



Insurance Principles and Concepts We Must Never Forget

Especially for My Favorite
Nebraska Agents

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Our Objectives

- Contracts, I'm talking about contracts
- Reading & understanding contracts
- How deductibles work
- Four corners of the policy
- Duty to Defend
- Coverage triggers
- Coinsurance
- Loss payees and the like
- Warranties & Representations
- Proximate Causation

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Two Party Contract

- Party # 1 = The Insured
- Party # 2 - The Insurer

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Policies, aka: Insurance Contracts

Policy

- A policy is a written contract of insurance between the insurer and the policyholder.

Also defined as "the entirety of the contract"

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What Is It Made Of

- Declaration page(s)
- Coverage Forms
- Endorsements
- Some policies require a "cause of loss" form

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Purpose Of These Items

- Delineation of the coverage provided
- Outlining the terms of the coverage(s) applicable
- Limits provided
- Grants of coverage
- Limitations that may apply
- Exclusions that will apply
- Responsibilities and duties that BOTH parties to the contract have

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Defined

- A **contract** is an agreement between two or more parties exhibiting the following necessary characteristics: mutual assent, competent parties, a valid consideration, and legal subject matter.

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A Simple Reminder

- ALL insurance policies are contracts
- Not all contracts are insurance policies
- ALL CONTRACTS contain
 - Limitations - Expectations -
 - Conditions

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Policies – Contracts of Indemnity

- **Indemnity** is compensation to a party for a loss or damage that has already occurred or to guarantee through a contractual clause to repay another party for loss or damage that might occur in the future.

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Another Look - Indemnity

- A guaranteed contractual clause to repay another for a loss or damage that MIGHT occur in the future
- Under this principle, the insured should collect the amount of their loss...

No More...No Less

We often call this Actual Cash Value

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Exceptions to Indemnity

- Valued policies
- Valued policy states & laws
- Replacement Cost coverage
- Life Insurance

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Valued Policy

- A **valued policy** is a policy that pays a predefined loss amount not related in any way to the actual incurred loss. (artwork, antiques, jewelry)

Some states have valued policy laws - Nebraska is one such state

EG: applies to any real property in the state

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Valued Policy States

- **Valued policy states** require insurers to pay the Face amount of the policy in the event of a total loss, even if the replacement cost is lower than the policy's face amount.
Each valued policy state's law is likely to be applied differently

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The Other Two Exceptions

- **Replacement Cost Coverage**
 - Because it pays without the application of depreciation – this actually goes against the principle of indemnity
- **Life Insurance**
 - How can the replacement cost of a life, if we were to depreciate it, apply to the value of a life?
Life insurance is meant to provide replacement Income of the deceased

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What About Rescission

- **Rescission**
- Is a declaration by an insurer that the policy was never in effect, the result being that coverage for a claim, when tendered by an insured to an insurer, is not covered.

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How Rescission Might Occur

- Insured submits application to insurer
- Insurer reasonably relies on the facts as stated by the insured/applicant
- The application (submission) contained one or more misrepresentations of material facts
- But for these misrepresentations the insurer would not have offered coverage on the same terms and conditions had it known the true facts

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How Rescission Might Occur

- But for the concealment of these facts, the insurer would not have offered coverage on the same terms And conditions had it known the true facts
- The U/W who issued the policy testifies that they would not have issued said policy had they known the true facts
- The insured is advised in writing that their policy has been rescinded - and premium payment has been returned - or has at least been offered

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Insurance Policies – Conditional Contracts

- Certain conditions need to be met before the contract becomes active
- Conditions Precedent
- Conditions Subsequent

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Conditions Precedent

- In a contract, a **condition precedent** is an event that must occur before the parties are obligated to perform.
- For example, an insurance contract may require the insurer to pay to rebuild the customer's home if it is destroyed by fire during the policy period.
- The fire is a **condition precedent**. The fire must occur before the insurer is obligated to pay.

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Condition Subsequent

- A **condition subsequent** is an event or state of affairs that, if it occurs, will terminate one party's obligation to the other.
- A **condition subsequent** differs from the similar condition precedents because they take effect after a party has already assumed a duty or after an interest has already vested.
- These conditions are often found within the fields of contracts and property.

