

No. 36961-3-II

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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METROPOLITAN PROPERTY &  
CASUALTY INSURANCE COMPANY,

Respondent,

v.

Personal Representative of the Estate of H.E. SHERRY  
JOHNSON; and WILLIAM and KARYL MARTIN,

Appellants.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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APPELLANTS' REPLY BRIEF

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## ANALYSIS

### A. By Making No Response, Met Concedes Two Key Issues

The Estate's opening brief argued that if coverage is found, Met is bound to pay the judgment entered against the Estate. (Opening Brief at pp. 1, 34) By making no response, Met concedes the issue. Therefore, the only remaining issue is whether coverage exists.

The Estate also argued that one of the exclusions depended upon by Met at the trial level, for liability assumed by contract, did not apply. (Opening Brief at p. 30) Met also makes no response to this argument and thus concedes the exclusion is inapplicable.

### B. The Pollution Exclusion Does Not Apply to the Personal Injury Coverage

Metropolitan's first argument is that the policy's pollution exclusion should apply. That exclusion, however, has been explicitly deleted from the Personal Injury coverage. That coverage states:

The Section II – Losses We Do Not Cover do not apply to **personal injury**

(CP 110; underlining added)

The pollution exclusion is contained in the "Section II – Losses We Do Not Cover" portion of the policy. (CP 105-6) Therefore, the pollution exclusion cannot defeat the Estate's claim for coverage.

In a somewhat confused fashion, Met also suggests that applying the wrongful entry coverage to a pollution claim cannot be reconciled with the overall intent of the contract. Met sets forth a parade of horrors in which it might have to cover arsons and auto accidents if a literal interpretation of “wrongful entry” is applied here. (Resp. Brief at 9)

Unfortunately for Met, this sort of argument already has been rejected by the Washington Supreme Court. In *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998), the Court declined to accept the losing insurers’ argument that “‘applying personal injury coverage to environmental contamination claims simply cannot be squared with the overall structure of the policy.’” 136 Wn.2d at 578 (quoting insurers’ brief).

C. **The Wrongful Entry Coverage Is Not Limited to Landlord-Tenant Disputes or Invasions of Private Occupancy Rights**

Met argues that because the term “wrongful eviction” is found on the same line as “wrongful entry,” the coverage is limited to landlord-tenant disputes. (Resp. Brief at 10-11) If that had been Met’s intent, it certainly could have stated it more clearly, as standard insurance industry language was available with which to do so.

The definition of Personal Injury in the 1986 ISO general liability form included this definition:

Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies.

(Appendix B, p.9); *see also Kitsap County, supra*, 136 Wn.2d at 578 (discussing same language). Another example is found in *Kruger Commodities, Inc. v. United States Fidelity & Guar.*, 923 F. Supp. 1474 (M.D. Ala. 1996): “[W]rongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor.” *Id.* at 1480, *quoted in Kitsap, supra*, 136 Wn.2d at 578-9.

Here, Met did not use any such limiting language, but instead sold Ms. Johnson broad, unqualified coverage for “wrongful entry.” When an insurer has limiting language available and declines to use it, a court will not read the same limitation into the broader language the insurer actually used. *See Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 694, 871 P.2d 146 (1994).

A similar rejoinder applies to Met’s argument that a “wrongful entry” requires an invasion of another’s occupancy rights, such as a trespass. (Resp. Brief at 16) In *Kitsap County* the Personal Injury coverage was for “wrongful entry or eviction, or other invasion of the right of private occupancy.” 136 Wn.2d at 574. The reference to “*other* right of private occupancy” indicated that only wrongful entries which

violated a right of private occupancy were a Personal Injury. This limitation has been deleted from Met's policy. Thus, Met's policy language does not support limiting the coverage to injuries flowing from violations of private occupancy rights.

It certainly would be a strange result to allow an insurer to delete, from its policy, limiting language used by other insurers and then to accept an argument that the insurer did not intend the deletion to have any effect!

