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NO. 66102-7-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

INTERNATIONAL MARINE UNDERWRITERS, a division of One Beacon
America Insurance Company, a Massachusetts Insurance Company,
Respondents,

v.

ABCD MARINE, LLC a Washington LLC; ABCD MARINE, a Washington
partnership and ALBERT BOOGAARD, an individual domiciled in
Washington,

Appellants,

v.

ALLIANCE INSURANCE CORP. a/k/a ALLIANCE INSURANCE, INC.,
Respondents

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE SUSAN CRAIGHEAD

APPELLANTS' REPLY BRIEF

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ORIGINAL

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I. STANDARD OF REVIEW

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). The same de novo standard applies to the interpretation of insurance contracts. *DePhelps v. Safeco*, 116 Wn. App 441, 447, 65 P.3d 1234 (2003). All reasonable factual and legal inferences must be afforded the non moving party to defeat the motion. *Anica v. Wal Mart Stores Inc.*, 120 Wn App. 481, 84 P3d. 1231 (2004). Neither respondent disputed the de novo standard of the review.

II. SUMMARY OF ISSUES VS. IMU

1. That there is coverage because the “Access Agreement” is an “insured contract” which provides indemnification to all Northland affiliated companies for Boogaard’s Injuries and damages by ABCD through IMU.
2. That IMU agreed to add Northland Holdings, Inc. as an additional insured on the ABCD Policy and directed Alliance to issue “Certificates of Insurance” certifying them as such. IMU intentionally or negligently failed to amend the ABCD policy to reflect the changes and cannot deny

coverage by virtue of their own actions and the reliance of Boogaard, ABCD, and Northland.

For the convenience of this Court of Appeals, all of the pages of the insurance contract that are in dispute are attached hereto as Appendix E (CP 110, 112, 114, 125, 136).

III. "INSURED CONTRACT" FIRST PARTY- NORTHLAND WAS TO BE INDEMNIFIED BY ABCD THROUGH IMU FOR LIABILITY DUE TO THIRD PARTY- BOOGAARD'S ACCIDENT

The defendant IMU intentionally mis-characterizes Boogaard's claim here in two important ways to obfuscate the issues. First, this is not a direct first party claim by Boogaard. Northland, due to its status as a indemnitee of an "insured contract," was entitled to be covered under ABCD's IMU policy for liability for the injuries to Boogaard arising out of ABCD's operations. Northland obtained a judgment for \$712,000 for their indemnity under the "Access Agreement" and assigned that judgment to Boogaard. Included in the Northland judgment was Boogaard's judgment for his injuries of \$600,000 and Northland's costs and attorneys fees of \$112,000. IMU was made a party to the lawsuit at the reasonableness hearing which approved the settlement. IMU did not appeal the finding of reasonableness or the summary judgments of Judge

Spector. Just because IMU repeatedly shouts its “first party” mantra that Boogaard is making a first party claim does not make it true. The insured was Northland Services, Inc. and all its affiliates.

Second, IMU goes to great lengths to state that it never had notice of the “Access Agreement” and thus arguably could not be bound by it. The obvious fatal flaw in this argument is that there is nothing in the IMU general liability insurance contract that requires that IMU to be given any notice whatsoever of the “insured contracts” its named insured, ABCD, enters into. Furthermore, the respondent has not cited any contract provision, or cited any case law, which supports any argument that IMU was entitled to notice of any “insured contract” that ABCD entered into after the effective date of the policy. The briefing to the trial judge and the Appellants’ Opening Brief challenged IMU on this point. The response was just to repeat the assertion that they had no notice.

The named insured under the IMU contract was ABCD, a general partnership, and Boogaard was an “automatic insured” (Sedillo Declaration, Appendix C, CP 416-417). By granting Northland’s motion for summary judgment, Judge Spector found that the intent of Northland under the “Access Agreement” was to obtain indemnity from ABCD for injuries to anyone, including Boogaard, caused by the negligence of Northland’s own employees at an ABCD work site. Nowhere in its

filings does IMU deny that the “Access Agreement” was an “insured contract” under the policy and instead it only argues that Boogaard was not a “third party” to the “insured contract.”

“Insured contracts” are standard in the construction industry intending to provide automatic indemnity coverage for customers/owners of contractors on the contractor’s job site. There is no limitation in the “Access Agreement”/ “insured contract” limiting the indemnification of Northland from liability to any one group of injured parties. In fact, the “Access Agreement” is all inclusive and provides specifically for indemnification for Northland against any claim by anyone injured on the ABCD worksite:

“8. USER shall be responsible for all bodily and personal injuries to all persons arising out of or resulting from its operations and/or use of the Property, including bodily and personal injuries to its own employees, except if caused by the sole intentional negligence of NSI. User shall indemnify and hold harmless (including costs and legal fees) of any from all losses, damages, claims and suits for bodily and personal injury, whether direct or indirect, arising out of its operations or use of the property...” (emphasis added)

Boogaard is a third party to Northland and by law Northland would be liable to Boogaard for the negligence of Northland’s employees, and by contract ABCD was required to provide indemnity to Northland for that liability.

The IMU contract states that it will provide automatic indemnity for ABCD customers where such indemnity is required by contract in the scope of their business. The policy provides coverage as follows in Section IX Definitions 9 f.

“f: That part of any contract or agreement pertaining to your business (including an indemnification of a municipality) under which **you** assume the tort liability of another to pay for a “bodily injury” or “property damage” **to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.**” (emphasis added).

If one looks at the indemnification provision in the IMU general liability contract itself the answer is clear. The term **You** has a specific meaning as the entity shown on the declaration. The term “**you**” is specifically defined in the IMU contract on Page 1 Second Paragraph as follows:

Throughout the policy the words “you and “your” refer to the **Named insured shown in the declarations**, and any other person qualifying as a named insured under the policy. The words “we,” “us,” and “our” refer to the company or company providing the insurance. (emphasis added)

The named insured on the policy declaration is **ABCD**. (Appendix E).

