification in Commercial Real Estate Transactions

Table of Contents

1. An Insurance Primer: How It Works and Why We Care **1-1**

Mark S. Allard
Varnum LLP
Grand Rapids

I. Insurance – It's Everywhere 1-1
II. How the Insurance Industry Works 1-2
III. How Do Policies Work? 1-3
IV. Duty to Defend 1-7
V. Ethical Issues Relating to the Duty to Defend 1-8

2. Gaps in Property and Casualty Insurance **2-1**

Michael S. Hale
Clairmont Advisors
Northville

Exhibits
A Drafting Insurance Requirements Provisions 2-3
B Commercial Property Insurance Coverage Checklist 2-7
C Representative Expert Witness Cases Involving Gaps in Insurance 2-11
D What's Wrong with These Lease Insurance Provisions 2-13

3. Common Issues Related to Insurance and Indemnity in Litigation **3-1**

Mark G. Cooper
Jaffe Raitt Heuer & Weiss PC
Southfield

I. The Relationship Between Insurance and Indemnity Is One of Risk Management 3-1

An Insurance Primer: How it Works and Why We Care

by
Mark S. Allard
Varnum LLP
Grand Rapids

An Insurance Primer: How It Works and Why We Care[1]

Mark S. Allard
Varnum LLP
Grand Rapids

I. Insurance - Its Everywhere 1-1
II. How the Insurance Industry Works. 1-2
III. How Do Policies Work? 1-3
IV. Duty to Defend 1-7
V. Ethical Issues Relating to the Duty to Defend 1-8

I. Insurance - Its Everywhere

A. Insurance Issues Are Pervasive in Transactions

When drafting Leases, Buy/Sell Agreements and Corporate Transaction Contracts, the issues relating to insurance policies can be utilized to assist your clients not only today, but well into the future.

B. Thirty Thousand Foot Overview of Insurance Implications

Some of the insurance implications for various types of matters

Real Estate Matters

1. Landlord Insurance
   - Property and Casualty Insurance
   - Commercial General Liability Insurance
   - Employment Practices Liability Insurance
   - Fidelity Bonds
2. Tenant Insurance
   - Property and Casualty Insurance
   - Commercial General Liability Insurance
   - Employment Practices Liability Insurance
3. Transactional Insurance
   - Title Insurance
   - Property and Casualty Insurance—Transfer of Risk

1. ©Copyright 2014

© 2014 The Institute of Continuing Legal Education

- Pollution Liability Insurance Policies
- Commercial General Liability Policies—Pre-1972 and Pre 1985—Relating to Pollution Issues

Corporate Matters—Drafting contracts must properly deal with indemnification and transfer of risk in corporate documents, as well as properly securing Additional Insured coverage **and confirming that coverage.**

1. Mergers and Acquisitions
    - Transfer of Risk
2. Named Additional Insureds
3. Assignment of Insurance
    - Assignable pursuant to the terms of the policy?
    - Acceptance of assignment by insurer
4. Directors and Officers Liability Coverage

II. How the Insurance Industry Works

A. Who Cares?

Understanding how insurance works is imperative for developing a strategy to work through the issues involved in an insurance coverage dispute.

B. Investments Drive Profits

Profit Motive—Sales of policies and, therefore, collection of premiums is merely the raw material for the profitable activities of an insurance company.

Simplified Profit Calculation—A simplified profit equation for an insurance company is as follows:

$$\text{Premium Dollars} + \frac{\text{Investment Income}}{\text{Time}} - \text{Overhead} - \text{Claims Expense} - \text{Claims Paid} = \textbf{Profit}$$

1. **Premium Dollars**—the premium dollars collected by the insurance company on policies sold.
2. **Investment Income**—the profit (or loss) the insurance company makes on investing premium dollars during the course of a given time period.
3. **Time**—the length of time that the insurance company is allowed to invest the premium dollars.
4. **Overhead**—Business Operations
5. **Claims Expense**—expenses incurred by the insurance company in defending and/or adjusting claims.

© 2014 The Institute of Continuing Legal Education

6. **Claims Paid**—Amounts Paid By the Insurance Company on All Claims
7. **Profit**—The Cash Leftover

III. How Do Policies Work?

A. Types of Policies

A comprehensive review of all policy types available in the market place is impossible. The marketplace, itself, continually changes as carriers tweak products to increase premium, and, in some cases, to decrease coverage.

B. Layers

Insurance does not provide complete coverage for all potential risks facing an insured. Additionally, insureds generally do not purchase policy limits to protect them from all potential types of claims to the highest level. An insured's risk tolerance guides the insured in the purchase of coverage.

The layers of covered and non-covered exposure are established by risk tolerance, and premium levels, for insureds. The various layers of risk allocation are as follows:

Self-Insurance—Most insurance companies require an insured to insure themselves to some extent. That self-insurance is sometimes relatively small, often in the form of a deductible (*i.e.* a $500 deductible on your personal auto policy, or $25,000 per occurrence on a commercial general liability policy). Or, self-insurance can be relatively large, in the form of a Self-Insured Retention ("SIR") (*i.e.* a $100,000 Self-Insured Retention on a $5,000,000 commercial general liability policy). For some insureds, with high-risk tolerance, self-insurance can be complete, in the form of a "fully fronted" policy (*i.e.* a trucking company purchases the $1,000,000 of liability coverage to satisfy Department of Transportation Regulations with a "fronted" policy, in which it agrees to reimburse the insurance company for whatever amounts the insurance company pays pursuant to the terms of that policy. The Department of Transportation requires that the $1,000,000 of coverage be "insured," and the "fronted" policy allows the trucking company to satisfy that requirement, and still significantly reduce its premium by fronting the policy itself).

Primary Insurance—The primary layer of insurance is the layer of coverage for losses or liability immediately above the insureds initial "self-insurance." Primary policies set maximum limits for coverage (*i.e.* $1,000,000 per occurrence, $2,000,000 aggregate, $1,000,000 completed operations). When purchasing primary insurance, the insured must know if the policy is a "wasting" policy, in which claim expenses and defense costs reduce the limits available to pay claims.

Excess Insurance—To ask one primary carrier to cover all claims up to the highest level that the insured seeks to cover by the purchase of insurance would create significant premium implications. Insureds usually bifurcate this risk with layers above the Primary Level. An Excess layer, generally, provides the same type of coverage as the Primary Policy, but only pays after the limits of that policy are "exhausted." Whether a policy is "pure excess" (mirror image of the primary policy for coverage purposes) depends upon the language of the policy. Some Excess Policies "follow the form" of the Primary Policy, while others provide additional insurance, and some provide narrower insurance coverage.

Additionally, the "exhaustion" of the Primary Policy varies from one Excess Insurance Policy to another. Primary Policies can exhaust by payment of claims, insolvency of

© 2014 The Institute of Continuing Legal Education

the insured, payment by a State Guaranty Fund or by payment by the insured, should the underlying Primary Policy not pay. The language of the actual Excess Policy will control on this issue.

Umbrella Coverage—Some insureds purchase Umbrella Policies instead of, or in addition to, Excess Policies. Umbrella Policies provide broader coverage then other policies below their layer, and usually provide higher limits above all other layers.

C. Liability Time Triggers

Most liability insurance policies are either "claims-made" or "occurrence" policies. Policies provide coverage for specific liability "policy periods." The policy periods can be any amount of time agreed upon between the parties. The time triggers ("claims-made" versus "occurrence") establish what events "trigger" coverage during the policy period. Generically, "claims-made" polices look for the date that the claim is made, while "occurrence" policies look to the date the claimed injury or damage occurred.

"Occurrence" Policies—The trigger of coverage under occurrence policies is the date when the claimed injury or damage first occurred. The policy in effect when the claimant alleges that the injury occurred is the policy that is triggered for purposes of coverage. The coverage language of an occurrence based policy will be, generically, as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

1. These policies will require that the "bodily injury" or "property damage" occurred during the policy period.
2. These policies will require that the "bodily injury" or "property damage" be caused by an "occurrence."
3. "Occurrence" is defined in the policy as:

> An accident, including repeated or continuous exposure to substantially the same harmful conditions, neither expected nor intended from the standpoint of the insured.

"Occurrence" policies have long tails of coverage. The policy that is in effect when the injury occurs is the policy that is triggered for coverage purposes. For continuous injury types of claims, (*i.e.* asbestos claims, lead paint claims, pollution claims, etc.) courts have held that all occurrence policies on the risk from the date of the first exposure to the injury causing event, through the date of remediation, all can be on the risk for coverage.

Michigan law states that all policies on the risk from the date of exposure to the date of injury in fact are triggered for coverage purposes. *Tenneco Inc. v American Mut. Ins. Co.*, 281 Mich App 429, 433 (2008) ft. nt. 2. Thus, in an asbestos claim, all policies that were on the risk between the time that the claimant first was exposed to asbestos, to the date that the lungs were injured by the asbestos, are on the risk. *Id.* The "injury in fact" trigger of coverage is different than the manifestation of the injury to the lungs, which occurs at a later date, and is the trigger for coverage in some states. Other states have held

 © 2014 The Institute of Continuing Legal Education

that the trigger is continuous, from the date of first exposure, to remediation. *See, Ray Industries, Inc. v Liberty Mutual Ins. Co.*, 974 F2d 754, 764–65 (6th Cir. 1992).

Practice Tip—Document retention policies for your clients should require that all insurance policies be retained, in complete form, along with proof of payment of premium and proof of issuance of the policy. If an occurrence based policy was issued, and the premiums were paid, and all other conditions precedent to coverage were met by the insured, that policy provides coverage for bodily injury or property damage that occurred during the policy period, for an indefinite period of time.