On the subject of deletions, Met's argument that property of another must be invaded is but another attempt to revive deleted exclusions that do not apply to the Personal Injury coverage. The Personal Injury coverage states:

The Section II – Losses We Do Not Cover do not apply to  
**personal injury**

(CP 110; underlining added)

“Section II – Losses We Do Not Cover” includes an exclusion for:

**property damage** to property owned by **you**.

(CP 106)

By deleting this exclusion with respect to the Wrongful Entry coverage, Met showed an intent to cover wrongful entries that involve property owned by the insured. If Met wanted to avoid covering

wrongful entries that took place on the insured's property, it simply could have avoided deleting the "owned property" exclusion.

Met's argument about invasion of others' rights also ignores the fact that this case involves groundwater pollution. The tank leakage caused a continuous process of groundwater pollution. (CP 37, lines 13-20) The tank would have been continuously leaking into groundwater from at least June 1994 until the leak was discovered in June 2004. (CP 66, lines 11-13) Groundwater contamination is an invasion of state-owned property. *See Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wn.2d 464, 479, 918 P.2d 923 (1996) ("owned property" exclusion did not apply to groundwater contamination, because the contamination was to state property).

**D. Limitations Relating to the Occurrence Coverage Should Not Be Read into the Separate Coverage for Personal Injury**

**1. Historically, the Personal Injury Coverage Has Been a Separate Coverage**

As the Estate anticipated in its opening brief, Met argues that various limitations in the Occurrence coverage should be applied to the Personal Injury coverage. The Estate has already explained why such an approach creates irreconcilable ambiguities in the policy. (Opening Brief at 25) Met's brief makes no attempt to distinguish the substantial body of case law cited by the Estate. Instead, Met ignores the cases and doggedly

moves forward with its attempt to pound the round peg of Personal Injury coverage into the square hole of Occurrence coverage.

Met has no hammer. Historically, the Occurrence coverage and the Personal Injury coverage were originally drafted as, and always have been treated as, separate coverages. Personal Injury coverage originally appeared in commercial liability forms. It first became a permanent feature of the standard ISO commercial liability form in 1986. (*See* Appendix B at pp. 3, 9) The Occurrence coverage was Coverage A while Personal Injury was separately set forth as Coverage B.

Coverage B insurance against personal injury liability is typical of such provisions that have been included in CGL policies since the 1980s. *See generally* M. Jane Goode, *Personal Injury Liability Coverage*, 30-SPG Brief 39 (Spring 2001); Fritz K. Huszagh & Marisa A. Mancici, *Current Issues Involving Insurance of Claims for Personal Injury*, 427 PLI/LIT 483 (1992). Coverage B personal injury liability insurance differs from Coverage A bodily injury and property damage insurance in at least two important ways. First, unlike Coverage A, Coverage B may be triggered without proof of an accidental occurrence. Instead, Coverage B is activated by the commission of certain specified offenses during the policy period. Also unlike Coverage A, which excludes coverage for “[b]odily injury’ or ‘property damage’ expected or intended from the standpoint of the insured,” Coverage B expressly extends coverage to liability for “‘personal injury’ . . . other than ‘bodily injury’,” caused by certain defined offenses arising out of the insured's business. *American Guar. I*, 129 F.3d at 808. Therefore, under Coverage B, the triggering act may be intentional.

Consequently, cases turning on the “occurrence” or “accident” requirement of Coverage A type liability insurance (or its exclusion of intentional or expected injuries) are irrelevant to this appeal.

*American Guarantee and Liability Ins. Co. v. 1906 Co.*, 273 F.3d 605, 611-12 (5th Cir. 2001).

Personal injury liability coverage, packaged with advertising injury liability coverage in the broad form liability endorsement, has been available since at least the late 1950s when multi-peril package policies were first offered. When the simplified commercial general liability coverage forms were introduced in 1986, personal and advertising injury liability coverage was included as Coverage B. It then became an integral part of the coverage form instead of being an optional coverage added by endorsement.

Malecki, *Commercial General Liability*, p.87 (National Underwriter Co. 2001) (Appendix A).