“Named insured” (You) is distinguished from “insured.”

The word “insured” means any person or organization qualifying as such under WHO IS AN INSURED (SECTION IV).

SECTION IV, WHO IS AN INSURED provides as follows:

1. If **you** are designated in the declarations as:...
- b. A partnership or joint venture, you are insured. Your members your partners, and their spouses are also insured, but only with to the conduct of your business.

By definition in the policy itself the use of the term “**you**” is limited to the entity listed on the declarations page and everyone else is an “automatic insured” as described by Sedillo. There are differences between the two, i.e., between a named insured and others to whom coverage is provided. For instance, the named insured has stringent reporting requirements. The employees, executive officers, and directors of the named insured are also insured. Certain exclusions apply only to the named insured (property). The named insured must reimburse deductibles. The named insured has to pay the premium. The named insured receives refunds. The named insured may cancel the policy, and the named insured receives all notices. (Sedillo Declaration, Appendix C).

As a practical matter the “insured contract” provision of this general liability policy is for the very purpose of not forcing the contractor to have to go through the paperwork of adding every customer to its insurance policy as an “additional insured” when the customer requires such coverage under the construction contract for the work to be done. It

is very common in the insurance industry for insurance companies to delegate the responsibility for issuing and maintaining “Certificates of Insurance” to agents and not even requiring the agent to forward copies of the certificates to the carrier to avoid administrative paperwork. (Sedillo Dec., App. C (CP 413-415)).

Owners such as Northland want to be insured for injuries to the employees of the contractor/ABCD, who are the ones to be most likely to be injured on the site, and against whom the contractor/ABCD would have immunity against their claims or comparative negligence by virtue of the L&I laws, see, eg. *Edgar v. City of Tacoma*, 129 Wn.2d 621, 634, 919 P.2d 1236 (1996). Ostensibly the argument for this is that the contractor generally has the most control over the work site and should bear the risk of accidents occurring there. (Sedillo Dec., Appendix C (CP 414)).

As a practical matter owners of shipyards, terminals, mines, garbage dumps, ski hills provide routinely provide visitors with agreements containing releases/waivers/indemnities every time a visitor desires entry to the premises through the controlled access to the owner’s property. It would be impossible to do business if each one of those entities requesting entry had to call their carriers each day to add each of their potential customers and/or suppliers for that day, in writing on their

general liability policy, for each stop they make during the day.

IV. IMU REPEATEDLY IGNORES MATERIAL EVIDENCE BEFORE THE COURT ON SUMMARY JUDGMENT WHICH PRECLUDED SUMMARY JUDGMENT

IMU does not dispute the evidence of ABCD's and Northland's request to add Naknek Bargelines, LLC and Northland Holdings, Inc. as additional insureds. In fact, IMU provided the language to Alliance to be used in the "Certificates of Insurance" prepared by Alliance and provided to ABCD, Naknek Bargelines, LLC and Northland Holdings, Inc. to allow ABCD to resume work on the Northland site in 2001. Rather than disputing this evidence IMU once again tries to hide the ball by making two counter arguments.

The first argument is that in 2000 IMU asked Alliance if ABCD needed any additional insureds on the policy. Northland responded that they did not require an endorsement. This first argument fails because Northland's/ABCD's first request did not occur until 2001 when ABCD was ejected from the job site until they complied with Northland's new insurance requirements.

The second argument is that Alliance was not IMU's agent and thus they could not bind IMU to any change in the policy. The second

argument fails because IMU gave permission to Alliance and dictated the language in the “Certificates of Insurance” issued by Alliance to add Northland and Nankek on the policy as “additional insureds.” The agency argument is irrelevant because the same result would have occurred had ABCD contacted IMU directly as a result of Northland’s demands and IMU told ABCD that they had bound coverage. IMU would not be allowed later to say that there was no coverage because they had negligently failed to endorse the policy.

Alliance provided specific answers to interrogatories that IMU had agreed to and in fact provided the language to be used by Alliance in the Accord Certificate in response to Northland’s demand to be added as an additional insured (CP 345-346). Contrary to the assertions of IMU these facts were part of the evidence before the trial judge as Exhibit 5 to the Declaration of David Balint in opposition to IMU’s motion for summary judgment. The question and answer are as follows:

10. Did Alliance inform IMU that it had issued a certificate of liability insurance showing “Naknek Barge Lines” and “Northland Holdings” as certificate holders with the notation “*certificate holder is included as additional insured but only with respect to name insured operations*” as contained in document AL 56? If so, then describe what manner in the information was conveyed to IMU, into what manner it was conveyed to back to Naknek Barge Lines and Northland Holdings.

Answer: By “Naknek Barge Lines” and” Northland Holdings”, Alliance assumes defendants mean Naknek Barge Lines, LLC and Northland Holdings, Inc., which are different companies from Northland Services, Inc. (see Declaration of Reagan Sparks dated May 1, 2008, that was filed by Northland Services, Inc’s attorneys in Albert Boogaard’s lawsuit against Northland Services, Inc.). *By a telephone call with IMU, in which the wording “certificate holder is an additional insured, but only with respect to name insured’s operations” was obtained from IMU, IMU knew about the certificate of liability insurance. A copy of the certificate of liability insurance may have been mailed to IMU, if IMU had indicated to Alliance that it wanted copies of such certificates mailed to it.* The certificate would most likely have been mailed to Naknek Barge Lines, LLC and Northland Holdings, Inc., *although it appears ABCD also received a copy of the certificate from Alliance and faxed to Ed Hiersche (Operations Manager of Naknek and Northland) to provide Naknek Barge Lines, and Northland Holdings, Inc. (emphasis added)*

It is true that later in subsequent discovery during the deposition of Tammy Hausinger, the Alliance Agent with whom the ABCD partners usually dealt, the details of the IMU approval for the addition of Northland and Naknek as “additional insured” were fleshed out (CP 859-861). However, the undisputed facts creating the Northland’s status as an “additional insured” through the direct complicity of IMU were before the court at the initial hearing and ignored by the trial court. Summary judgment cannot be granted when there are disputed issues of material

fact. *Zimmerman v. W8LESS Products, LLC*, ___ Wn. App___, 248 P.3d 601 (March 15, 2011).