Claims-Made Policies—These policies focus on the date when the claim is first made against the insured. The trigger of coverage for these types of policies generally reads as follows:

> The Company will pay on behalf of the Insureds those Damages and Claim Expenses which the Insured becomes legally obligated to pay as a result of any Claim first made against them during the Policy Period or, if applicable, the extended reporting period.

1. Claims-Made policies generally require that the insured not have notice of the claim before the date that the policy is issued.
2. Some Claims-Made policies establish a Continuity Date, which states that coverage will not be available for claims that are made during the policy period, but for which the actions that lead to the claim occurred prior to the Continuity Date. Continuity Dates generally tie into the first time that a claims made policy was purchased for this insured, to prevent insureds from going bare for significant periods of time, and then purchasing Claims-Made policies at the last minute, before claims are made.
3. These policies generally have an Extended Reporting Period that allows the insured to purchase coverage after the termination of the policy period for claims reported after the policy date.

D. Components of Policies

Again, it is impossible to review all of the components of various insurance policies. There are five components of policies that are generally included in all insurance policies:

First Component—Insuring Clauses—Insuring clauses take on various forms, depending on the type of insurance policy purchased.

- Bodily Injury or Property Damage
- Personal Injury
- Wrongful Acts or Errors or Omissions
- Covered Property Harmed by Covered Loss
- Duty or Right to Defend

The Second Component—Declarations Page—The declarations page tailors the general forms of the policy to the specific insured. The provisions of a declarations page include:

- Named Insured
- Additional Insureds—MORTGAGEE
- Policy Limits
- Self-Insured Retention or Deductible
- Policy Periods
- Continuity Dates (Claims Made Policies)
- Pending or Prior Proceeding Dates (Claims Made Policies)
- Premiums
- List Endorsements and Forms Attached to the Policy Period

Third Component—Exclusions—It is impossible to identify all exclusions in each type of policy. The exclusions, however, are very important and must be reviewed carefully when the policy is purchased.

- Mold, Mildew and Dry Rot
- Vacancy Exclusion
- Intentional Acts
- Pollution Exclusion
- Owned Property
- Nuclear Energy

Fourth Component—Conditions—Most policies require that all conditions precedent to coverage must be met by the insured before the carrier will pay the claim. Some of the more important conditions are:

- Payment of Premiums
- Notice of Claim
- Generally, Policies Require that Notice be Given "as soon as practicable." Michigan law converts this to as soon as reasonably possible. Carrier must prove prejudice to succeed on a late notice claim. *Wood v Duckworth*, 156 Mich App 160, 162–63 (1986).
- Proof of Loss—most first party property policies require a Proof of Loss to be filed within sixty days after request by the insurance company.
- Contractual Limitations Period. The statute of limitations under Michigan law for breach of contract is six years. Insurance companies can reduce these by contractual limitations. *Rory v Continental Ins. Co.*, 473 Mich 457, 470–72 (2005).
- Cooperation Clause—prohibits insured from settling, incurring defense costs, or admitting liability without written consent of the insurance company.

 © 2014 The Institute of Continuing Legal Education

Fifth Component—Definitions—Definitions must be read carefully. Some expand coverage, and some restrict coverage.

Sixth Component—Endorsements—These policy forms can change the entire policy that you have read, to date. Endorsements include the following:

- Amendments or Revisions to Policy Language
- Changes to Definitions
- Additional Insureds Can Be Identified Pursuant to Endorsements
- Provisions of the Declaration Pages Can Be Changed by Endorsement
- Premium Calculations Can Be Amended By Endorsement

IV. Duty to Defend

A. Litigation Insurance

The duty to defend arises in third party insurance coverage (*i.e.* comprehensive general liability insurance, errors and omissions insurance, banker's liability policies, automobile and home owner's policies). Michigan Courts have continually recognized that the Duty to Defend is broader than the Duty to Indemnify under these types of policies. *American Bumper & Mfg. Co. v Hartford Fire Ins. Co.*, 452 Mich 440 (1996). An insured is entitled to a defense under a Duty to Defend policy if any of the potential claims are arguably covered pursuant to the terms of the insurance policy, even if they are false or groundless. *Auto-Owners Inc. Co. v City of Claire*, 446 Mich 1 (1994). Any doubt as to the Duty to Defend must be resolved in the insured's favor. *Cincinnati Ins. Co. v Federal Ins. Co.*, 166 F Supp 2d 1172 (E.D. Mich. 2001). The Insurer must look beyond the pleadings to ascertain the Duty to Defend. *Allstate v Freeman*, 432 Mich 656 (1989).

B. The Language of the Duty to Defend

The language of the Duty to Defend is broader than simply defense costs. It includes litigation expenses, certain bonds, including, in some cases, appeal bonds. In most policies, the Duty to Defend language also includes the duty to investigate the claim, and to settle claims. Some of these policies allow the Insured to reject settlement, but will cap defense costs and indemnification at the level for which the case could have been settled, at the time that it could have been settled.

C. Reservation of Rights Letters

When an insurance company is presented with a claim, and it exercises its right and duty to defend, but believes some, or all, of the claims may not be indemnified pursuant to the terms of the policy, it must issue a Reservation of Rights Letter. The Reservation of Rights Letter must identify the areas on which the carrier may, eventually, deny indemnification coverage. Failure to do so can result in a waiver of rights by the insurance company. *Allstate Ins. Co. v Hayes*, 442 Mich 56, 59 (1993) ft. nt. 3.

© 2014 The Institute of Continuing Legal Education

V. Ethical Issues Relating to the Duty to Defend

A. The Rules of Professional Conduct

The Michigan Rules of Professional Conduct specifically state that an attorney, who is paid by one person or entity to represent another, cannot allow the payor to direct the litigation. MRPC 5.4(c) states as follows:

> A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

B. Counsel Appointed by an Insurance Company to Defend an Insured Is Counsel for the Insured, Only

Under the Rules of Professional Conduct, an attorney's loyalty and duty are solely owed to the insured, even when counsel is appointed to represent the insured pursuant to a Duty to Defend in an insurance policy. As the Michigan Court of Appeals stated in *Atlanta International v Bell*, 181 Mich App, 272, 274–75 (1989) *aff'd in part, rev. in part*, 438 Mich 512 (1991),

> No attorney-client relationship exists between an insurance company and an attorney representing an insurance company's insured. Rather, an attorney's sole loyalty and duty is owed to the client alone, the client being the insured, not the insurance company.
>
> While the realities of practice may be that an insurance company selects and pays the attorneys to represent the insured, the fact remains that an insurance defense attorney represents the insured and not the insurance company. The only attorney-client relationship which exists is between the attorney and the insured client. Indeed, whenever the interests of the insured and the insurance company differ, the attorney's ethical obligation is to pursue the interests of the insured client the attorney is representing and not the interests of the insurance company who pays the bill. Indeed, the insurance company's relationship is, in reality, with its insured; that is, the insurance company is obligated to pay the attorney fee incurred by its insured in defending litigation covered by an applicable insurance policy. The fact that an insurance company may directly pay the attorney fee rather than merely reimbursing its insured does not affect the nature of the attorney-client relationship nor does it change the fact that the attorney represents the insured client and only owes a duty to that insured client. [Internal citations omitted.]

Atlanta International was a litigation matter in which the Plaintiff was bringing a legal malpractice claim against Bell and Hertler, P.C., and individuals within that law firm. The Michigan Court of Appeals rejected the legal malpractice claim, because the insurance company did not have a direct attorney-client relationship with the law firm. This portion of the Court of Appeals Opinion was affirmed by the Michigan Supreme Court. 438 Mich 512, 519–21 (1991).

C. Conflicts of Interest-Reservation of Rights Letter

When an insurance carrier issues a reservation of rights letter, and assigns counsel to defend, Michigan Courts have not decided whether an independent counsel must be assigned to monitor the actions of the assigned insurance defense counsel. In California, for instance, independent counsel under such circumstances must be appointed, and paid for, by the Insurance Company. *See, San Diego Federal Credit Union v Cumis Ins. Soci-*

 © 2014 The Institute of Continuing Legal Education

ety, Inc., 162 Cal App 3d 358. Since, under Michigan law, the attorney owes his exclusive duty and loyalty to the insured, and not to the insurance company, the inherent conflict should not occur.

D. Coverage Disputes-Duty of Appointed Counsel

Most insurance defense counsel will not advise insureds if there is a coverage dispute between the insured and the insurance company. Insurance defense firms, however, receive the bulk of their work from insurance companies, and may not be willing to advise insureds on coverage issues due to a perceived conflict. Generally, the insured is better served in securing separate coverage counsel in order to deal with coverage issues, including those raised in the reservation of rights letter.

© 2014 The Institute of Continuing Legal Education

Gaps in Property and Casualty Insurance

by
Michael S. Hale
Clairmont Advisors
Northville

Gaps in Property and Casualty Insurance

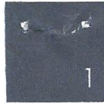
Michael S. Hale
Clairmont Advisors
Northville

Exhibits

A Drafting Insurance Requirements Provisions 2-3
B Commercial Property Insurance Coverage Checklist 2-7
C Representative Expert Witness Cases Involving Gaps in Insurance 2-11
D What's Wrong with These Lease Insurance Provisions 2-13

© 2014 The Institute of Continuing Legal Education

Exhibit A
Drafting Insurance Requirements Provisions



Michigan Bar Journal | October 2013

1 Drafting Insurance Requirements Provisions

Title:
Drafting Insurance Requirements Provisions in Leases, Contracts, and Real Estate Documents

Subtitle:
What You Don't Know Can Hurt You

By Michael S. Hale

Fast Facts:
Many insurance requirements provisions in contracts, leases, and real estate documents do not adequately cover client exposures attempting to be addressed by the drafter attorney.
Recent updates in certificates of insurance being used to evidence coverage present substantial issues for drafters of contracts and leases.