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Contract of Adhesion

- **Contract of adhesion** is a legal concept wherein a contract is offered intact to one party by another with the stipulation that the second party accept or reject the contract in total without the opportunity to bargain over the wording

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Advantage to the Insured

- Because of this unequal bargaining position
- Any ambiguity is to be interpreted in the favor of the insured
- Thus, coverage applicable is interpreted in its
BROADEST sense
- Exclusions are interpreted in their NARROWEST
sense

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An Aleatory Contract

- An **aleatory contract** is an agreement concerned with an uncertain event that determines the parties' rights and obligations.
- The performance of the parties (in regard to the contract) is contingent upon an event that may never occur

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An Unilateral Contract

- The promise of one party (insurer) is given in exchange for the act of another party (insured).
- Insured pays the premium and the insurer promises to pay if (but only if) a covered loss occurs.
- If nothing happens - then nothing is required of the insurer
- Only one party (insured) did anything (paid the premium)

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Contract of Utmost Good Faith

- Both parties are reliant upon the Good Faith of the other
- Principle of **Uberrimae Fidei**
- Insurer and insured both must be transparent and disclose all the essential information required before signing up for an insurance policy. It states that both the parties must disclose all the material facts before subscribing to the policy.

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How To Read And Understand
The Policies We Are Selling

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Have An Approach That You Can Apply EVERY Time

- **D**eclarations (first)
- **E**xclusions (fourth)
- **C**onditions (sixth)
- **I**nsurance Agreements (second)
- **D**efinitions (third - and throughout the policy)
- **E**ndorsements (fifth)

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WHY Exclusions

- All policies have them
- Catastrophic events
- Covered by another policy
- Maintenance issues
- Against public policy
- Not needed by everyone
- Keep costs (premiums) in line
- You want it? You can get it, just pay me more

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Property Policies, Two Types, Per Se

- **Named Perils** Forms
 - They specify the exact types of losses for which payment will be forthcoming
 - If a type of loss is not enumerated, no coverage applies
 - Puts the insured in the position of needing to prove to the insurer that coverage does apply because the type of loss was listed
 - Even with the specific perils listed, some exclusions will also be listed within the peril

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Property Policies, Two Types, Per Se

- **Special Form** - Open Perils
 - Coverage applies to all losses unless there is a specific applicable exclusion
 - It is up to the insurer to prove that an exclusion applies in order to not pay a claim
 - Some exclusions will also provide coverage as "give back" or exception to the exclusion

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Named Perils Exclusions (example)

- **Windstorm or Hail** as a covered peril, EXCLUDES:
 - Frost or cold weather
 - Ice (other than hail), snow or sleet, whether driven by wind or not
 - Loss or damage to the interior of a building or structure or to property inside such, whether driven by wind or not, unless the building or structure first sustains damage to its roof or walls

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Special Form Give Back (Example)

- **Earth Movement** is excluded, including earthquake, tremors, aftershocks, landslide, mine subsidence, earth sinking (but not sinkhole collapse)
- But if earth movement as described results in a fire or explosion, we will pay for such loss or damage caused by such

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Other Policies Have Exclusions Too

- CGL
- Employment Practices
- Business Auto
- Homeowner's
- Personal Auto
- The list is really endless

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Deductibles & Retentions

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Deductibles

- The **deductible** is the amount the insurer will deduct from the loss before paying up to its policy limits.
- May apply to multiple policies
 - Property
 - Inland Marine
 - General Liability
 - Auto

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Retention

- **Retention** is assumption of risk of loss by means of noninsurance, self-insurance, or deductibles.
- Retentions are normally applied and required of the insured BEFORE the insurer makes any payment
- Deductibles are deducted from the amount of the loss

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How Might They Apply

- Property Deductibles
- On a per occurrence basis
- Will be shown on the Decs
- Applied to covered losses only
- Deductible is subtracted from the amount of the loss, not from the coverage limit

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Example

- Property insured with a limit of \$100,000
- There is a \$5,000 deductible
- The loss totals \$65,000
- The loss payment made by the insurer will be a total of \$60,000

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Example

- Property insured with a limit of \$100,000
- There is a \$5,000 deductible
- The loss totals \$110,000
- The loss payment made by the insurer will be a total of \$100,000
- In this example we are assuming that coinsurance is not an issue

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How Might They Apply

- Liability Deductibles
- On a per claim basis
- On a per occurrence basis
- Could apply to either or both BI/PD