For IMU to claim in its responsive brief that there was no evidence before the trial court that IMU gave permission and provided the language to Alliance to add Northland and Naknek as additional insured on “Certificates of Insurance” (CP 345-346) provided to ABCD and to Northland to allow ABCD to continue to work on the pier were not before the trial court is disingenuous at best. It was Boogaard’s belief that Northland and Naknek were “additional insureds” on the ABCD policy based upon these prior issued insurance certificates that led him to sign the “Access Agreement” in confidence that he had already complied requirements of the access agreement with his existing insurance. Northland also relied upon the prior insurance certificates by letting ABCD and Boogaard to continue to work at the pier without any further evidence of insurance for two weeks after the “Access Agreement” was executed until the date of the accident. Any reasonable insured or beneficiary looking at the “insurance certificates” issued by Alliance naming Northland and Naknek as additional insured would believe that Northland and Naknek were additional insured on the IMU policy.

In fact, nowhere in its brief to this Court does IMU cite any sworn testimony to dispute the factual contention by Alliance that IMU gave the

authority and direction to Alliance to make Northland Holdings, Inc. and Naknek Bargelines, LLC additional insureds.

**V. EXPERT TESTIMONY IS ADMISSIBLE TO CONSTRUE
INSURANCE POLICIES IN RELATION TO INDUSTRY
PRACTICE WHERE TERMS ARE NOT DEFINED**

Boogaard was a welder with a high school and some community college education. He relied upon Alliance and IMU to provide him insurance that enabled him to work on the Northland pier and meet Northland's requirements. Unfortunately for Boogaard and for the Court the language in the insurance contract is not defined as to whom the term "third party" refers to in the use of the term in the "insured contract" provision. As a result of lack of definition of terms "third party" in the IMU contract the custom and usage of the term in the construction, maritime, and insurance industry needs to be examined and expert testimony is generally admissible to explain terms. *Alpine Industries, Inc. v. Gohl*, 30 Wn App. 750, 637 P2d. 998 (1981).

Appellants have provided the expert testimony of insurance industry expert, Robert Sedillo, to help facilitate the understanding of the IMU marine insurance contract as used in the industry. Sedillo explains that in the custom and usage in these types of routine "insured contract"

provisions in the marine industry the term “third party” is a third party to the indemnified customer/owner who wants to be indemnified from all injuries on the job site to anyone. Sedillo cited the 2007 edition of *Malecki on Insurance*, which is authoritative within the industry, to provide assistance to the court on determining who is a third party in a indemnity assumption of liability contract, and the answer provided in the text is illustrative of the facts in this case.

Contractual Liability- Tort Liability Assumed -Who is a Third Party? The question is who can a third party be? The answer is one who has sustained injury or damage at the hands of the indemnitee, and that means it can be almost anyone, even an employee of the indemnitor. (Sedillo Declaration, Appendix C, CP 418)

Due to the fact that the contractor’s employees and agents are the people most likely to be injured, and that typically the contractor has control of his own work site, these indemnifications are typical and the risk of loss falls on the contractor (Sedillo Declaration, Appendix C, CP 414).

Just because a party receives a benefit from a policy of insurance it does not make that person a “named insured.” For instance, partners of ABCD are indemnified for their negligence in the ABCD/IMU insurance contract, but those partners individually have no responsibility for paying premiums nor are they entitled to any notices from the carrier about

changes in coverage that might affect them. The rights and obligations are different between named insured and “automatic insured” as Sedillo states, and that Boogaard as an “automatic insured” partner is a third party to the IMU insurance contract as would an employee or subcontractor of ABCD.

Boogaard signed the “ Access Agreement” in his representative capacity as an agent of ABCD. A case construing an insurance policy which is analogous on it’s facts is *Public Employees Mut. Ins. Co. v. Kelly*, 60 Wn.App. 610, 615-616, 805 P.2d 822 (1991).

In *Pemco*, supra. the insurance carrier argued that the resident of a corporation was personally the “owner” of a vehicle involved in an accident. The ownership facts cited by the insurance company to support its position included that the president signed the insurance contract, the insurance contract was issued to him, the vehicle involved in the accident was listed on his policy, he owned the majority of shares of the corporation, and he could control the use of the vehicle. The court held that the title of the vehicle was in the corporation and the corporation paid for maintenance and upkeep of the vehicle and thus the corporation was the owner for the purposes of the policy. The Court went on to hold that the definition of “owner” in the motor vehicle code was different than in the policy, and that the corporate president’s actions with regard to the

vehicle and insurance were in his corporate capacity and thus he was not an “owner” under the policy. In this case Boogaard signed the “Access Agreement” in his capacity as the agent of ABCD to bind the company.

The Court of Appeals in *Pemco* then went on to look at other cases in which the term “owner” was construed in different ways. In *Kelly v. Aetna Casualty & Surety Co.*, 100 Wn.2d 401, 670 P.2d. 657 (1983), a doctor who was on the title of his son’s car to protect his financial interest was not an “owner” for the purposes of the policy. In *Farmers Ins. Co. v. U.S.F. & G. Co.*, 13 Wn. App. 836, 537 P.2d 839 (1975) the Court held that the term “owner” was not limited to the registered owner but also included a possessor. In the *Farmers* case, *supra*. the insured was driving a non-owned vehicle borrowed from a used car lot by a third party, who asked the insured to drive the car . The insured’s policy covered him for driving a non-owned vehicle with the “owner’s permission.” The court found coverage. Thus, depending on context, the term simple term “owner” could apply differently in diverse factual situations. Importantly, the court found that the only time that time that the term “owner” applied to the individual, who operated a company for insurance purposes, was for a sole proprietor. *Progressive Insurance Company vs. Haker*, 55 Wn App. 828, 780 P2d. 919 (1989). Boogaard was not a sole proprietor. By virtue

of the fact that Boogaard signed the “Access Agreement” for the ABCD partnership he was not signing the agreement for himself.