Sometimes attorneys are expected to be all things to all people. As stalwarts for protecting clients, they often are expected to have uncanny knowledge of other industries such as property and casualty insurance. This is no easy feat; it takes a seasoned insurance broker or underwriter to understand the ever-changing policy contracts and available endorsements that limit or expand available coverage. Certificates of insurance only make this process more complex, particularly in light of new forms that do not require notice of cancellation to an additional insured. Many businesses and their attorneys put far too much stock in certificates over the policies themselves.

Attorneys often default to template insurance requirements provisions that could be outdated and expose the client to either uncovered loss or breach of contract for not providing the agreed-upon coverage.

This article provides guidelines for attorneys involved in drafting and negotiating insurance requirements provisions in contracts, leases, or mortgage documents.

Basic Insurance Issues Facing Drafters of Contracts, Leases, and Mortgage Documents

1. **Many insurance requirements provisions include outdated terms such as "comprehensive general liability insurance" or "public liability insurance," which are, generally speaking, no longer commonly used in the insurance industry.** Instead, "commercial general liability insurance" is used to refer to liability insurance for bodily injury, property damage, and defined personal and advertising injury.
2. **The term "personal injury" in a commercial general liability insurance policy does not mean bodily injury.** Instead, it means non-bodily injury such as slander, libel, defamation, invasion of privacy, wrongful eviction, and sometimes non-employment discrimination.
3. **Michigan law requires courts to interpret the contract as a whole.**[1] However, it is generally a good idea to have all insurance requirements in one section. Although some template provisions will include an indemnity section under "Insurance," it is usually better to keep the insurance requirements section separate from the indemnity provision to avoid unintended interpretations.
4. **Ambiguities are construed against the drafter, but this might be negotiable.** For example, some businesses include language indicating that the usual rule of *contra proferentum* does not apply and the parties have jointly drafted the language. For less-experienced parties, the drafter should exercise particular caution to either define words with specific intended meaning or be prepared to accept the plain and commonly understood meaning, particularly when dealing with insurance terms.
5. **Attorneys may have concerns about holding themselves out as insurance experts when they are not.** It is advisable to defer to the client's insurance agent to review such provisions before they are signed by the parties to the contract, or to recommend separate insurance counsel. Too often, insurance agents only receive copies of *executed* agreements when not much can usually be offered to address issues that may exist.
6. **Certificates of insurance should, for most purposes, be assumed to have little effect.** Not only do these certificates say they are for information only and do not change the policy, but they are almost always drafted by insurance agents who are legal agents of the policyholder and not the insurer. Thus, the certificates are not likely binding on many insurers, who are quick to ask agents not to even send them copies. Therefore, treat certificates of insurance as suspect and obtain and review the actual policy or endorsement.

   Under relatively recent changes, all state insurance departments have accepted the Acord 25 Certificate of Insurance, which replaces an older version. This new certificate includes no representation that the insurer (or agent) will provide any notice to a listed additional insured. This presents major concerns when representing landlords who may be allowing tenants to insure the building, who now also may receive no notice of cancellation or change in coverage. These issues also apply in other contracts such as purchase agreements. As a result, it is best to obtain a copy of an actual endorsement from the insurer confirming the additional insured status, which also provides a notice of cancellation provision in that endorsement.

   Notably, mortgagees are usually covered by the property insurance policy protecting the real property collateral. This may not, however, be the case concerning business inventory lien holders.

   In light of the above, be very cautious when counseling a client regarding agreeing to language that requires notification of cancellation to the other party.

7. **The contractual liability insurance coverage for indemnity obligations is frequently overlooked in insurance requirements provisions, and this could mean disaster for both parties.** It is advisable to include a sentence requiring contractual liability insurance in the commercial general liability insurance policy. However, keep in mind when drafting the provision that such coverage is often less broad than the contractual indemnity provision itself.

8. **There are more than 30 different types of additional insured endorsements available on a standard commercial general liability insurance policy.**[2] This includes additional insured club members, charitable institutions, volunteers, executors, administrators, and lessors, among others. Which endorsement is right for your client? It is wise to seek the advice of the client's insurance broker and outside insurance counsel.

9. **"Primary and noncontributory" additional insured language in a contract's insurance provisions can be important to the additional insured but warrants caution.** Many commercial general liability insurance policies do not automatically contain language purporting to elevate the additional insured to primary status on the named insured's policy. An endorsement is typically required. If this is the case, a copy of that endorsement should be obtained by the additional insured.

10. **"Blanket" additional insured endorsements may limit coverage but should not always be relied on.** There is an endorsement available on the commercial general liability insurance policies of many insurers that will provide "automatic" additional insured status if required by a written contract including a lease. However, such endorsements can sometimes limit coverage in certain ways, such as excluding coverage for renovations or improvements made to real estate. As a result, when representing the additional insured, attempt to have the party listed specifically by endorsement.

11. **Avoid allowing another party to provide the property insurance coverage for your client.** For example, in a triple net lease, some landlords require that the tenant insure the landlord's building. This is a recipe for complete disaster from both parties' perspectives. Not only is the landlord allowing the tenant and its insurance agent to protect the assets of the landlord, it also opens itself up to inferior coverage as a loss payee and the potential of not being notified in the event of a cancellation.

12. **Additional insureds do not have the same rights as named insureds.** For example, even though a landlord may be listed as an additional insured on the other party's liability insurance policy, this coverage is only derivative of the negligence of the named insured tenant. It is critical, therefore, that the landlord continues to maintain its own liability coverage as lessor regardless of the insurance maintained by the tenant.

13. **Waivers of subrogation are common in lease agreements but are frequently overbroad in scope.** These waivers are designed to legally block the other party's insurer from pursuing it in a reimbursement action but should be limited to waiving the rights of the insurer to subrogate for covered claims and avoid including other liability-limiting provisions.

14. **Automobile exposures are often given inadequate attention in insurance requirements provisions.** All businesses, including tenants, have automobile exposures. Require additional insured status on these policies.

15. **Workers' compensation exposures are often given inadequate attention in insurance requirements.** Attempt to negotiate a waiver of subrogation in favor of your client on the other party's workers' compensation policy. For example, if a tenant's employee suffers an injury on your client's premises, you would want to try to block the tenant's workers' compensation carrier from attempting to subrogate against your landlord client.

16. **In purchase agreements, clearly define when the risk of loss transfers.** Coordinate this with appropriate insurance coverage for the client.

17. **Requirements to name additional insureds should not apply to all the defined policies.** This is a common mistake. Workers' compensation, for example, is not a policy on which an additional insured can be listed.

18. **If your client agrees to name a company and its "employees, officers, agents, and members" in the contract, know that this is not automatic.** The insurer will typically list only the company without the other individuals.

19. **Be cautious about professional liability insurance policies and additional insureds.** Professional liability policies, also known as errors and omissions policies, are frequently included in the insurance requirements provisions of professional service contracts, such as the hiring of an IT or staffing company. Be particularly careful about requiring additional insured status of your client on a professional liability policy because it usually means that coverage for lawsuits by your client against the hired company would be barred under the insured-versus-insured exclusion, which is almost always contained in such policies.

Conclusion

If your head is spinning after reading the above, you are not alone. Further, this is only the tip of the iceberg on insurance-related issues your clients may face. Many attorneys, understandably, are not insurance experts and do not clearly comprehend

 © 2014 The Institute of Continuing Legal Education

the nature of what should be included in insurance requirements provisions or how to best protect their clients through adequate insurance policies. It is advisable to consult competent insurance agents and insurance counsel in these evaluations. ■

Michael S. Hale is president of Clairmont Advisors, LLC, and managing director and general counsel of 360 Risk Management, Inc. in Northville. He has more than 20 years of experience in the insurance industry as a broker and attorney and has represented both insurers and policyholders in coverage-related matters. He has served as an expert witness in more than 150 insurance coverage and errors and omissions cases. He can be reached at mhale@clairmont-advisors.com or (248) 321-8941.

ENDNOTES

1. *Auto-Owners Ins Co v Churchman*, 440 Mich 560; 489 NW2d 431 (1992).
2. See Insurance Services Office, Inc <http://www.iso.com/> (accessed September 12, 2013).

Exhibit B
Commercial Property Insurance Coverage Checklist

	Coverage Issue	Comments
1.	Coinsurance penalty provision in building or contents coverage	Coinsurance could make the client a "co-insurer" of a property loss if inadequate insurance was maintained. This should be avoided through negotiation with the insurer prior to the issuance of the policy.
2.	Inadequate limits for replacement cost for building and/or contents and failure to include leasehold improvements in values.	One of the most significant underinsured property losses is in the area of inadequate limits for building and/or contents. It is important to base limits on replacement cost and not market value and to revisit these limits each year. Debris removal costs should be taken into account.
3.	Failure to blanket building and/or contents amounts between various locations.	Where there are multiple locations, the agent should attempt to negotiate a single overall blanket limit which combines the limits for the various buildings and contents. This is a safety net in the event of inadequate limits at any one location.
4.	Inadequate coverage for debris removal costs.	Most policies give you only 10% of the building limit to pay for costs to remove debris plus a small additional sum like $10,000. Attempt to negotiate higher limits.
5.	Inadequate business interruption coverage for lost income and extra expenses.	Business interruption coverage is not often given the attention it deserves. Many companies only insure a year of lost revenue and extra expenses. This is often inadequate.