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Example

- \$1,000,000 limit of liability
- \$5,000 PD deductible
- Applies on a **per occurrence** basis
- The insured, a commercial painter, is painting a building and overspray damages four vehicles in the parking lot
- As the overspray is considered one occurrence, even though there are four separate claims, the insured's deductible is \$5,000

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Example

- \$1,000,000 limit of liability
- \$5,000 PD deductible
- Applies on a **per claim** basis
- The insured, a commercial painter, is painting a building and overspray damages four vehicles in the parking lot
- Although the overspray is considered one occurrence, there are four separate claims, the insured's deductible is \$20,000

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WHY Deductibles

- Part of the Risk Financing portion of Risk Management
 - Assists in achieving the least expensive coverage costs for the insured
 - Assist in availability of post loss resources
 - Is considered a type of self-insurance
 - It is managed (or can be in most cases) by the insured

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WHY Deductibles

- Eliminates the costs of and frequency of smaller claims
- Helps to eliminate moral hazards
- Helps to eliminate morale hazards
- Aligns with the manageability of affordable insurance costs

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Four Corners Rule

- "Four corners of an instrument" is the principle that a document's meaning should be derived from the document itself
- IE, from its language and all matters encompassed in it
- Its purpose? To establish whether an insurer owes a duty of defense to its insured or not

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EG: Nebraska, NOT a Four Corners State

- Nebraska also allows the 4 corners of the contract to be governing, however it also allows extrinsic evidence, outside of the four corners of the complaint, to be used in determining if there is a duty to defend
- Extrinsic Evidence is evidence relating to a contract but not appearing on the four corners of the contract because it comes from other sources involving the setting in which the parties negotiated the contract.

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In Eight Corner States

- The eight corners rule as applied in a number of states is that an insurer's duty to defend must be assessed based only on the claims asserted in the plaintiff's complaint and the policy itself.
- This rule gets its name from the four corners of the contract plus the four corners of the plaintiff's complaint

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So, In Some States It Might Be That

- An insurer's duty to defend is not determined only from the "four corners" of the original complaint, but also involves exploration of other events about the incident

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Ambiguities, A Matter of Case Law

- In considering the meaning of an insurance policy, we interpret the language according to its plain and ordinary meaning

Voorhees v. Preferred Mut. Ins. Co. New Jersey, 1992

- An insurance policy is a contract that will be enforced as written when its terms are clear in order that expectations of the parties will be fulfilled

Kampf v. Franklin Life Ins. Co. New Jersey, 1960

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Exclusions Interpreted

- We have observed that in general insurance policy exclusions must be narrowly construed, the burden is on the insurer to bring the case within the exclusion

Am. Motorists Ins. Co. v. L-C-A Sales Co. New Jersey 1998

- We do not suggest that any far-fetched interpretation of a policy exclusion will be sufficient to create an ambiguity requiring coverage

Stafford v. T.H.E. Ins. Co. New Jersey 1998

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The Axiom To Remember

- The insurer's duty to defend is always broader than their duty to indemnify
- Consider the insuring agreements of these various policies

CGL

Business Auto

Homeowners

Personal Auto

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CGL

- 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. We will have the right and duty to defend the insured against 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

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Business Auto

- We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply.

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Homeowners

- If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
 - **1.** Pay up to our limit of liability for the damages for which an "insured" is legally liable. Damages include prejudgment interest awarded against an "insured"; and
 - **2.** Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when our limit of liability for the "occurrence" has been exhausted by payment of a judgment or settlement.

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Personal Auto

- We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured". We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payment of judgments or settlements. We have no duty to defend any suit or settle any claim for "bodily injury" or "property damage" not covered under this Policy.

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CoverageTriggers

- The **coverage trigger** is the event that must occur before a particular liability policy applies to a given loss
- In property forms it will be found in the various "cause of loss" forms which are attached
- In Liability forms it is again defined by the "insuring agreement"

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Liability Triggers

- Occurrence Trigger
- Claims Made Trigger
- Claims Made and Reported Trigger

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Occurrence Trigger

- An **Occurrence Trigger Policy** provides coverage for incidents that happen during your policy period, regardless of when you file a claim. These policies can be more expensive than a claims-made policy because of how long coverage applies.