VI. REFORMATION

In this case, there were facts before the trial court that all parties to the IMU insurance policy issued to ABCD had agreed that the policy should be endorsed to add Northland Holdings, Inc./Naknek Bargelines, LLC as additional insureds. The agreement was reached between Tammy Hausinger of Alliance and IMU directly. Had the endorsement been issued it would have been totally improper and illegal for IMU to have dropped the coverage without notice and therefore said coverage would have been in place at the time Boogaard was injured, and it would have covered Northland’s negligence. It is difficult to understand how the trial Judge could have ignored this fact. Especially because this fact was not expressly denied, and still continues to not be expressly denied by IMU.

It cannot be stated more plainly than in the Restatement of Contracts 2nd §155 which states as follows:

“§ 155. When Mistake Of Both Parties As To Written Expression Justifies Reformation

Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third

parties such as good faith purchasers for value will be unfairly affected.”

The Restatement goes on to state that even a party to a contract’s negligence in failing to notice an omission of an agreed term does not change the fact that reformation should be granted. Section 157 states:

“§ 157 - Effect of Fault of Party Seeking Relief

A mistaken party’s fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter, unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.”

The case of *Washington Mutual Sav. Bank v. Hedreen*, 125 Wn.2d 521, 886 P.2d 1121 (1994) at 529-30 states:

“The courts of Washington, as well as those of other jurisdictions, are in agreement that negligence is not a bar to reformation of a contract when the reformation claim is based upon mutual or unilateral mistake. *See, e.g., Meyer v. Young*, 23 Wash.2d 109, 113, 159 P.2d 908 (1945); *Carlson v. Druse*, 79 Wash. 542, 548-49, 140 P. 570 (1914); *Home Stake Prod. Co. v. Trustees of Iowa College*, 331 F.2d 919, 921 (10th Cir.1964). In discussing the availability of reformation as a remedy when there has been a unilateral mistake, the *Gammel* court stated the “[f]act that the first party was negligent in failing to observe that the writing does not express what he has assented to does not deprive him of this remedy.” *Gammel v. Diethelm*, 59 Wash.2d 504, 508, 368 P.2d 718 (1962) (quoting 3 A. Corbin, *Contracts* § 614, at 730). Similarly, the *Daly* court has stated:

‘Reformation will be granted when there is a mistake on the part of one of the parties as to the content of a document and there is fraud or inequitable conduct on the part of the other party. It is not determinative that the mistaken party could have noticed the discrepancy between his

understanding and the written agreement by reading the documents....’

(Citations omitted.) *Mitchell Int'l Enters., Inc. v. Daly*, 33 Wash.App. 562, 565, 656 P.2d 1113 (1983).

“...If negligence were a defense to a reformation claim, then reformation would almost never be available as a remedy because mistake is most frequently a basis for reformation, and negligence generally results from mistake. *Carlson v. Druse*, 79 Wash. 542, 548, 140 P. 570 (1914); *Home Stake*, at 921. This rationale for allowing reformation when negligence has occurred is also espoused by the authors of the Restatement.”

A further elaboration of the law of reformation as it pertains to insurance contracts specifically is contained below.

VII. BAD FAITH ACTS

The respondent has spent time and energy responding to the bad faith issues that are not part of this appeal. By mutual agreement between Boogaard and IMU the bad faith issues were dismissed without prejudice and with a waiver of the statute of limitations to allow this appeal to proceed. However, the evidence in this case is clear that IMU made a business decision to spend \$39, 939.50 in fees trying to void the indemnity “Access Agreement” rather than providing and/or paying the indemnity of Northland in the amount of \$712,000 for their liability under the ABCD general liability policy to ABCD. When they lost the gambit they made it

financially impossible for Boogaard to appeal the Spector summary judgement, and exposed him to \$112,000 in Northland's attorneys fees.

IMU's bad faith here includes IMU's failure to acknowledge the "Access Agreement" as an "insured contract", and it's refusal to acknowledge the addition of Naknek and Northland as additional insured after authorizing the issues of insurance certificates in 2001 to that effect and subsequently failing to so endorse their policy. Additionally, IMU did not disclose to Boogaard that it that it also insured Northland and its subsidiaries for this accident and that they had a conflict of interest (CP 873). It is fitting that IMU is a marine insurance company because they left Boogaard up the creek without a paddle.

VIII. FACTS REGARDING STATUTE OF LIMITATIONS - ALLIANCE'S POSITION

Alliance argued to the trial court and now in its reply brief that the statute of limitations against them began to accrue on November 1, 2004 when an attorney representing Northland notified Boogaard's attorney that they would hold ABCD responsible for indemnifying and insuring Northland pursuant to an "Access Agreement" signed by ABCD on September 29, 2004 (CP274-275). On November 4, 2004 Boogaard's attorney tendered Northland's letter and assertions of rights under the

“Access Agreement” to Alliance (CP100-101). On November 10, 2004 Alliance forwarded the Northland claim to IMU together with a claim form fully filled out noting Boogaard’s representation by attorney Martin D. Fox. (CP553-559).

Alliance now claims that this should have triggered a reasonable insured to know that there was no coverage and that it should have triggered knowledge by ABCD that its broker had negligently failed to secured additional insured status required by the pier operators of ABCD’s work place. Alliance could have notified Boogaard at this point that Northland was not covered for injuries to Boogaard arising out of ABCD’s operations at Pier 115 but not even Alliance knew there was no coverage. Alliance could have reviewed its ABCD file and notice that they had erred by failing to have secured the endorsement to the policy that added Northland Holdings as an additional insured. Alliance was the expert. Alliance was in a better position than Boogaard to know there was no coverage because of their negligence! The denial of coverage by IMU did not occur until March 20, 2008 (CP 582-3).