Reproduction prohibited without express written consent of Clairmont Advisors, LLC

© 2014 The Institute of Continuing Legal Education

	Coverage Issue	Comments
6.	Coinsurance penalty provisions in business income coverage forms.	Similar to coinsurance with buildings and contents, this concept should be avoided with business interruption.
7.	Failure to negotiate an extended period of indemnity beyond 30 days.	Regardless of the limit of insurance for lost income, the insurer will stop paying when the building is rebuilt or with reasonable diligence should have been rebuilt plus 30 days. Many insurers will offer longer periods to cover you while you regain market share. This is particularly important in manufacturing and landlord type risks.
8.	Failure to negotiate away the protective safeguard endorsement.	Some insurers will require this endorsement where a discount is being provided for a fire suppression system or burglar alarm. The problem is that if the system does not work, the insurer has an argument to deny a claim.
9.	Absence of coverage for rebuilding in compliance with laws, ordinances and building codes.	Building codes change. Following a fire your client may be required to rebuild in a different, more costly manner such as adding an elevator, installing a sprinkler system, using more expensive metal trusses, etc.
10.	Inadequate or nonexistent coverage for loss of income due to ordinance or law delays.	Similar to the preceding item, business interruption coverage does not usually pay for delays in rebuilding associated with building codes and ordinances. Separate coverage can be purchased.
11.	Listing wrong names as named insureds.	One of the most serious issues is not listing the proper entity that owns the property. In this day of many limited liability companies, it is important to list all such entities to avoid insurable interest arguments at the time of a claim.

Reproduction prohibited without express written consent of Clairmont Advisors, LLC

© 2014 The Institute of Continuing Legal Education

	Coverage Issue	Comments
12.	Allowing tenant to insure landlord property.	Many landlords require the tenant to insure the building. This is usually a major mistake. One reason is that the tenant will often only list the landlord as a loss payee which gives it no independent rights to coverage or even to negotiate with the insurer on a claim. Further, it presupposes that the tenant's insurance agent is competent to insure the landlord's assets.

Reproduction prohibited without express written consent of Clairmont Advisors, LLC

© 2014 The Institute of Continuing Legal Education

Exhibit C
Representative Expert Witness Cases Involving Gaps in Insurance

- *Chem-Strip* [failure of agent to place correct property coverage resulting in the bankruptcy of the company and its owner].
- *Delau Fire & Safety* [Failure of proposing agency to advise on additional coverage general liability exclusions in policy quoted, resulting in numerous uncovered lawsuits].
- *Campbell's Collision* [inadequate business interruption coverage resulting in catastrophic underinsured loss to insured].
- *Richardson* [failure to offer or obtain adequate limits for personal auto liability, resulting in $500,000 personal payout by policyholder].
- *Middlebelt Hope* [failure to negotiate proper extended period of indemnity on business interruption coverage].
- *Crystal Homes* [improper writing of builder's risk coverage].
- *Historic New Center Limited* [failure to list all named insureds that had insurable interest].
- *Cogswell* [failure to address coinsurance penalty provision in property policy].
- *Truck Insurance Exchange* [inadequate coverage after agent moved client from commercial to personal policy with lower limits].
- *H & K Custom Cabinetry* [failure to blanket contents limits among contiguous buildings with separate addresses].
- *Interstate Mnft* [failure to blanket limits and/or obtain agreed amount to waive coinsurance].
- *Cedar Log and Lumber* [inadequate property limits].
- *Kinaia Investments* [misrepresentation issue relating to application].
- *Bahorski* [inadequate coverage for water damage claim].
- *Griffin* [failure of agent to properly insure de-attached structure and contents].
- *RLV Leasing* [failure of agent to list correct named insureds].
- *Wheaton* [failure of agent to obtain correct policy for non-owner occupied home].
- *Steven Michael Heika* [failure to secure nonowned auto coverage for pizza store].
- *Prus* [failure to notify on removal from named insured provision].
- *Custom Software* [failure to obtain proper coverage for computer loss caused by lightning].
- *Lehnen* [failure to negotiate adequate property limits for bar].
- *Harvey* [failure to negotiate water damage coverage].

Reproduction prohibited without express written consent of Clairmont Advisors, LLC

- *Holman* [failure to negotiate proper coverage for rebuilding in accordance with ordinances].
- *L & M Brikho's Market* [failure to list entity as named insured and to secure coverage arising out of power failure / power surge].
- *Freemont* [pollution exclusion precluded coverage for lead paint claim].
- *Triangle Auto Sales* [inadequate crime coverages for auto dealer].
- *Quality Textures* [failure to obtain coverage for personal property of others].
- *Pitcher* [inadequacy of limits on homeowners insurance policy].
- *Schwartz* [inadequacy of homeowners coverage for dwelling, deck and stairway].
- *O'Neill* [failure to negotiate umbrella policy that would have covered boat accident].
- *Loudon Steel* [failure to obtain appropriate property coverage; failure to blanket limits].
- *Jewell* [driver not covered under auto insurance].
- *Triangle Business, LLC* [failure to correct business mailing address and provide notice of cancellation.]
- *ND Property, LLC* [failure to list landlord as additional insured or lender's loss payable on tenant's property policy.]

Reproduction prohibited without express written consent of Clairmont Advisors, LLC

 © 2014 The Institute of Continuing Legal Education

Exhibit D
What's Wrong with These Lease Insurance Provisions

Page 3-4 of Lease

"INSURANCE
Tenant, at Tenant's expense, shall maintain plate glass and public liability insurance including bodily injury and property damage insuring Tenant and Landlord with minimum coverage as follows:

COMMERCIAL GENERAL LIABILITY
Each Occurrence - $1,000,000

BUSINESS OWNERS
Personal & Adv. Injury - $1,000,000
General Aggregate - $2,000,000
Products-Comp./Op. Agg. - $2,000,000

EXCESS LIABILITY
Each Occurrence - $1,000,000

UMBRELLA POLICY
Landlord to be named as owner - $1,000,000

WORKERS COMPENSATION & EMPLOYERS LIABILITY
Each Accident - $100,000.

Tenant shall provide Landlord with a Certificate of Insurance showing Landlord as additional insured. The Certificate shall provide for a thirty day written notice to Landlord in the event of cancellation or material change in coverage. Tenant shall also maintain business interruption during the term of this lease.

Page 9 of Lease

Tenant shall also, at its own expense, obtain insurance for all of the FF&E located at the leased premises for the amount of replacement value of the items. Landlord shall be the sole beneficiary of any proceeds under said policy…"

Reproduction prohibited without express written consent of Clairmont Advisors, LLC

© 2014 The Institute of Continuing Legal Education

Summary Lessons From Above Exercise

1. Avoid insurance requirements in separate areas of a lease. It is asking for trouble.

2. Do not use phrases such as "public liability," or "comprehensive general liability."

3. Include requirements that aggregates apply per location and per project so as to avoid impaired aggregate limits from operations unrelated to the tenancy.

4. Use "umbrella" instead of "excess."

5. Avoid certificate of insurance language and instead require an endorsement from the tenant's insurer, a copy of which will be provided to the landlord, requiring 30 days notice in the event of cancellation.

6. Avoid allowing a tenant to insure any of the landlord's property. If necessary, obtain a separate policy in the landlord's name and have the tenant pay for it.

7. Do not require catch-all additional insured language because policies like workers' compensation and employers liability cannot name additional insureds.

8. Include primary and noncontributory language but be sure the tenant's policy tracks with that.

9. Include a requirement that tenant obtain contractual liability insurance for the indemnity obligations of the lease.

10. It is preferred to require additional insured status for the landlord entity and its members, employees, shareholders and officers. However, note that most policies do not automatically extend such coverage and it must be negotiated.

11. Always refer to premises damage liability coverage for damage to leased space in addition to standard property damage liability limits.

12. Include a requirement that the tenant's workers' compensation policy include a waiver of subrogation provision.

13. Require that the tenant maintain business automobile insurance with the landlord listed as additional insured.

14. There is no such classification as a "sole beneficiary" under a property insurance policy. Avoid allowing the tenant to insure any of the landlord's property. However, if this cannot be avoided, require additional insured status on the property insurance of the tenant.

Reproduction prohibited without express written consent of Clairmont Advisors, LLC

 © 2014 The Institute of Continuing Legal Education

Common Issues Related to Insurance and Indemnity in

by
Mark G. Cooper
Jaffe Raitt Heuer & Weiss PC
Southfield

Common Issues Related to Insurance and Indemnity in Litigation

Mark G. Cooper
Jaffe Raitt Heuer & Weiss PC
Southfield

I. The Relationship Between Insurance and Indemnity Is One of Risk Management 3-1

I. The Relationship Between Insurance and Indemnity Is One of Risk Management

> The protection that the mechanisms of contractual indemnity and insurance provide is often neither as extensive nor effective as the parties using them may believe—in reality, the protection may be illusory for a number of reasons.

—*Indemnity and Insurance in Contractual Relationships*, Greg Drutchas, ICLE

Indemnity and insurance are the primary means of risk management for most organizations. Both are a form of risk transfer and both are contractual, which subjects their enforcement to judicial interpretation. Each needs the other to be most effective but despite this, lawyers tend to think of insurance and indemnity in terms of contract while insurance professionals think of insurance and indemnity in terms of risk management. Too often, lawyers and insurance professionals butt heads, but both views—the lawyers' and the insurance professionals'—are correct, and the two parties should work together.

A. Insurance and Indemnity Are the Primary Forms of Risk Management to Most Organizations

To create more effective and consistent contract provisions, it is important to think in terms of risk management, rather than simply in terms of signing contracts and purchasing insurance. There are several important aspects of risk management to consider:

Risk Avoidance—A risk management technique whereby risk of loss is prevented in its entirety by not engaging in activities that present the risk because the activity presents too much danger.

Risk Retention—Planned acceptance of losses by deductibles, deliberate non-insurance, and loss-sensitive plans where some, but not all, risk is consciously retained rather than transferred (financially driven).

Risk Transfer—The use of contractual obligations such as indemnity and exculpatory agreements, waivers of recovery rights, and insurance requirements to pass along to others what would otherwise be one's own risks of loss. This is the most common and is usually chosen by default.