The Metropolitan form, being a homeowners form, varies from the commercial general liability forms discussed by the commentators, but only slightly. To make sense, Met’s Personal Injury coverage still must be read as a *separate coverage* from the Occurrence provisions. *Accord, Kitsap County, supra*, 136 Wn.2d at 581-82 (treating Personal Injury coverage as separate from Occurrence coverage).

Consider the fact that the Occurrence coverage is limited to “property damage,”<sup>1</sup> which is specially defined as “*physical* injury or destruction of *tangible* property, including loss of use of this property. (CP 90; italics added); see *Prudential Property and Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 115, 724 P.2d 418 (1986) (discussing similar language). The Personal Injury coverage, however, includes torts such as defamation of character. (CP 110) The tort of defamation’s primary goal is to protect a person’s reputation. See *Richmond v. Thompson*, 130 Wn.2d 368, 381, 922 P.2d 1343 (1996). How can one’s reputation possibly qualify as *tangible* property that can be *physically* injured?

The Personal Injury coverage developed separately as a historical matter and applies to a list of specific offenses such as invasion of privacy, wrongful entry, and false imprisonment. It is a round peg that cannot be fit into the square hole of Occurrence coverage. Met’s arguments about the Occurrence coverage, and whether the Estate’s claim meets those requirements, are irrelevant to this appeal. *American Guarantee, supra*, 273 F.3d at 611-12.

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<sup>1</sup> For the sake of brevity, the Estate will not mention the “bodily injury” definition, as the present case does not involve “bodily injury.” The ambiguities created when the “bodily injury” definition is forced upon the Personal Injury coverage are discussed in the Estate’s opening brief at pp. 27-28.

2. **Because the “Policy Period” Condition Only Refers to the Occurrence Coverage, It Is Ambiguous When Applied to the Optional Coverage for Personal Injury**

Met argues that the following provision bars coverage:

1. **Policy Period.** This policy applies only to accidental loss in Section I, or **Bodily Injury** or **Property Damage** in Section II, which occurs during the policy period.

(CP 110)

Of course, even if the above condition applied, there is no doubt that “property damage” took place during Met’s policy periods. (E.g., CP 37, lines 7-9; CP 66 lines 11-13) The question in this appeal is not whether “property damage” took place while Met insured the property, but whether the incident in question qualifies as a “wrongful entry” under the Personal Injury coverage.

Nevertheless, the “policy period” provision is ambiguous at best. Here is the ambiguity: It can be read, as Met contends, to indirectly import an Occurrence coverage requirement for “property damage” (physical injury to tangible property) into the Personal Injury coverage, or it can be read to say that if the claim is based on the Occurrence coverage for “property damage,” then that “property damage” must take place during the policy period.

If Met's interpretation is adopted, then the average layperson reading the policy encounters several conundrums. First, he or she is left to wonder how an apparent coverage requirement (for "property damage") found its way into the Personal Injury coverage by way of the Conditions section of the policy, rather than being spelled out in the Personal Injury coverage itself. The "policy period" language becomes, in effect, an exclusion that is not found in the list of exclusions applying to Personal Injury, but which comes in through the back door via the Conditions section.

Second, he or she would be confounded by the same issue discussed previously—the "property damage" requirement for physical injury to tangible property cannot be squared with coverage for the offenses covered by the Personal Injury provision.

The reasonable reader can avoid these conundrums by reading the "policy period" provision as only applying to the Occurrence coverage, which expressly requires the presence of "property damage." Because the Personal Injury coverage is a separate coverage, which does not require "property damage," the "policy period" condition does not apply. This is a reasonable, historically accurate reading of the separate Personal Injury coverage. Since the reading favors the Estate, it is the one that

must be adopted. *Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997).

3. **The Policy Applies If Wrongful Entry Takes Place During the Policy Period**

The Estate is not arguing that Metropolitan insures events that are completely unconnected with its policy period. The Personal Injury coverage, however, is triggered by the commission of one of the covered offenses, not by the presence of “property damage” or “bodily injury,” which are Occurrence coverage concepts. Therefore, for coverage to exist, it is only necessary for wrongful entry to take place during the policy period. The wrongful entry in this case consists of continuing fuel oil contamination to soil and groundwater. (CP 37, lines 7-9; CP 66 lines 11-13) Since this contamination was present and ongoing during the policy period, there is a sufficient connection between the policy period and the Personal Injury.