Where in this scenario could there possibly be any knowledge that IMU would ultimately deny coverage? This could not have been known by ABCD or Boogaard or his attorneys. It was certainly not known by Alliance. Most impressively it was not even known by IMU because they

did not deny coverage until March 20, 2008 immediately following a Summary Judgment ruling in the underlying personal injury case ruling that the “Access Agreement” was fully enforceable by Northland Services, Inc., and all its affiliates including the other defendant to the underlying action, Northland Holdings, Inc.

As stated in *Huff v Roach* 125 Wn. App. 724, 106 P.3d 268 (2005), at 729:

“Generally, the statute of limitations accrues when the plaintiff has the right to seek relief in the courts. *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001).”

Alliance was in a far better position than Boogaard to know whether there was coverage for Northland for injuries to Boogaard. Even if all of the facts of non-coverage were known or reasonably knowable, which they obviously were not, if a lawsuit had been brought against Alliance for failure to secure the additional status that they represented they had secured for Northland Holdings, Inc. and Nanknek Barge Lines, the crucial element of any damage whatsoever was missing.

If the underlying court had deemed the “Access Agreement” to be unenforceable, and therefore Boogaard entitled to his damages from the tortfeasor, then there would have been no proximate cause and no damage to Boogaard resulting from the negligence of Alliance. Furthermore, how

could Boogaard have sued Alliance when IMU could have (and should have) accepted coverage for Boogaard's losses? (In fact, this may still be the result if this Court of Appeals finds, as it should, that IMU did provide indemnity coverage for Northland either because they had agreed to Northland's status as an additional insured and/or because there was automatic coverage of the "Access Agreement" under principles of "insured contract.")

Alliance's reliance on *Huff v. Roach, supra*, is misplaced, especially because the *Huff* court expressly distinguished the facts of that case from the case which *is* relevant, i.e., *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d, 215 (1975), which was discussed in Appellants' opening brief. In *Huff* the Oregon attorney had missed the personal injury statute of limitations of two years. In personal injury actions, by definition, there is known damage. The amount of the damages might be undetermined but the plaintiff knows the fact of damage. Therefore, in simple terms, when the lawyer missed the statute of limitations the court held that the plaintiffs knew all of the elements of their case, including proximate cause of damages. They knew that there had been negligence. They knew or should have known that their cause of action against a tortfeasor was lost. However, in our case, there were no damages nor any rights to sue Alliance until it was apparent that their negligence was known or

reasonably knowable and until it was apparent that there was any damage, which did not occur until IMU denied coverage.

IX. SETTLEMENT

Alliance's argument that the settlement agreement between Boogaard and Northland Holdings, Inc. and Northland Services, Inc. absolves them of liability is an argument violative of logic. It's like the old joke about the person who murdered his parents and then appealed to the mercy of the court because he was an orphan. The personal injury damages suffered by Boogaard were agreed to be \$600,000. Judge Spector, at a reasonableness hearing, found this to be reasonable. However, on a cross-claim Judge Spector also approved the damages against Boogaard on the basis of the breach of the "Access Agreement" by ABCD. What is obvious is that had Alliance complied with its duty to ABCD to secure coverage (as Alliance represented they had done) then there would have been no cross-claim because IMU would have been compelled to cover the losses caused by the Northland employee. The negligent acts of Alliance occurred at several points. In September of 2001, Alliance got IMU's permission to add Northland Holdings, Inc. and Naknek Bargelines, LLC as additional insureds. They issued a certificate of insurance certifying to the pier operators and to ABCD that additional

insured status had been conferred on Nortland Holdings, Inc. and Naknek Bargelines. Alliance failed to more fully document the express permission given by IMU, and thereafter by failing to secure a formal endorsement to the policy. See the Sedillo Declaration (AppendixD).

Alliance made the same mistake the following year on August 20, 2002 when they issued another certification that there was additional insured coverage for Naknek and Northland Holdings (CP 332). According to Alliance's interrogatory answers (CP 345 - 346) and the deposition of Tammy Hausinger, the Alliance representative (CP 859-860), express permission to add these additional insureds was given by IMU. Had they done their job properly, there would have been an endorsement covering the acts of negligence of Northland on the date of the injury, October 14, 2004.

Another act of negligence by Alliance was the failure to issue additional insured certificates of coverage for the years 2003-2004 and 2004-2005 without bothering to inform either their customer, ABCD, or the pier operators, that they were not doing so.

Finally, after Boogaard was injured on October 2004, IMU maintains that Alliance told them that Boogaard was not making a claim under the policy. On the basis of that, IMU ceased any involvement or investigation until the underlying personal injury lawsuit was commenced.

X. ALLIANCE'S CORPORATE STATUS DEFENSE

The facts of the interactions between Boogaard on behalf of ABCD and Alliance have not been disputed by Alliance in its responsive brief. In 2000, Alliance secured the IMU marine policy from IMU covering ABCD. The policy was renewed annually thereafter and was in effect up through the time of Boogaard's injury in October 2004. In the midst of the second year of the policy, the pier operators sought insurance protection for themselves for any injuries that their workers may inflict by demanding that they be added as additional insureds (see Exhibit A to Appellants' Opening Brief). Boogaard went to his broker and gave them a copy of the letter demanding the coverages, leaving Alliance to secure the additional coverage from IMU. Until the required coverage could be secured some three weeks later, ABCD was prevented access to the jobs site. Alliance certified in September of 2001 and then the next year as well that, in fact, the insurance policy had been amended to include Northland Holdings, Inc. and Naknek Bargelines, LLC as additional (first party) insureds.

By the time Boogaard was injured, there would have been no question about insurance coverage had IMU followed through on the commitment it made to so endorse the policy. This omission by IMU was either negligent or intentional.

It is important to note that Alliance does not deny its negligence in failing to secure the written endorsement. It would have been literally impossible for the persons who relied on the certificate of insurance issued by Alliance to know that no endorsement had formally been issued. The certificate was produced to the Pier 115 operators and ABCD was allowed back on the job site. Everyone relied on these insurance certificates. How then is Alliance trying to escape its obviously negligent act? Their defense is that even had they done their job properly the endorsement would have read Northland Holdings, Inc. and not Northland Services, Inc.