© 2014 The Institute of Continuing Legal Education

B. Both Insurance and Indemnity Are a Form of Risk Transfer

> [Insurance and Indemnity] may not safeguard against significant risks. The safeguards they provide might be inadvertently limited by the language of the underlying contractual issues. The party whom is believed to be assuming the risk may not have the financial capacity to perform.

—*Indemnity and Insurance in Contractual Relationships*, Greg Drutchas, ICLE

The general relationship between insurance and indemnity is as follows:

Indemnity comes before insurance and transfers risk from one organization to another.

Insurance transfers risk from the other organization to the insurance company, and the insurance company takes on the risk in exchange for a premium.

The **premium** gets worked back into the contract or project and is usually paid for by the original indemnitee (the party receiving the indemnity protection), bringing the relationship full circle.

C. Insurance and Indemnity Are Contractual

> First…insurance policies are subject to the same contract construction principles that apply to any other species of contract. Second, unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written.

—*Rory v Continental Ins Co*, 473 Mich 457 (2005).

Insurance is an "adhesion" contract drafted by ISO or the Insurer, but is not subject to the adhesion doctrine under Michigan law.

Indemnity, on the other hand, is a negotiated contract subject to potentially equal input from both parties.

Both insurance and indemnity will be treated the same by courts – as commercial contracts subject to the general rules of contract interpretation.

D. Insurance and Indemnity Need Each Other to Be Effective

> "insured contract" is a defined term common in liability policies that provides limited exceptions to the contractually assumed liability exclusion, by stating that the exclusion does not apply to liability assumed in an "insured contract." The definition of the term varies, but in most cases, it will extend some coverage for liabilities assumed in an enforceable hold harmless provision of a commercial contract.

—IRMI.com

The insured contract provision found in most liability policies recognizes that most commercial contracts contain indemnity provisions and provides insurance coverage to meet the indemnity obligation.

© 2014 The Institute of Continuing Legal Education

Indemnity comes first because the risk must be transferred the party that controls the risk, but **insurance** prevents empty indemnity by providing insurance to the indemnitor and naming the indemnitee as an additional insured (hopefully). However, even in the absence of additional insured status for the indemnitee, there is probably insurance under the "insured contract" provision of the policy of insurance.

Michigan Considerations:

- No Adhesion Contract Rule
    - *Rory v Continental Ins Co*, 473 Mich 457 (2005).
- Under *MCL 691.991*, parties may agree to indemnify another party for the other party's sole negligence, except in cases of construction or maintenance contracts. Importantly, many incorrectly assume that this statute is limited to construction, so be sure to review the statute entirely before concluding on what types of contracts are subject to anti-indemnity laws.
- Commercial Insurance and Indemnity disputes receive special assignment to Michigan Business Courts; *MCL 600.8031*
- Attorney fees are not recoverable without a contractual provision requiring it (a prevailing parties clause) or statutory authority—*American Rule.*
- Even though MCL 600.295 abolished joint and several liability in Michigan, this does *not* apply to contract actions. *Zahn v Kroger Co of Michigan*, 483 Mich 34 (2009).
- The exclusive remedy provision of the WDCA does not prohibit enforcement of an indemnification contract when the injured party is the employee of the entity being required to pay the indemnification amount. *Zahn v Kroger Co of Michigan*, 483 Mich 34 (2009).

E. Rules of Contract Interpretation Under Michigan Law

As noted earlier, lawyers tend to think of insurance and indemnity in terms of contract and contract law. To help paint this picture more clearly, the following are some fundamental rules of Michigan contract law:

- Courts will look at whether indemnification clauses are properly interpreted by construing them the say way as any other contract.
    - "We must next determine whether the indemnification clause the parties used was properly interpreted. An indemnity contract is to be construed in the same fashion as other contracts." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288 (2002).
- Generally, this means that courts will construe contracts by their plain meaning, so long as the contract is clear and unambiguous.
    - This Court has generally observed that if the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning. *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188 (2005).

© 2014 The Institute of Continuing Legal Education

- Similarly, courts may not make a new contract for parties under the guise of construction of the contract, if doing so will ignore the plain meaning of words chosen by the parties. *Lintern v Michigan Mut Liability Co*, 328 Mich 1 (1950).
- The extent of the contractual duty must be determined from the language of the contract itself. *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345 (2004).
- All contracts, including indemnity contracts should be construed to ascertain and give effect to the intentions of the parties and should be interpreted to give a reasonable meaning to all of its provisions. *Klever v Klever*, 333 Mich 179 (1952).

F. Indemnity and Construction

Case study: *Matusak v Houseman Construction Co,* October 18, 2012, Michigan Court of Appeals Docket Number 306904 (Premises Liability)

In this case, the owner of a commercial building leased his property to Midwest Safety Products (Lessee). The owner further contracted with Houseman Construction Company (General Contractor) to be the general contractor for an addition to building. The General Contractor then subcontracted with Brigade Fire (Sub-Contractor) to work on building fire suppression system.

In carrying out its work, the Sub-Contractor opened lines on the building's fire suppression system, thereby emptying water into parking lot. The Plaintiff in this action, Ms. Matusak, was an employee of the lessee and suffered injuries when she slipped and fell from ice on the premises. It is unclear whether the ice that caused her accident resulted from the drained water or from another source.

Following her accident, Ms. Matusak sued the building's Owner, Contractor, and Sub-Contractor. However, the Contractor and Sub-Contractor obtained summary disposition of the lawsuits against them based upon Ms. Matusak's failure to prove they were negligent.

Furthermore, the Owner brought cross-claims against both the Contractor and Sub-Contractor for indemnification based upon contract provisions between the parties. The Owner eventually settled with Ms. Matusak and sought indemnity from the Contractor and Sub-Contractor.

The Contractor obtained summary disposition of Owner's claim based upon the contract, which stated that the Contractor would not be liable for the acts of its subcontractors, leaving the Owner (who settled with Matusak) and the Sub-Contractor as the only remaining parties to the dispute.

Prior to settling with Matusak, the Owner had tendered the defense and sought indemnity from the Sub-Contractor. Since the Sub-Contractor refused, the Owner moved for summary disposition against the Sub-Contractor post-settlement based upon the legal principal that an indemnitor that breaches its indemnity obligations becomes bound to any reasonable settlement negotiated by the indemnitee.

The trial court granted the Owner's motion and entered a judgment for the settlement amount against the Sub-Contractor. On appeal, the Michigan Court of Appeals reversed the trial court's decision.

 © 2014 The Institute of Continuing Legal Education

The Court of Appeals noted that the Sub-Contractor had agreed to indemnify the Owner only for expenses that arose from its performance under the agreement that were *caused in whole or in part by the Sub Contractor's act, omission, fault, negligence or breach* of the agreement.

Therefore, the court concluded that the Sub-Contractor would only be liable to indemnify the Owner for its acts or omissions that involved some degree of culpability. It further found that because the trial court dismissed Ms. Matusak's claims against the Sub-Contractor, the Sub-Contractor therefore could not be deemed liable for Ms. Matusak's injuries.

What have we learned?

Indemnity is limited in the construction scenario. The general rule of commercial contracts is that the extent of the indemnity duty "must be determined from the language of the contract, itself". *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345 (2004). So, generally, an indemnitee may contract to require the indemnitor to indemnify it for any losses, whether or not the indemnitor acted negligently.

However, construction contracts are governed by MCL 691.911, as amended March 1, 2013, which prohibits "provisions purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee." Thus, in construction contracts, the indemnification clauses must require fault on the part of the indemnitor to be enforceable; and where there is a requirement of fault, the indemnitee will be required to prove fault to recover under the indemnification provision.

Possible Solutions?

One potential solution could be that sub-contractors and general contractors name the owners who hire them as an additional insured under their policies of insurance. This would avoid the requirement of proving indemnity because the owner would be covered by the sub-contractor or the general contractor's insurance policy.

G. Title Insurance and Agency

In real estate transactions, title agents are at the center of a very complex series of transactions. Title agents are frequently separate entities from the title insurance companies that issue the title policies, and this relationship often creates a convoluted view of the title agent's role to persons participating in the real estate transaction. The title agent's duties are clearly defined by the contracts between the parties, which are between the agent and the underwriter (agency agreement), the underwriter and the lender (lender title policy/protection letter), the agent and the lender (closing instructions), and the owner and the lender (owner title policy).

Where fraud or other loss occurs at closing, owners or lenders have sued title agents and title insurers based upon tort theories of recovery, but dismissal of these suits is attainable based upon the legal doctrine that a title insurance company contracting with a lender has no separate duty in tort to third parties, and a title agent that contracts with a lender has no separate duty with a third party to the transaction. See *Wormsbacher v Seaver Title Co*, 284 Mich App 1 (2009) ("a title insurer should be liable in accordance with the terms of the title policy only and should not be liable in tort.").

© 2014 The Institute of Continuing Legal Education

However, *Elsebaei v Philip R Seaver Title Co*, December 27, 2012 (Michigan Court of Appeals Docket No. 303623; 304605) calls into question the ability to dismiss these types of suits brought by third parties. In that case, the court noted, "Defendants voluntarily undertook obligations with respect to the disbursement of funds and they had a duty to perform them in a non-negligent manner that extended to third parties." It further observed that "there was evidence that defendants were in control of the disbursement of the loan proceeds to Landmark and that control may have exceeded the role of a title insurer. The trial court at one point referred to the relationship between plaintiffs and defendants as an 'escrow' relationship." Based on these observations, the court remanded the case back to the trial court for further analysis.