It doesn’t matter that in addition to taking place during Met’s policy period, the wrongful entry also might have existed when Met did not insure the property. So long as any portion of a multi-year loss takes place during one of its policy periods, an insurer is jointly and severally liable for the entire amount of the judgment against the insured. *Gruol Const. Co., Inc. v. Insurance Co. of North America*, 11 Wn. App. 632,

637-8, 524 P.2d 427 (1974). This result holds true even if the insured has no insurance in some years. *American Nat. Fire Ins. Co. v. B & L Trucking and Const. Co., Inc.*, 134 Wn.2d 413, 951 P.2d 250 (1998). When a loss spills over into other insurers' policy periods, the insurance company's remedy is to indemnify the insured for the entire judgment and then seek contribution from the other liability insurers. *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034, 1050 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (leading case).

**E. The "Penal Law" Exclusion Does Not Apply**

Citing the exclusion for "injury caused by a violation of a penal law or ordinance committed by you," Met argues that the Model Toxic Control Act is a "penal law." The phrase "penal law" refers to criminal statutes. *American Family Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769, 781 (2002). The MTCA is not a criminal statute. It is not found in title 9 or 9A of the RCW; no MTCA section makes any a violation a misdemeanor or a felony; there is no threat of imprisonment. The only enforcement provision mentioning penalties—for enhanced (treble) damages—expressly refers to a the penalty as a "civil penalty." RCW 70.150.050(1)(b).

Further, even if some portion of the MTCA imposed criminal liability, there is no evidence that such a provision applied to the Estate or

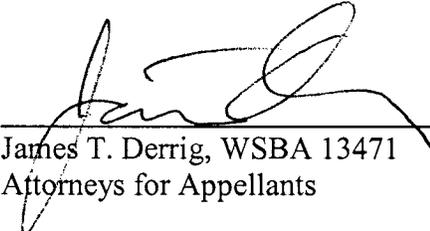
Ms. Johnson in this instance. For the exclusion to apply, the record before the court must affirmatively demonstrate violation of a criminal statute. *Northern Sec. Ins. Co. v. Perron*, 172 Vt. 204, 777 A.2d 151, 166-7 (2001). The elements of the insured's civil liability must correspond with the elements of the criminal violation. *Mutual of Enumclaw Ins. Co. v. Gutman*, 172 Or. App. 528, 21 P.3d 101, 105-6 (2001). The Estate's present liability was imposed after the Martins initiated a civil action for contribution. RCW 70.105D.080. The Estate's liability to the Martins is not based on criminal violations.

#### **CONCLUSION**

For the above reasons, the Court of Appeals should (1) reverse the summary judgment entered in Met's favor, (2) reverse the denial of the appellants' motion for summary judgment, (3) direct entry of summary judgment in appellants' favor, and (4) award appellants their attorney fees.

DATED this 23rd day of June, 2008.

EKLUND ROCKEY STRATTON, P.S.



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**APPENDICES**

# **APPENDIX A**

# **CGL**

## **Commercial General Liability Seventh Edition**

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## 2

# Coverage B—Personal and Advertising Injury Liability

Advertising liability insurance for organizations other than advertising agencies was probably first introduced for use in the United States with umbrella liability policies in the 1940s. The first standardized form for providing advertising liability coverage with the comprehensive general liability policy was the broad form comprehensive general liability endorsement, introduced in 1976. Personal injury liability coverage, packaged with advertising injury liability coverage in the broad form liability endorsement, had been available since at least the late 1950s when multi-peril package policies were first offered. When the simplified commercial general liability coverage forms were introduced in 1986, personal and advertising injury liability coverage was included as Coverage B. It then became an integral part of the coverage form instead of being an optional coverage added by endorsement. It was not until the growth of litigation over the meaning of advertising injury liability coverage in the late 1980s and the 1990s that advertising injury liability coverage was widely recognized as an important addition to liability policies.