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Claims Made Trigger

- **Claims-Made Coverage Trigger** – a type of coverage trigger that obligates an insurer to defend and/or pay a claim on an insured's behalf, if the claim is first made against the insured during the period in which the policy is in force.

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Claims Made and Reported Trigger

- **Claims-Made and Reported Policy Trigger** – a type of claims made policy in which a claim must be both made against the insured and reported to the insurer during the policy period for coverage to apply.

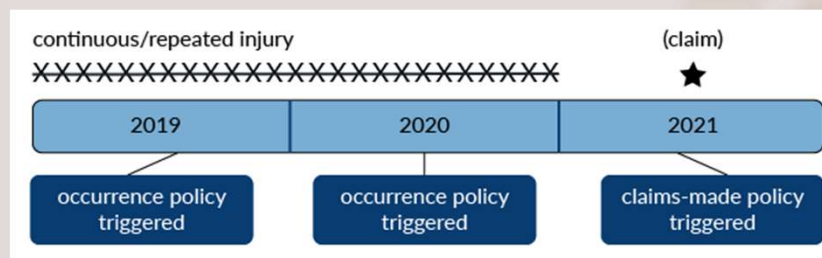
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Retroactive Dates

- A **Retroactive Date** is a provision found in many (although not all) claims-made policies that eliminates coverage for claims produced by wrongful acts that took place prior to a specified date, even if the claim is first made during the policy period.

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Comparison of Occurrence and Claims Made Triggers



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Retro Date Application Example

- For example, a January 1, 2020, retroactive date in a policy written with a January 1, 2020-2021, term, would bar coverage for claims resulting from wrongful acts that took place prior to January 1, 2020, even if claims (resulting from such acts) are made against the insured during the January 1, 2020-2021, policy period.

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Two Purposes of Retro Dates

- **(1)** to eliminate coverage for situations or incidents known to insureds that have the potential to give rise to claims in the future and
- **(2)** to preclude coverage for "stale" claims that arise from events far in the past, even if such events are unknown to the insured.
- In the former case, the retroactive date preserves the principle of "fortuity"—that is, the insurer should not be called on to cover the so-called burning building.
- In the latter instance, the retroactive date makes policies more affordable by precluding coverage for events that, while insurable, are remote in time.

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Coinsurance



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Defined – It's Risk Sharing

- A **Coinsurer** is one that shares the loss sustained under an insurance policy.
- A **Coinsurance Provision** is defined as a property insurance provision that penalizes the insured's loss recovery if the limit of insurance purchased by the insured is not equal to or greater than a specified percentage (commonly 80 percent) of the value of the insured property.

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Unless Waived or Suspended

- It is a contractual requirement of the insurance contract
- Normally seen at factors of 80%, 90%, 100%
- Its purpose
 - Not to punish the insured
 - To provide a financial incentive to the insured to carry a proper amount of insurance

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Coinsurance

FORMULA: $\frac{\text{DID}}{\text{PROMISE}} \times \text{Loss} = \text{Amount Paid (- deductible)}$

Example 1:

- \$1,000,000 Building Value
- 100% Coinsurance
- \$800,000 -- Amount of Insurance Carried
- \$100,000 -- Loss
- \$5,000 -- Deductible

$$\frac{\$800,000}{\$1,000,000} \times \$100,000 = \$80,000$$

Minus the \$5000 deductible

Example 2:

- \$1,000,000 Building Value
- 80% Coinsurance
- \$800,000 -- Amount of Insurance Carried
- \$100,000 -- Loss
- \$5,000 -- Deductible

$$\frac{\$800,000}{\$1,000,000} \times \$100,000 = \$80,000$$

Minus the \$5000 deductible

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Where Might We See It

- Commercial Property policies
 - Agreed Value is how we get is suspended for the term of the policy
- Inland Marine policies
 - EG: Cargo, Transportation, Builder's Risk, Installation floaters, Tools & Equipment
- Homeowners (but there it is called "insurance to value")

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Mortgagees, Loss Payees,
Lender's Loss Payable

PS: They Are Not Interchangeable

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Mortgagee

- A **mortgagee** is a financial institution that is the lender in a mortgage, holding a financial interest in the property.
- A **Mortgagee Clause** is a property insurance provision granting special protection for the interest of a mortgagee (e.g., financial institution that has an interest in the property) named in the policy, in effect setting up a separate contract between the insurer and the mortgagee.