H. Insurance and Indemnity from the Perspective of an Owner and Landlord

The greatest challenge to an owner/landlord is monitoring compliance after the contracts are signed. In other words, the owner may have very strong language in its construction contracts and leases requiring insurance and indemnity, but few contractors and tenants comply with it. The basic premise is that the landlord insures what it owns and the tenant insures what it owns. Generally, this means that the landlord insures the building and common areas, while the tenants retain responsibility for personal property and liability. However, there can be some variations based upon the type of property, i.e., Retail, Medical, Office, or Industrial (especially with regard to environmental coverage), and there are different ways to package the risk:

Start with the Indemnity Provision—

One way to structure indemnity for liability is based upon areas of control (Option 1), e.g.; Tenant shall indemnify landlord for liability upon or at the "Premises," while Landlord shall indemnify Tenant for liability upon or at the "common areas."

Another way to structure indemnity for liability is based upon conduct (Option 2), e.g; Each party shall indemnify the other for liability arising out of their own acts or omissions.

Add Insurance to Assure Protection—

Generally, insurance will be purchased as follows:

- Property Insurance for building purchased by the landlord (includes business income loss coverage);
- Insurance for personal property purchased by the tenant;
- The tenant will further purchase Commercial General Liability insurance with an environmental coverage endorsement, naming the landlord as an additional insured;
- Automobile, Workers Comp, Professional Liability insurance may also be purchased (generally by landlords primarily concerned with premises liability);
- Finally, a Mutual Waiver of Subrogation will be enforceable even without consent from insurance carrier.

© 2014 The Institute of Continuing Legal Education

Be Mindful of Practical Considerations in Lease Negotiations—

- Tenants frequently ignore the insurance and indemnity provisions.
- Landlords frequently do not verify insurance compliance by tenant.
- Once the tenant has possession, compliance is rarely enforced by landlord.
- Landlords rarely have an effective insurance compliance program.
- At best, landlord may have a 70% compliance rate based solely on obtaining copies of the tenants' insurance certificates.
- Lender requirements may be different than the landlord's form lease requirements.
- Many leases contain old insurance provisions which contain obsolete terminology such as "comprehensive general liability", "public liability" or "standard extended endorsement". These should be reviewed and updated to ensure proper coverage is obtained by the parties.

I. Insurance and Indemnity in Construction Agreements

Construction projects mean multiple parties will be on the work site, each in control of different risks. The projects involve high exposure, requiring high limits of coverage and a sophisticated risk management analysis to evaluate appropriate insurance coverage.

Standard liability and property insurance is insufficient for complex construction—it requires specialized forms of insurance coverage like builders risk, professional liability, and environmental coverage. Further, a different statute of limitations and repose applies for contractors, requiring long "tail coverage" for latent defects leading to claims. Large self-insured entities with large deductibles will often need complex insurance programs.

Further, it is important to keep in mind that everyone wants to be named on someone else's policy, and everyone wants the other parties to have primary insurance and their own insurance to be contributory. Moreover, subcontractors may have minimal insurance or may not be capable of obtaining insurance that meets the requirements of large projects.

In this situation, it may be prudent to request the contractor and sub-contractor's insurance coverage before drafting the provisions. Otherwise, the contractor or sub-contractor may be obligated to purchase insurance that is either cost-prohibitive or unnecessary for the specific project.

J. Business Courts and Insurance & Indemnity

The Michigan business courts will now handle all commercial contract and commercial insurance disputes. However, disputes involving individual insureds are specifically excluded, i.e., PIP no fault. When faced with litigation on these issues, it is important to bear in mind the benefits of early neutral evaluation. The State Bar of Michigan Insurance and Indemnity section has created a list of qualified evaluators to handle this process.

K. Case Discussions

***Acorn Investment Co v Michigan Basic Property Insurance Association,* 298 Mich App 558; 828 NW2d 94 (2012).** In this case, the Plaintiff filed a claim with the Defendants, its fire insurance carrier, after a fire occurred on Plaintiff's property. The Defen-

© 2014 The Institute of Continuing Legal Education

dants denied coverage, and this action followed. The trial court granted summary disposition in Plaintiffs' favor, holding Defendants liable. The case then proceeded to case evaluation, where Plaintiffs accepted an award of $11,000.00. However, Defendants rejected the award and the parties subsequently agreed to submit the case to an appraisal panel, which issued an award of $20,877.00. The Plaintiffs then filed a motion for entry of judgment, which the court granted, and requested case-evaluation sanctions and debris-removal expenses, which the court denied.

On appeal, the Plaintiff argued that the court erred in refusing to grant the sanctions or removal expenses. Plaintiff asserted that the appraisal constituted a "verdict" within the meaning of MCR 2.403(O)(2)(C), and that as such, it was entitled to actual costs. The Michigan Court of Appeals rejected this argument, however, finding the appraisal process was effectively an arbitration and that as such, it was not a "verdict" within the meaning of the court rule.

***Heaton v Pristine Home Builders, LLC,* unpublished per curiam opinion of the Michigan Court of Appeals, docket number 305035 (Oct 25, 2012).** The Plaintiffs in this case sued when their home was damaged by the negligent installation of the home's foundation walls, which shifted and compromised the entire structure of the home. The Plaintiffs sued the general contractor, Pristine Home Builders, as well as the subcontractor Pristine hired to install the walls, Great Lakes Superior Walls. A jury awarded damages to the Plaintiffs, assigning Pristine 40% of the liability. When Pristine failed to pay this obligation, the Plaintiffs filed a request and writ of garnishment against Pristine' s commercial general liability insurer, Auto-Owners Insurance Company. Auto-Owners objected the garnishment, arguing that the negligent construction did not constitute an "occurrence" which was defined in the policy as "an accident, including continuous or repeated exposure to substantially the same conditions."

After the trial court granted summary disposition in favor of Auto-Owners, the Plaintiffs appealed. The Michigan Court of Appeals affirmed the lower court's holding, finding that the negligent construction was not an "occurrence" within the meaning of the policy. The court relied on the rule stated in *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134; 610 NW2d 272 (2000). In *Radenbaugh*, the court defined "occurrence" as an "accident," which is an "undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected."

The *Radenbaugh* court further held that an accident will be found when "an insured's defective workmanship results in damage to the property of others," but "when the damage…is confined to the insured's own work product the insured is the injured party, and the damage cannot be viewed as accidental." Because all of the work affected by the defective walls was work done by Pristine or its subcontractor, damage was confined to the insured's own work product, and there was no covered "occurrence" under the policy.

***Oak Creek Apartments, LLC v Garcia,* unpublished per curium opinion of the Michigan Court of Appeals, docket number 308256 (March 21, 2013).** This case arose from damages to an apartment building owned by the Plaintiff, when Defendant Manuel Garcia negligently performed roof repairs on the building. Among the damage incurred were costs to bring the building up to city code. These damages cost the Plaintiff approximately $75,000.00, $25,000.00 of which was covered by Plaintiff's insurance.

 © 2014 The Institute of Continuing Legal Education

The Plaintiffs sought coverage for the remaining costs from the Garcia's insurer, Hastings Mutual, but the company denied coverage. Plaintiffs resultantly sued Garcia for the rest, additionally seeking a declaratory judgment that Hastings Mutual was obligated to cover these costs under its general liability policy with Garcia's company. Hastings Mutual moved for summary disposition, arguing that the damage did not fall within its policy because it was not caused by an "occurrence." Under the policy, coverage extended only to "property damage" covered by an "occurrence," which the policy defined as "an accident, including exposure to substantially the same general harmful conditions." The trial court denied the motion and Hastings Mutual appealed.

The Michigan Court of Appeals affirmed based on *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, where it held that an accident only exists within the meaning of a general liability policy when the insured's defective workmanship results in damage to the property of others. 240 Mich App 134; 610 NW2d 272 (2000). While Hastings Mutual argued that an "occurrence" or "accident" could not exist in a situation where, as here, the damages arose from the insured's own faulty work, the court noted that the damages were not solely confined to Garcia's work product. Rather, the building sustained damage beyond the roof, including damage to its contents and interior.

The court further rejected Hastings Mutual's argument that there could be no "occurrence' or "accident" because the underlying complaint arose out of Garcia's breach of contract with the injured party. The court explained that such a theory is viable only where the damage does not extend beyond the insured's work product, and that the proper focus in determining whether an "occurrence" exists is on the nature and extent of the damage rather than on the theories of liability alleged. Because the scope of the damage in this case extended further than Garcia's own work product, existence of an "occurrence" had been established.

Finally, the court rejected Hastings Mutual's argument that the costs sought by Plaintiff, to bring the building up to code, did not constitute "property damage" caused by an "occurrence," and were therefore not covered by the policy. The policy contained language requiring Hastings Mutual to pay for "those sums that the insured becomes legally obligated to pay as damaged because of…property damage to which this insurance applies." Because the need for additional code compliance arose from property damage that resulted from an "occurrence" within the meaning of the policy, Hastings Mutual was obligated to pay absent an exclusion in the policy. Hastings Mutual attempted to point to several exclusions for property damage to particular parts of property upon which the insured worked directly and to which damage was incurred as a result of the insured's faulty workmanship. However, the court found that these exclusions did not apply because Garcia's work was limited to the roof, while the damages extended beyond it. Having rejected Hastings Mutual's various, but similar, theories, the court affirmed, holding it liable for the amount sought by the Plaintiffs.

***The Cincinnati Insurance Company v VK Vemulapalli,* Unpublished per curiam opinion of the Michigan Court of Appeals, docket number 309980 (July 30, 2013).** In this case, the Michigan Court of Appeals sought to clarify when a party may be awarded penalty interest under the Unfair Trade Practices Act (UTPA) when its insurer fails to pay its claim on a timely basis. Following an award to the insured for replacement costs of its fire alarm system, which had suffered water damage, the insured sought penalty interest under MCL 500.2006 of the UTPA.

On appeal, the Court of Appeals clarified that penalty interest may apply even if the claim was reasonably in dispute. Whether penalty interest applies depends on whether the insurance company issued payment on the claim within 60 days of the insured's submission of a satisfactory proof of loss. The court then remanded for a finding consistent with this rule.