In large part because of the litigation over advertising injury liability coverage, Coverage B of the CGL coverage forms has undergone many changes since those forms were introduced in 1986. The emergence of e-commerce exposures potentially covered under personal and advertising

## **APPENDIX B**

## 1986 OCCURRENCE FORM

### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

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

Throughout this policy the words "you" and "your" refer to Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under SECTION II - WHO IS AN INSURED.

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION V - DEFINITIONS.

#### SECTION I - COVERAGES

##### COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

###### 1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. 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. This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence." The "occurrence" must take place in the "coverage territory." We will have the right and duty to defend any "suit" seeking those damages. But:

(1) The amount we will pay for damages is limited as described in SECTION III - LIMITS OF INSURANCE;

(2) We may investigate and settle any claim or "suit" at our discretion; and

(3) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

b. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury."

c. "Property damage" that is loss of use of tangible property that is not physically injured shall be deemed to occur at the time of the "occurrence" that caused it.

###### 2. Exclusions.

This insurance does not apply to:

a. "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.

b. "Bodily injury" or "property damage" 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:

(1) Assumed in a contract or agreement that is an "insured contract;" or

(2) That the insured would have in the absence of the contract or agreement.

c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) 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 of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Any obligation of the insured under a workers compensation, disability benefits or unemployment compensation law or any similar law.

e. "Bodily injury" to:

(1) An employee of the insured arising out of and in the course of employment by the insured; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of (1) above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract."

## APPENDIX B

### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

f.(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) At or from premises you own, rent or occupy;

(b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

g. "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent.

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of the operation of any of the equipment listed in paragraph f.(2) or f.(3) of the definition of "mobile equipment" (Section V.8).

h. "Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice or preparation for, a prearranged racing, speed or demolition contest or in any stunting activity.

i. "Bodily injury" or "property damage" due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution. This exclusion applies only to liability assumed under a contract or agreement.

j. "Property damage" to:

(1) Property you own, rent, or occupy;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in your care, custody or control;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

k. "Property damage" to "your product" arising out of it or any part of it.

## 1986 OCCURRENCE FORM

### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

- l. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor

- m. "Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work;" or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

- n. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product;"

(2) "Your work;" or

(3) "Impaired property;"

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Exclusions c. through n. do not apply to damage by fire to premises rented to you. A separate limit of insurance applies to this coverage as described in SECTION III - LIMITS OF INSURANCE.

### COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

#### 1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this insurance applies. 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. We will have the right and duty to defend any "suit" seeking those damages. But

- (1) The amount we will pay for damages is limited as described in SECTION III - LIMITS OF INSURANCE;

(2) We may investigate and settle any claim or "suit" at our discretion; and

(3) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlement under Coverages A or B or medical expenses under Coverage C.

- b. This insurance applies to "personal injury" only if caused by an offense:

(1) Committed in the "coverage territory" during the policy period; and

(2) Arising out of the conduct of your business excluding advertising, publishing, broadcasting or telecasting done by or for you.

- c. This insurance applies to "advertising injury" only if caused by an offense committed:

(1) In the "coverage territory" during the policy period; and

(2) In the course of advertising your goods, products or services.

#### 2. Exclusions.

This insurance does not apply to:

- a. "Personal injury" or "advertising injury:"

(1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

(2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

(3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured; or

(4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

- b. "Advertising injury" arising out of:

(1) Breach of contract, other than misappropriation of advertising ideas under an implied contract;

(2) The failure of goods, products or services to conform with advertised quality or performance;

(3) The wrong description of the price of goods, products or services; or

## APPENDIX B

### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

- (4) An offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting.

### COVERAGE C. MEDICAL PAYMENTS

#### 1. Insuring Agreement.

- a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
- (2) On ways next to premises you own or rent; or
- (3) Because of your operations;

provided that:

- (1) The accident takes place in the "coverage territory" and during the policy period;
- (2) The expenses are incurred and reported to us within one year of the date of the accident; and
- (3) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

- b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

#### 2. Exclusions.

We will not pay expenses for "bodily injury:"

- a. To any insured.
- b. To a person hired to do work for or on behalf of any insured or a tenant of any insured.
- c. To a person injured on that part of premises you own or rent that the person normally occupies.
- d. To a person, whether or not an employee of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers compensation or disability benefits law or a similar law.
- e. To a person injured while taking part in athletics.
- f. Included within the "products-completed operations hazard."