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Lender's Loss Payable

- A **Lenders Loss Payable** endorsement is a commercial property policy endorsement that gives a creditor of the insured that has loaned money in connection with the insured's personal property the same rights and duties that a mortgage clause gives a mortgagee.

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Loss Payee

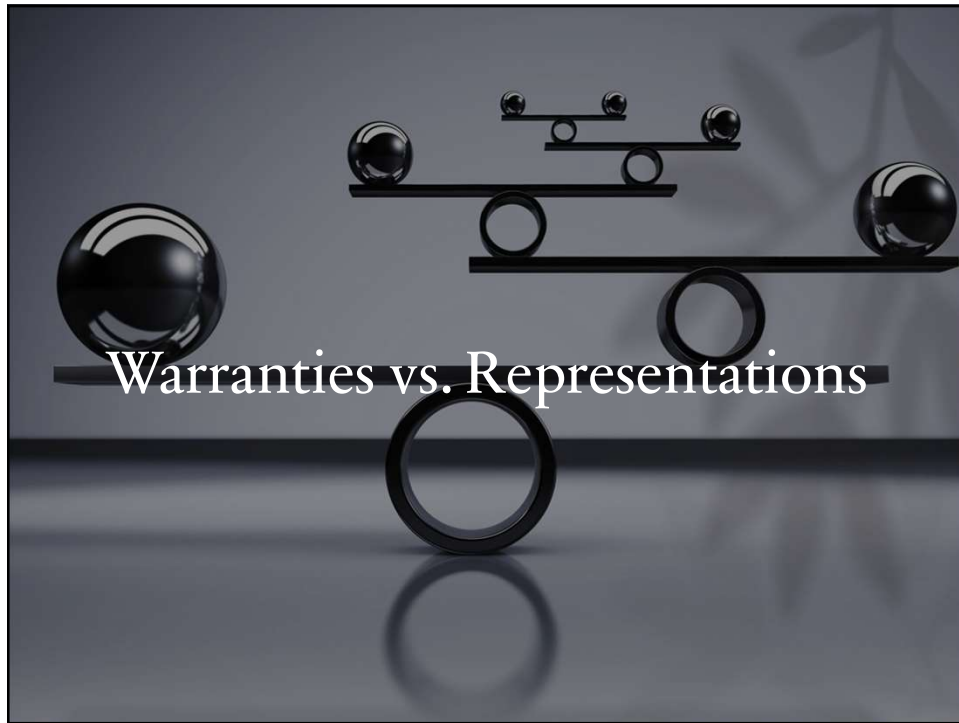
- The **Loss Payee** is a person or entity that is entitled to all or part of the insurance proceeds in connection with the covered property in which it has an interest.

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Key Differences

- The "loss payable" (loss payee) option merely requires the insurer to pay claims jointly to the insured and the loss payee as their interests may appear.
- Unlike the mortgageholders clause and the lender's loss payable option of this endorsement, it does not offer the loss payee any protection against the policy being invalidated by actions of the insured
- It does not require that advance notice of cancellation or nonrenewal be given to the loss payee

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Warranty Statement

- A warranty refers to a statement of fact given to an insurer by the insured concerning the insured risk which, if untrue, will void the policy.

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Representation Statement

- Misrepresentation is a false or misleading statement that, if intentional and material, can allow the insurer to void the insurance contract

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Where Might We Find Them

- On all applications for coverage
- Not all applications use warranty statements
- Some applications use representations
- Many use both

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A Few Examples...of Both ?

- Any other residence owned, occupied or rented?
- Has any insurance been transferred w/in agency?
- Is building retrofitted for earthquake?
- Is house for sale?
- Does the applicant obtain MVR verifications?
- Does applicant own, operate, or lease aircraft or watercraft?
- Any employees with physical handicaps?