On remand, the trial court found that the insured never submitted a satisfactory proof of loss, thereby failing to trigger the insurance company's obligation to pay and rendering penalty interest inappropriate. The insured again appealed, and the Court of Appeals again clarified its ruling. The Court of Appeals deemed the trial court's inquiry incomplete because it failed to address the question of whether the insurer had complied with MCL 500.2006(3), which excuses the insured from its obligation to submit proof of loss if the insurance company fails to specify in writing, within 30 days after receiving the claim, which materials constitute satisfactory proof of loss. If the trial court had addressed this question and found that this insurance company did not comply, then the insured's own failure to submit proof of loss may have been excused and penalty interest could still have been warranted. As such, the court remanded, prescribing a three-step rule for determining whether penalty interest applies under the UTPA: first, the court must determine whether the insurer complied with MCL 500.2006(3) and, if not, whether this excused the insured from submitting proof of loss; second, if the insurer did comply, the court must determine whether the insured submitted a satisfactory proof of loss as required by MCL 500.2006; and finally, if the insured submitted satisfactory proof of loss or was excused from doing so, the court must determine whether the insurer paid the claim in a timely manner pursuant to MCL 500.2006.

***Triangle Associates, Inc v LI Industries,* Unpublished per curiam opinion of the Michigan Court of Appeals, docket number 307232 (Aug. 13, 2013).** The Plaintiffs in this case sued their subcontractor and its insurer, Amerisure, after the subcontractor negligently performed masonry work on a building Plaintiff had contracted to repair, causing stones to fall from the building's roof. The contract between the sub-contractor and the Plaintiff required the sub-contractor to name the Plaintiff as an additional insured under its policy with its insurer, Amerisure.

Amerisure moved for summary disposition, stating that there was no "occurrence" within the policy period because the only damage that occurred was caused by the sub-contractor's faulty workmanship, and damaged only the sub-contractor's own work product. Amerisure's initial motion for summary disposition was denied because the Plaintiff had alleged that it was an additional insured under the policy, thereby seeking payment for damages incurred because of someone *else's* faulty work (the sub-contractor), thereby obviating Amerisure's argument.

The Plaintiff subsequently dismissed the sub-contractor from the suit following a settlement, and then ultimately filed for summary disposition as to its claims against Amerisure, alleging that the unambiguous language of the policy granted it coverage. During this time, evidence came to light that while Plaintiffs had been named the additional insured on some of the sub-contractor's policies, they were *not* named on the policy in effect at the time the stones fell. Also during this time, the trial court made an evidentiary ruling excluding evidence related to any policies that had expired before the date of the loss, since, having expired, they could not possibly have extended coverage.

 © 2014 The Institute of Continuing Legal Education

The trial court thus denied the Plaintiff's motion and instead granted summary disposition to Amerisure because the Plaintiff was not an additional insured under the policy, and because the only damage that occurred was to the insured sub-contractor's own work product by the sub-contractor's own faulty work. Thus the court held that there was no "occurrence" pursuant to the precedent set forth by *Radenbaugh v Farm Bureau General Insurance Co*, 240 Mich App 134; 610 NW2d 272 (2000).

On appeal, the Michigan Court of Appeals affirmed. The court first noted that there may have been provisions in the previous policies that extended coverage to the Plaintiffs in the current instance, but that it could not consider those policies because the lower court had excluded that evidence and because the Plaintiffs failed to provide a copy of the lower court record that would allow the court to determine whether the breadth of that ruling included the present issue. Because the court was limited only to the most recent policy, and because Plaintiff was clearly not named under that policy, the only claim left was that the insured (the sub-contractor) suffered damage only to its own work product, caused by its own faulty workmanship. This fact pattern put this case neatly within the parameters of *Radenbaugh*, and served to exclude this claim from coverage. Therefore, the court affirmed.

***Haley v Farm Bureau Life Insurance Co,* unpublished per curiam opinion of the Michigan Court of Appeals, docket number 302158 (Aug 27, 2013).** This case arose out of a dispute between the Plaintiff-homeowners and Defendant-insurance company when the Plaintiffs sought coverage for a fire that damaged their home and personal property. When the Plaintiffs sued the company, the company moved for summary disposition on the basis that the Plaintiffs made false statements and misrepresentations about the fire and about the value of the claim. Following the trial court's denial of the motion and the Plaintiffs' presentation of their case-in-chief, the Defendants moved for a directed verdict, arguing again that Plaintiffs misrepresented and that there was not sufficient proof of damages. The trial court also denied this motion, and the jury returned a verdict in favor of the Plaintiffs. Subsequently, the Defendants moved for JNOV or a new trial, arguing that the jury verdict was excessive, that the trial court erred in denying its motion for a directed verdict, and that the verdict was against the great weight of the evidence and contrary to law.

On appeal, the Defendant contested multiple issues, all but one of which were affirmed. First, it argued that summary disposition should have been granted because the Plaintiffs made material misrepresentations about the fire and about their losses, thereby voiding their insurance policy. After reviewing the record, the court found that reasonable minds could differ on whether the at-issue statements were made knowingly, willfully, and with intent to defraud. Rather, the court found that it would be reasonable to conclude that the Plaintiffs made an honest mistake due to confusion or inability to appropriately convey themselves. The mere fact that the Plaintiffs' testimony was not wholly consistent did not automatically mean that the Plaintiffs deliberately intended to defraud the Defendants. The court made a similar finding regarding the Defendant's appeal from its request for JNOV.

The appellate court also addressed the question of whether the trial court properly admitted, as lay testimony, the testimony of the firefighters that responded to the fire. However, because the firefighters' testimony was based upon their own experience fighting this fire as well as firefighting in general, the evidence was properly admitted. The

© 2014 The Institute of Continuing Legal Education

Defendant also argued that the Plaintiffs' expert witness testimony regarding the cause and origin of the fire should not have been admitted because it was not based on any facts or data. The court disagreed, however, on the basis that the Defendant mischaracterized the witness's testimony and that his actual opinion was based on sufficient facts and data. The court also upheld the lower court's decision to allow the Plaintiff's public adjuster to give expert testimony regarding the amount of damages, noting that the actual amount need not be precise and that his testimony was based on sufficient facts and data, reliable methods, and that those methods had been applied fairly.

The court also upheld the jury's finding of damages, explaining that the amount of damages need not be wholly precise, and that the standard for precision is relaxed when, as in this case, only the amount rather than the actual presence of damages is disputed.

Finally, the court addressed the issue of remittur. It held that the jury's verdict was not excessive because its determination regarding the repair costs fell within the range of evidence permitted at trial. However, the court did not agree with, and reversed, the jury's determination of the actual cash value of the home. The highest amount the Plaintiffs reported as the cash value of the home was $104, 600.00, which included the value of the land upon which the Plaintiffs' home was located. The actual jury award exceeded this amount, totaling $132,500.00. However, the Plaintiffs' land was not damaged, nor was it insured, meaning that the valuation at $104,600.00 was too high, let alone the actual award. Further, the court noted that the actual cash value of a home only becomes relevant when an insured has not sought to repair the home. When repairs are actually completed, an insured is entitled only to replacement costs in lieu of the actual cash value. In this case, the record made did not indicate whether the Plaintiffs completed actual repairs that cost up to $132,500.00. As such, the amount awarded could not have been reasonably based on the evidence presented, and the court remanded the case to trial court for remittur proceedings pursuant to MCL 2.611(E)(1).

 © 2014 The Institute of Continuing Legal Education

Questions and Answers

NOTES

NOTES

ICLE | Your Partner in Practice

“Having the Partnership cuts our costs because we save hours of research time.”

—Bernhardt “Chris” D. Christenson III
Christenson & Fiederlein PC, *Flint*

ICLE’s PARTNERSHIP

> Practical Resources, Priceless Connections

Find out what thousands of Michigan lawyers already know! **The ICLE Partnership** gives you practical, Michigan-specific, how-to resources plus priceless networking connections. Get access to updates, in-depth legal analysis in all major practice areas, forms, primary law, and the ICLE Community—plus timely advice on technology and running a modern law practice.

	PREMIUM	BASIC
55 ICLE Online Books—continually updated and linked to primary law, and featuring cases laid out from start to finish with authoritative legal analysis	✓	
The Award-Winning* ICLE Community—network, get answers to practice questions, and showcase your expertise in this private, easy-to-use, online “community of practice” for lawyers	✓	✓
Formbank—2,000+ attorney-drafted forms with commentary, ready to edit and make your own	✓	
How-To Kits—step-by-step guidance for completing legal transactions, with supporting law and forms	✓	
On-Demand Seminars—50 new webcasts each year provide first alerts and insight into legal change	✓	✓
MI Law Online—fully-integrated primary law resource	✓	✓
Checklists—a safety net of handy reminder lists	✓	
Top Tips in Ten Minutes—quick insight from the best practitioners	✓	✓
SCAO forms—always current, editable, savable	✓	
Running My Practice area—resources dedicated to helping you run an efficient law practice	✓	✓
Divorce Clausebank—comprehensive collection of clauses for your divorce judgments and settlement agreements	✓	
Live Partnership Seminars—network with colleagues at 12–14 annual live attendance events	FREE	Discounted
Weekly Law and Practice Updates	✓	✓
Customer Support	✓	✓
Discounts—on attendance at major educational events and selected ICLE products	✓	✓

*Winner of the Association of Continuing Legal Education Administrators Best Award for Best Use of Technology (2013).