Alliance spent several pages of its brief on the proposition that ABCD did not provide them a copy with the “Access Agreement” signed by ABCD three weeks before Boogaard was injured. This is factually correct but legally irrelevant because the lawsuit against Alliance is based on: 1) Alliance’s failure to have secured the proper “additional insured” endorsement from IMU and, 2) Alliance’s negligence by asserting to all and sundry that in fact *had* secured the endorsement.

The Alliance negligence was primarily in 2001 and in 2002, not in 2004. Yes, the “Access Agreement” (Appendix B to the Appellants’ Opening Brief) demands additional insured status for Northland Services, Inc. and all of its affiliated companies, which would obviously include

Northland Holdings, Inc. It also requires other coverages but—and this is also important—Alliance does not dispute the proposition that additional insured status would have been necessary and sufficient to protect and cover Northland’s negligence. As stated in the Appellant’s Opening Brief, their defense is, essentially, no harm no foul.

It is interesting and significant to note that it is ABCD’s broker, Alliance, that is making this argument and not the insurance company itself, IMU. Taking the evidence before the trial Judge, and all reasonable inferences therefrom, it is apparent that the notice by Ed Hiersche on the August 27, 2001 memo demanding coverage designating Northland Holdings, Inc. rather than Northland Services, Inc. was a mistake in the sense that Northland Holdings, Inc. was not the real party in interest. It makes no sense that if Northland Holdings, Inc. was simply a shell company, with no employees who could possibly commit negligence, that it would demand coverage for itself. Obviously the intent, not denied by anyone, was that coverage was demanded for any employees of the pier operators who might have caused harm. The rules of reformation of contract, described above are equally applicable to Alliance as they are to IMU.

In essence, if Ed Hiersche, the designated “Port Engineer” for Northland Holdings, Inc. and Naknek Bargelines, was mistaken as to

entities controlling the physical operations of the pier then how could Boogaard on behalf of ABCD be expected to figure it out and correct it? The testimony was unequivocal that the ABCD partners simply did as they were told on the job site by Ed Hiersche or his subordinates. They were told where to work, how to work, and who to invoice for different types of jobs, but there is no evidence that Boogaard could have second-guessed or known that the insurance coverage he was told he had secured through Alliance was insufficient.¹

It is apparent, or at least within the inference of the evidence before the trial Judge, that the intent of Northland was that it was asking for insurance for the pier operators and their employees. There was testimony that Northland Holdings, Inc. had no employees and therefore the inference is obvious that Northland requested coverage for all of its employees including Northland Services, Inc. and Naknek Bargelines, LLC. It was simply a mistake of who was requested to be an insured under additional insured status. In the case of *Rocky Mt. Fire & Cas. Co. v. Rose*, 62 Wn.2d 896, 385 P.2d 45 (1963) discussed in appellants' opening brief, the facts are important. In that case, a father bought an

¹ The Hiersche memo of 8/27/01 (CP 328) was cc'd to, among others, Barry Hachler who was the corporate officer of all of these interrelated corporations. The obvious intent was to cover pier employees of the pier operators from their negligence.

automobile insurance policy in his name. Later his daughter bought her own car and was named as an insured on the policy. Later, father and daughter switched cars after which the daughter married. The driver of the car at the time of injury was the daughter's husband. Even though there was a mistake as to the designated covered party, the court in that case said that since there was no increase in insurable risk, and since the driver of that car was always meant to be covered, the court reformed the contract to provide coverage.

The *Rocky Mt.* court cited the older case of *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 674, 132 Pac. 643 (1913). In that case, which is almost identical to the instant case, a fire insurance policy was sought for a piece of property separately owned by the wife. By mistake, the husband's name only was put on the policy after which there was a fire loss. The court held that where the intent was clearly to cover the owner of the real estate, the court would reform the contract to name the wife as the insured. In our case the evidence, or at least the reasonable inference from the evidence, is that the employees of the pier operators were meant to be covered.

It is clear from all of the cases where the court finds the intended insurable risk does not change, that the courts will reform the contracts of insurance to cover the party with the true insurable interest. In this case

that was Northland Services, Inc. This can be determined in our case because as of September 2001 until October 2004, nothing changed on that pier. It was the same operators, the same employees, the same businesses, the same risks, and ABCD consistently did the identical work under the identical supervision of Ed Hiersche. It is obvious that since Northland Holdings says it had no employees or management control, it did not require any coverage. Such coverage would be meaningless, which cannot be presumed to be anyone's intent.

Finally, an illustration of this can be found in *Metro Mtge. Etc. v. Reliable Ins. Co.*, 64 Wn.2d 98, 390 P.2d 694 (1964). Again, the facts are important because on the basis of the facts the court reformed the insurance contract. A vendor sold a parcel of real estate on a real estate contract, demanding that the purchaser buy fire insurance should the property be destroyed. The requirement was that the proceeds of the policy would first be paid to the vendor to the extent of the then remaining balance of the contract and then the remainder paid to the purchaser. Without notice to anyone, the vendor sold his interest in the real estate contract after which the building was destroyed. The insurance company defended on the basis that they never heard of the new vendor who claimed the rights to the proceeds. The insurance policy contained a provision preventing assignment of the policy without consent of the

company but the court held there was no notice requirement for the seller of the real estate contract. Again to identify the proper insurable interest, the court reformed the contract to name the proper real party in interest.

The issue can be most vividly framed by posing the following hypothetical: if Northland Services, Inc. had requested liability insurance for itself and for its employees and it erroneously asked that the insurance be placed in the name of Northland Holdings, Inc. (an entity allegedly without any employees whatsoever and with allegedly no operational say-so in the operations of Pier 115) then, under these circumstances, would the insurance contract be reformed to name the only party with an insurable interest, i.e., Northland Services, Inc.? The answer is obviously yes.