- g. Excluded under Coverage A.

- h. Due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

### SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

We will pay, with respect to any claim or "suit" we defend:

1. All expenses we incur.
2. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
3. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
4. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit," including actual loss of earnings up to \$100 a day because of time off from work.
5. All costs taxed against the insured in the "suit."
6. Pre-judgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any pre-judgment interest based on that period of time after the offer.
7. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

### SECTION II - 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.

## 1986 OCCURRENCE FORM

### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

- 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.
2. Each of the following is also an insured:
- Your employees, other than your executive officers, but only for acts within the scope of their employment by you. However, none of these employees is an insured for:
    - "Bodily injury" or "personal injury" to you or to a co-employee while in the course of his or her employment; or
    - "Bodily injury" or "personal injury" arising out of his or her providing or failing to provide professional health care services; or
    - "Property damage" to property owned or occupied by or rented or loaned to that employee, any of your other employees, or any of your partners or members (if you are a partnership or joint venture).
  - Any person (other than your employee), or any organization while acting as your real estate manager.
  - Any person or organization having proper temporary custody of your property if you die, but only:
    - With respect to liability arising out of the maintenance or use of that property; and
    - Until your legal representative has been appointed.
  - Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
3. With respect to "mobile equipment" registered in your name under any motor vehicle registration law, any person is an insured while driving such equipment along a public highway with your permission. Any other person or organization responsible for the conduct of such person is also an insured, but only with respect to liability arising out of the operation of the equipment, and only if no other insurance of any kind is available to that person or organization for this liability. However, no person or organization is an insured with respect to:
- "Bodily injury" to a co-employee of the person driving the equipment; or
  - "Property damage" to property owned by, rented to, in the charge of or occupied by you or the employer of any person who is an insured under this provision.
4. Any organization you newly acquire or form, other than a partnership or joint venture, and over which you maintain ownership or majority interest, will be deemed to be a Named Insured if there is no other similar insurance available to that organization. However:
- Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
  - Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
  - Coverage B does not apply to "personal injury" or "advertising injury" arising out of an offense committed before you acquired or formed the organization.
- No person or organization is an insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

### SECTION III - LIMITS OF INSURANCE

- The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
  - Insureds;
  - Claims made or "suits" brought; or
  - Persons or organizations making claims or bringing "suits."
- The General Aggregate Limit is the most we will pay for the sum of:
  - Medical expenses under Coverage C; and
  - Damages under Coverage A and Coverage B, except damages because of injury and damage included in the "products-completed operations hazard."
- The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of injury and damage included in the "products-completed operations hazard."
- Subject to 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal injury" and all "advertising injury" sustained by any one person or organization.

## APPENDIX B

### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

5. Subject to 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

- a. Damages under Coverage A; and
- b. Medical expenses under Coverage C, because of all "bodily injury" and "property damage" arising out of any one "occurrence."

6. Subject to 5. above, the Fire Damage Limit is the most we will pay under Coverage A for damages because of "property damage" to premises rented to you arising out of any one fire.

7. Subject to 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The limits of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

### SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

#### 1. Bankruptcy.

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

#### 2. Duties In The Event Of Occurrence, Claim or Suit.

a. You must see to it that we are notified promptly of an "occurrence" which may result in a claim. Notice should include:

- (1) How, when and where the "occurrence" took place; and
- (2) The names and addresses of any injured persons and witnesses.

b. If a claim is made or "suit" is brought against any insured, you must see to it that we receive prompt written notice of the claim or "suit."

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit,"
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation, settlement or defense of the claim or "suit," and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

#### 3. Legal Action Against Us.

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

#### 4. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

##### a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

##### b. Excess Insurance

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

- (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work;"
- (2) That is Fire insurance for premises rented to you; or
- (3) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I).