ICLE

The Institute of Continuing Legal Education
The education provider of the State Bar of Michigan

The State Bar of Michigan • The University of Michigan Law School • Wayne State University Law School • University of Detroit Mercy School of Law • The Thomas M. Cooley Law School • Michigan State University College of Law

LEARN MORE!
www.icle.org/partnership
877-229-4350

# OF LAWYERS IN FIRM	PREMIUM—MONTHLY PAYMENT PLAN	PREMIUM—ANNUAL FEE	BASIC — MONTHLY PAYMENT PLAN°	BASIC—ANNUAL FEE
1	◯ $79/MO	◯ $935	◯ $36/MO	◯ $425
2–4	◯ $119/MO	◯ $1,395	◯ $55/MO	◯ $645
5–7	◯ $165/MO	◯ $1,925	◯ $73/MO	◯ $855
8–10	◯ $249/MO	◯ $2,925	◯ $119/MO	◯ $1,395
11–15	◯ $299/MO	◯ $3,495	◯ $137/MO	◯ $1,595
16–29	◯ $394/MO	◯ $4,635	◯ $174/MO	◯ $2,045
30–44	◯ $595/MO	◯ $6,995	◯ $229/MO	◯ $2,695
45–99	◯ $880/MO	◯ $10,345	◯ $385/MO	◯ $4,525
100–149	◯ $1,237/MO	◯ $14,545	◯ $550/MO	◯ $6,465
150–199	◯ $1,283/MO	◯ $15,095	◯ $568/MO	◯ $6,675
200+	◯ $1,329/MO	◯ $15,625	◯ $586/MO	◯ $6,895

Prices guaranteed until 06/30/14. Partnership subscriptions run for 12 months. Prices depend on the number of lawyers in the firm. All usage of the ICLE Parnership is governed by the Subscriber Agreement. By purchasing the Partnership or logging in to Partnership, you agree to be bound by its terms.

If you choose annual payment, the annual fee is due at sign-up and is nonrefundable. Renewal prices are discounted IF you renew your subscription. Lapsed subscribers must pay full price to renew.

A monthly payment option is available, with an initial 12-month commitment. For more information on the monthly payment plan, see www.icle.org/partnership.

NAME ______________________

MI BAR # ______________________

FIRM ______________________

ADDRESS ______________________

CITY ______________ STATE ______ ZIP ______

PHONE ______________ FAX ______________

E-MAIL ______________________

CHECK # ______________ PAYABLE TO ICLE

CHARGE MY: ◯ VISA ◯ MASTERCARD ◯ AMEX ◯ DISCOVER

____
CREDIT CARD # EXP DATE

____
AUTHORIZED SIGNATURE

SUBSCRIBER AGREEMENT—ICLE PARTNERSHIP (BASIC OR PREMIUM)

1. You are purchasing a subscription to the ICLE Partnership. Your price is based on the number of lawyers in your firm, the Partnership option (Premium or Basic) you select, and your payment choice.

2. *Firm lawyers.* You represent that the number of lawyers you provide at signup—which includes lawyers "of counsel" to your firm—is accurate. You must promptly inform ICLE in writing of any changes in the firm's lawyers, name or address.

3. *Online Resources.* "Online Resources" means resources provided in electronic form as part of the Partnership option you select.

4. *Premium Partnership.* The Premium Partnership provides access to:

a. Online Resources which include 50 or more continually updated online books (does not include *MI Real Property Law*); approximately 50 on-demand webcasts each year; the How-to Kit collection, the Formbank, the Clausebank, SCAO forms, Top Tips in Ten Minutes, archived materials from recent Partnership seminars; MI Law Online; and "Running My Practice" (law practice management resources).

b. Access to the ICLE Online Community as described in section 6.

c. Free attendance at any Partnership seminar offering in-person or live webcast attendance (approximately 12-14 seminars each year). Consult the ICLE website for attendance policies. ICLE may change the number, titles, dates, and locations of seminars at any time.

d. *Discounts.* Discounts on ICLE products and non-Partnership seminars as specified on the ICLE website.

5. *Basic Partnership.* The Basic Partnership provides access to:

a. Online Resources including only the approximately 50 on-demand webcasts offered each year, an archive of those webcasts, MI Law Online, Top Tips in Ten Minutes, and "Running My Practice" (law practice management resources).

b. Access to the ICLE Online Community as described in section 6.

c. The Basic Partnership **does not include** access to Online Books, the How-To Kit collection (except for those included in "Running My Practice"), the Formbank, the Clausebank, SCAO forms, or the full collection of archived seminar materials, and does not provide free attendance at Partnership seminars described in 4(c) above.

d. *Discounts.* Basic Partners receive the same discounts as Premium Partners plus a discount on Partnership seminars described in 4(c) above.

6. *The ICLE Online Community.* ICLE Partners who are practicing lawyers have access to the ICLE Online Community, an online forum at the ICLE website. Partners who are Michigan Bar members are automatically listed in the Community but may opt out. Each user must adhere to the Community Code of Conduct (posted in the Community) or ICLE may terminate that user's Community access with no refund of Partnership fees. Usage of the Community and Community content is governed by the Community Code of Conduct and not by the terms of this Agreement.

7. *Annual Payment.* If you select annual payment, full payment is due at signup and is nonrefundable. No early cancellation for refund is permitted. Each year, you will receive a renewal notice.

8. *Monthly Payment.*

a. Monthly payment must be by credit card.

b. *Initial 12-month commitment.* If you are a new purchaser or switching to monthly payment at renewal, you are committing to pay for the following 12 months. If you fail to make any monthly payment, ICLE may require immediate full payment of the remaining months, and your liability for that full amount will survive termination of this agreement.

c. *"Month by month" after the first 12 months.* After the first 12 months, we will continue to charge your credit card for monthly payments until you cancel your subscription. You will not receive a renewal notice. We will notify you if the price or subscription benefits change. We will require updating of your attorney list and will adjust your monthly fee if the firm size category changes.

d. *Canceling after 12 months.* After the first 12 months, you may cancel your subscription by notifying ICLE in writing with 30 days' notice. There is no proration of monthly fees. If you re-subscribe after cancellation, you are considered a new purchaser. If you select monthly payment, you must commit to an initial 12-month subscription period.

e. *Late payments; customers who cannot select monthly payment.* Monthly payments are due on the first of each month for service in that month. Customers with an outstanding overdue balance with ICLE, who have been repeatedly delinquent in paying outstanding balances, or who are repeatedly late making monthly payments (as determined by ICLE in its sole discretion) cannot select monthly payment.

9. Resources provided as part of the Partnership, including but not limited to Online Resources, are copyrighted; all right, title, and interest (including intellectual property rights) belong to ICLE or its third-party contributors.

10. *License.* In consideration of the subscription fee, ICLE grants you and the authorized users in your firm a nonexclusive, nontransferable, limited license to access, retrieve, and view the Online Resources provided with your subscription while it is in force and to use them **only for purposes of your (and other authorized users') law practice or legal study**. This license includes the right to quote and excerpt from the Online Resources (appropriately credited) by electronic or other means in memoranda, briefs, and similar work product created in the regular course of legal research and law practice. You may also create printouts of reasonable portions of the Online Resources for internal use and download and adapt selected forms or jury instructions for use in client matters. **Any other sharing, copying, distribution, display, reuse, or resale of the material in the Partnership is strictly prohibited.** Other downloading, electronic copying, or transmission of significant portions of the Online Resources is prohibited. ICLE determines reasonable use in its sole discretion.

11. *Authorized Users; Monitoring of Usage.* ICLE will provide a unique user name and password for each lawyer and the legal assistants in your firm. This user name and password may be used only by that lawyer or legal assistant and only while employed by the firm. All users must not disclose this information to anyone else and must treat this information with the same care as the firm's confidential business information. You must communicate these obligations to lawyers, legal assistants and support staff and promptly report any known breach to ICLE. ICLE monitors individual usage and may share usage reports with the individual user and/or the firm, or as required by law.

12. By receiving access to the Partnership, all users consent to receiving periodic e-mail notices from ICLE. However, all e-mails (except routine business notices) include the right to opt out of further e-mails.

13. DISCLAIMER. ALL SERVICES AND INFORMATION, INCLUDING BUT NOT LIMITED TO THE ONLINE RESOURCES. FURNISHED AS PART OF THE ICLE PARTNERSHIP ARE PROVIDED ON AN "AS IS" "AS AVAILABLE" BASIS. ICLE EXPRESSLY DISCLAIMS ALL WARRANTIES, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THESE SERVICES AND INFORMATION DO NOT CONSTITUTE LEGAL ADVICE, AND THEIR USE IS NOT A SUBSTITUTE FOR LAWYERS' OR THE FIRM'S INDEPENDENT PROFESSIONAL JUDGMENT. ICLE ASSUMES NO RESPONSIBILITY FOR PROVIDING INTERNET ACCESS.

14. ICLE (including ICLE's employees, officers, agents, sponsoring organizations, and contributors) is not liable for any loss, injury, claim, liability, or damage resulting from errors or omissions in the ICLE Partnership or any interruption in providing access to the Partnership. ICLE's liability in connection with any other claim shall not exceed the amount of the initial 12-month subscription fee. ICLE shall not be liable for any direct, special, indirect, incidental, or consequential damages of any kind arising in connection with the use of the Partnership.

15. *Termination; Nonrenewal.* ICLE reserves the right to terminate this Agreement immediately if you or any members of your firm materially breach this Agreement, including but not limited to failure to make timely monthly payments, misuse of the Online Resources, or disclosure of user names and passwords. ICLE reserves the right to change the terms on which it offers the Partnership (or to cease offering it). This agreement (as modified by ICLE and communicated to you by ICLE) governs usage of the Partnership while your subscription is in force. Obligations under ¶9 and ¶¶12–13 survive termination, nonrenewal, or cancellation.

16. This agreement is nontransferable, is the entire agreement of the parties, is governed by Michigan law, and its provisions are severable. ICLE's failure to enforce any provision does not waive further enforcement rights.

____
SIGNATURE

____
PRINT NAME OF SIGNER AND TITLE

____
FIRM NAME