XI. CONCLUSION & REQUEST FOR RELIEF

This case cries out for justice. ABCD, a legal entity as a general partnership, did nothing wrong. From the time the partnership formed for the purpose of doing welding work on Pier 115, no misconduct or fault of any kind could be attributed to it or to the individual partners. This includes Boogaard.

ABCD hired an expert, Alliance, to comply with the insurance requirements placed on them. Alliance secured the required insurance in

April 2000 from IMU. At that time there was no requirement for additional insureds. However, in August of 2001, Ed Hiersche, as the Port Engineer, handed ABCD a letter (Appendix A) demanding that ABCD be named as additional insureds on the IMU policy. This letter was taken by ABCD to its broker, Alliance. It took three long weeks for IMU to agree to add additional insureds exactly as requested. Alliance had express permission and agreement of IMU to add these additional insureds. Alliance issued a certification to ABCD and to the additional insureds that there was, in fact, coverage. Alliance issued a similar certificate the next year, 2002. Everyone relied on the accuracy of the certificate. IMU negligently (or intentionally) failed to issue the formal endorsement. Alliance, the experts, failed to follow through; they failed to notice the endorsement hadn't been issued and they failed to follow up on that with IMU. Everyone agrees that to be an additional insured means that they would be fully covered for torts caused by the negligence of any of their employees.

A couple of weeks before he was injured, ABCD signed an "Access Agreement" which required additional insured status for Northland Services, Inc and all its affiliated companies, including Northland Holdings, Inc, and which also obligated ABCD to indemnify said companies from any tort liability caused by any of their employees.

By definition, and by industry usage, and by case authority, this constituted an “insured contract” automatically making Northland Services, Inc. and all of its affiliated companies covered for their acts of negligence arising out of ABCD’s operations on the Pier. There is no exclusion on the policy under the insured contract provisions for partners of the named insured. IMU could have easily excluded ABCD, but only gets there through a tortured interpretation of their own contract, violating all rules of construction of insurance contracts.

In short, IMU is liable for the damages caused by the Northland employee on October 14, 2004, both under the principle of “insured contract” and under their agreement and commitment to add Northland Holdings, Inc. and Naknek Bargelines, LLC as additional insureds. Principles of reformation of insurance contracts apply because in 2001 everyone involved intended for these “additional insureds” to be added, and because of the intent to insure the employees of the Pier owners.

It is requested that this Court remand to the trial Judge with directions to find that the tortfeasor’s acts of spearing Boogaard with a forklift on October 14, 2001 were covered by IMU, and with directions to the Court to assess the damages.

ABCD and Boogaard relied on Alliance for its insurance needs. This included securing the required coverage from IMU for the “additional

insureds” status of the Pier operators as required by Ed Hiersche. It appears that Alliance did only part of its job, by securing the permission from IMU for these additional insureds. However, Alliance negligently failed to follow through to make sure that the formal endorsements were issued. They compounded the error by certifying to all and sundry that there was in fact this “additional insured” coverage. Had they done their job then there would have been no question of coverage for Boogaard’s severe injuries.

If, in fact, this Court rules that there *is* coverage then Alliance is free from any direct liability for failing to secure the coverage. However, Alliance remains liable and this Court should remand for finding of all the incidental, and consequential, foreseeable and costly damages to ABCD and Boogaard to get to this point.

At least for the sake of summary judgment, Alliance does not dispute their negligence but seeks escape on technical, procedural grounds which have no merit. These include the statute of limitations defense, the defense that Boogaard suffered no injuries by the time the underlying case against Northland was resolved by settlement and reasonableness hearing, and the fabricated “corporate identity” defense.

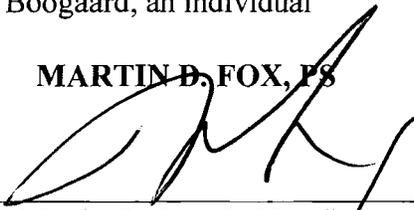
It is requested that if this Court sustains the IMU summary judgment that it expressly reverse the trial Judge's three summary judgments and remand for trial to assess damages.

DATED this 25th day of May 2011 at Seattle, Washington.

DAVID J. BALINT, PLLC

By: 
David J. Balint, (WSBA # 5881)
Of Attorneys for Appellants/defendants ABCD
Marine, A Washington Partnership, and Albert
Boogaard, an individual

MARTIN D. FOX, PS

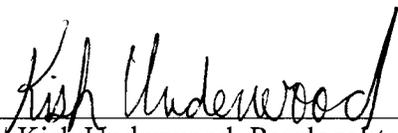
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Of Attorneys for Appellants ABCD
Marine, A Washington Partnership/Albert
Boogaard

**DECLARATION OF SERVICE
OF APPELLANTS' REPLY BRIEF**

I certify that on the 25th day of May 2011 I caused a true and correct copy of the APPELLANTS' REPLY BRIEF to be served on the following in the manner indicated below:

- 1) Counsel for plaintiffs/respondents
Dennis M. Moran (X) US Mail
Moran Windes & Wong, PLLC () Hand Delivery
5608 – 17th Ave. Northwest (X) ABC Legal Messenger
Seattle, WA 98107 (X) Email
- 2) Counsel for third party defendants () US Mail
Steven A. Rockey () Hand Delivery
Rockey Stratton, P.S. (X) ABC Legal Messenger
521 Second Avenue West (X) Email
Seattle, WA 98119-3927

DATED this 25th day of May 2011 at Seattle, Washington.



Kish Underwood, Paralegal to David J. Balint

APPENDIX E



C5JH 80128

Previous Policy Number

PRODUCER NUMBER

46-68305

The Company issuing this policy is indicated below:
OneBeacon America Insurance Company

POLICY NUMBER

C5JH 80128

Named Insured ABCD Marine

Producer Alliance Insurance, Inc.