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### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

When this insurance is excess, we will have no duty under Coverage A or B to defend any claim or "suit" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

#### c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

#### 5. Premium Audit.

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy term is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

#### 6. Representations.

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

#### 7. Separation Of Insureds.

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

#### 8. Transfer Of Rights Of Recovery Against Others To Us.

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

### SECTION V - DEFINITIONS

1. "Advertising injury" means injury arising out of one or more of the following offenses:

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

b. Oral or written publication of material that violates a person's right of privacy;

c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of copyright, title or slogan.

2. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment."

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada.

## APPENDIX B

### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or

c. All parts 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.

5. "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.

6. "Insured contract" means:

a. A lease of premises;

b. A sidetrack agreement;

c. An easement or license agreement in connection with vehicle or pedestrian private railroad crossings at grade;

d. Any other easement agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

e. An indemnification of a municipality as required by ordinance, except in connection with work for a municipality;

f. An elevator maintenance agreement; or

g. That part of any other contract or agreement pertaining to your business under which you assume the tort liability of another to pay damages because of "bodily injury" or "property damage" to a third person or organization, if the contract or agreement is made prior to the "bodily injury" or "property damage". Tort liability

means a liability that would be imposed by law in the absence of any contract or agreement.

An "insured contract" does not include that part of any contract or agreement:

a. That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(1) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or

(2) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

b. Under which the insured, if an architect, engineer or surveyor, assumes liability for injury or damage arising out of the insured's rendering or failing to render professional services, including those listed in a. above and supervisory, inspection or engineering services; or

c. That indemnifies any person or organization for damage by fire to premises rented or loaned to you.

7. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto;"

b. While it is in or on an aircraft, watercraft or "auto;" or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto."

8. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent.

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

## 1986 OCCURRENCE FORM

### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

- (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
- e. Vehicles not described in a, b, c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
- (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
  - (2) Cherry pickers and similar devices used to raise or lower workers;
- f. Vehicles not described in a, b, c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.
- However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos."
- (1) Equipment designed primarily for:
    - (a) Snow removal;
    - (b) Road maintenance, but not construction or resurfacing;
    - (c) Street cleaning.
  - (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
  - (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.
9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
10. "Personal injury" means injury, other than "bodily injury," arising out of one or more of the following offenses:
- a. False arrest, detention or imprisonment;
  - b. Malicious prosecution.
  - c. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;
  - d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
  - e. Oral or written publication of material that violates a person's right of privacy.
11. a. "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
- (1) Products that are still in your physical possession; or
  - (2) Work that has not yet been completed or abandoned.
- b. "Your work" will be deemed completed at the earliest of the following times:
- (1) When all of the work called for in your contract has been completed.
  - (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
  - (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
- Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.
- c. This hazard does not include "bodily injury" or "property damage" arising out of:
- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle created by the "loading or unloading" of it;
  - (2) The existence of tools, uninstalled equipment or abandoned or unused materials;
  - (3) Products or operations for which the classification in this Coverage Part or in our manual of rules includes products or completed operations.
12. "Property damage" means:
- a. Physical injury to tangible property, including all resulting loss of use of that property; or
  - b. Loss of use of tangible property that is not physically injured.
13. "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.

## APPENDIX B

### COMMERCIAL GENERAL LIABILITY COVERAGE FORM

#### 14. "Your product" means.

a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

- (1) You;
- (2) Others trading under your name; or
- (3) A person or organization whose business or assets you have acquired; and

b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. and b. above.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

#### 15. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. or b. above.

NO. 36961-3-II

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

METROPOLITAN PROPERTY  
& CASUALTY INSURANCE  
COMPANY,

Respondent,

v.

H.E. SHERRY JOHNSON, et al.,

Appellants.

NO. 36961-3-II

CERTIFICATE OF SERVICE

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he caused true and complete copies of

1. Appellants' Reply Brief, and
2. this Certificate of Service

to be served by having the same delivered by hand to the offices of the  
counsel of record in this case listed below and left with a clerk therein, or  
with a person apparently in charge thereof:

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DATED this 23rd day of June, 2008.

EKLUND ROCKEY STRATTON, P.S.



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