Street 346 NW 89th Street
City Seattle
State WA
Zip 98117

Street P.O. Box 77086
City Seattle
State WA
Zip 98177

Policy Period: From: April 3, 2004 To: April 3, 2005
At 12:01 A.M. Standard Time at your Mailing Address shown above.

Named Insured Is A: Corporation Partnership Individual Joint Venture Organization (Other than Corp, Partnership or Joint Venture)

Business Description: Welding and deck repair on barges and fishing vessels.

Location of all premises you own, rent or occupy:
Northland Services Yard at E. Marginal Way, Seattle, WA

Limits of Insurance: General Aggregate Limit (Other Than Products-Completed Operations) \$1,000,000
Products-Completed Operations Aggregate Limit \$ 300,000
Personal and Advertising Injury Limits \$ 300,000
Each Occurrence Limit \$ 300,000
Fire Damage Limit (Any One Fire) \$ 50,000
Medical Expense Limit (Any One Person) \$ 5,000

Deductible: \$10,000

Premium, Fees & Rate(s): Exposure Rating Basis: Gross Receipts
Estimate Exposure For Period: \$90,000
Adjusted at a Rate of: 2.80 %
Estimated Annual Premium: \$2,500
Terrorism Premium: Not Covered
Advance or Deposit Premium: \$2,500
Minimum Annual Premium: \$2,500
Premium Shown is Payable: Annual

SUBJECT TO CONDITIONS OF FORMS AND ENDORSEMENTS ATTACHED HERETO:

Comprehensive Marine Liability Policy Ship Repairer's Legal Liability Endorsement
Traveling Workmen Endorsement Electronic Date Recognition Endorsement

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE FOREGOING PROVISIONS AND STIPULATIONS AND THOSE HEREINAFTER STATED, WHICH ARE HEREBY MADE A PART OF THIS POLICY TOGETHER WITH SUCH PROVISIONS, STIPULATIONS AND AGREEMENTS AS MAY BE ADDED HERETO, AS PROVIDED IN THIS POLICY.

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

Dennis R. Smith

Dennis R. Smith
Secretary

Ray Barrette

Ray Barrette
Managing Director & CEO

Countersigned by
this date

May 7, 2004

Authorized Representative

COMPREHENSIVE MARINE LIABILITY POLICY

Various provisions in this policy restrict or exclude coverage. Read the entire policy carefully to determine your rights and duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we," "us," and "our" refer to the company or companies providing this insurance.

The word "Insured" means any person or organization qualifying as such under WHO IS AN INSURED (SECTION IV).

Other words and phrases that appear in quotation marks have special meaning. Refer to DEFINITIONS (SECTION IX).

The Section, Form or Clause titles or headings are for your reference only and have no bearing on the interpretation of the Sections, Forms or Clauses. Be certain to read all Sections, Forms and Clauses carefully to determine their meaning.

SECTION I - COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

Insuring Agreement.

1. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. But:
 - a. The amount we will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION V); and
 - b. Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgements or settlements under Coverage A or B or medical expenses under Coverage C and/or Supplementary Payments under Section III.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B (SECTION III).

2. This insurance applies to "bodily injury" and "property damage" only if:
 - a. The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
 - b. The "bodily injury" or "property damage" occurs during the policy period.

- b. The expenses are incurred and reported to us within one year of the date of the accident; and
 - c. The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.
2. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:
- a. First aid administered at the time of an accident;
 - b. Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
 - c. Necessary ambulance, hospital, professional nursing and funeral services.

SECTION II - EXCLUSIONS

A. EXCLUSIONS APPLICABLE TO SECTION 1, COVERAGES A AND B ONLY:

Notwithstanding anything to the contrary contained in this policy, it is hereby understood and agreed that this policy is subject to the following exclusions and that this policy shall not apply to:

- 1. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
- 2. "Bodily injury" or "property damages" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
 - a. Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
 - b. That the insured would have in the absence of the contract or agreement.
- 3. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
 - a. Causing or contributing to the intoxication of any person;
 - b. The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
 - c. Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business, whether or not for profit, of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.
- 4. a. Any liability of whatsoever nature of the insured, whether you may be liable as an employer or in any other capacity whatsoever, to any of your "employees", including but not limited to any liability under any Workers' Compensation Law, Unemployment Compensation Law, Disability

any judgment therein which accrues after entry of the judgment and before we tender or deposit in court that part of the judgment which does not exceed the limit of our liability therein;

2. Premiums on appeal bonds required in any such claim or "suit", premiums on bonds to release attachments in any such claim or "suit" for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the Insured because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed two hundred fifty (\$250) dollars per bail bond, but the Company shall have no obligation to apply for or furnish any such bonds;
3. Expenses incurred by the insured for first aid to others at the time of an accident, for "bodily injury" to which this policy applies;
4. All reasonable expenses incurred by the insured at our request in assisting us in the investigation or defense of the claim or "suit", including actual loss of earnings up to two hundred fifty (\$250) dollars a day because of time off from work.

SECTION IV - WHO IS AN INSURED

1. If you are designated in the Declarations as:
 - a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
 - b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
 - c. An organization other than a partnership or joint venture, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
 - d. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
2. Each of the following is also an insured:
 - a. Your "employees", other than your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, no "employee" is an insured for:
 - (1) "Bodily injury" or "personal injury" to you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), or to a co-"employee" while that co-"employee" is either in the course of his or her employment or performing duties related to the conduct of your business;

- c. All of the world if:
- (1) The injury or damage arises out of:
 - (a) Goods or products made or sold by you in the territory described in a. above; or
 - (b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
 - (2) The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.
6. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker."
7. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any similar governing document.
8. "Impaired property" means tangible property, other than "your product" or "your work," that cannot be used or is less useful because:
- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a contract or agreement;
- If such property can be restored to use by:
- a. The repair, replacement, adjustment or removal of "your product" or "your work;" or
 - b. Your fulfilling the terms of the contract or agreement.
9. "Insured contract" means:
- a. A lease of premises;
 - b. A sidetrack agreement;
 - c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - e. An elevator maintenance agreement;
 - f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.