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Be Aware

- Most (if not all) of the statements that are made by applicants in their attempt to procure Professional Liability, EPLI, D & O, and similar types of policies are WARRANTY statements
- As Such, if they are found to be untrue there is a distinct possibility of the VOIDING of coverage

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On Policies, However

- We also find Protective Safeguards Endorsements
 - CP 04 11 09 17
- We also find Burglary & Robbery Protective Safeguards
 - CP 12 11 09 17

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CP 04 11 09 17, Multiple Safeguards

- P-1, Automatic Sprinkler System
- P-2, Automatic Fire Alarm
- P-3, Security Service
- P-4, Service Contract
- P-5, Automatic Commercial Cooking Exhaust and Extinguishing System
- P-9, the protective system described in the schedule

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Schedule

PROTECTIVE SAFEGUARDS		
This endorsement modifies insurance provided under the following:		
COMMERCIAL PROPERTY COVERAGE PART STANDARD PROPERTY POLICY		
SCHEDULE		
Premises Number	Building Number	Protective Safeguards Symbols Applicable
Describe Any "P-9":		
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

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Beware...

- **A.** The following is added to the Commercial Property Conditions:
- **Protective Safeguards**
- As a condition of this insurance, you are required to:
 - **1.** Maintain the protective safeguards listed in the Schedule, and over which you have control, in complete working order;
 - **2.** Actively engage and maintain in the "on" position at all times any automatic fire alarm or other automatic system listed in the Schedule; and
 - **3.** Notify us if you know of any suspension of or impairment in any protective safeguard listed in the Schedule.

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Beware, Continued

- However, if part of an Automatic Sprinkler System or Automatic Commercial Cooking Exhaust And Extinguishing System is shut off due to breakage, leakage, freezing conditions or opening of sprinkler heads, notification to us will not be necessary if you can restore full protection within 48 hours.

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Beware, Finalized

- **B.** The following is added to the Exclusions section of:
 - Causes Of Loss – Basic Form
 - Causes Of Loss – Broad Form
 - Causes Of Loss – Special Form
- We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you failed to comply with any condition set forth in Paragraph **A.**

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CP 12 11, Multiple Safeguards

- BR - 1, Automatic Burglary Alarm
- BR - 2, Automatic Burglary Alarm
- BR - 3, Security Service
- BR - 4, the protective safeguard described in the Schedule

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Schedule

BURGLARY AND ROBBERY PROTECTIVE SAFEGUARDS		
This endorsement modifies insurance provided under the following:		
COMMERCIAL PROPERTY COVERAGE PART		
SCHEDULE		
Premises No.	Building No.	Protective Safeguards Symbols Applicable
Describe any "BR-4":		
Additional requirements, if any, for engagement of an automatic burglary alarm or other automatic system listed in this Schedule (other than the requirements of Paragraph A.2.):		
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.		

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Beware...

- **A.** The following is added to the Commercial Property Conditions:
- **Burglary And Robbery Protective Safeguards**
- As a condition of this insurance, you are required to:
 - **1.** Maintain the protective safeguards listed in the Schedule, and over which you have control, in complete working order;
 - **2.** Actively engage any automatic burglary alarm or other automatic system listed in the Schedule and maintain it in the "on" position during all non-work hours and whenever the premises are unoccupied;

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Beware, Continued

- **3.** Actively engage an automatic burglary alarm or other automatic system, or parts thereof, in accordance with any other requirements, if any, indicated in the Schedule; and
- **4.** Notify us if you know of any suspension of or impairment in any protective safeguard listed in the Schedule.
- However, notification to us of the suspension of or impairment in an automatic burglary alarm or other automatic system listed in the Schedule will not be necessary if you:

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Beware, Finalized

- **a.** Can restore full protection within 48 hours of the suspension or impairment;
- **b.** Provide at least one watchperson or other means of surveillance at the premises during all non-work hours and whenever the premises are otherwise unoccupied; and
- **c.** Provide at least one watchperson or other means of surveillance during work hours if the Schedule requires that the premises or part thereof be protected during work hours.

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Beware, Finally, Really

- **B.** The following is added to the Exclusions section of the Causes Of Loss - Special Form:
- **Burglary And Robbery Protective Safeguards**
- We will not pay for loss or damage caused by or resulting from theft if, prior to the theft, you failed to comply with any condition set forth in Paragraph **A.**

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Doctrine of Proximate Causation

A Nebraska Special

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Proximate Cause

- **Proximate Cause** is the cause having the most significant impact in bringing about the loss under a first-party property insurance policy, when two or more independent perils operate at the same time (i.e., concurrently) to produce a loss.

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In Tort Law

- What is the meaning of **Proximate Cause**?
- The actions of the person (or entity) who owes you a duty must be sufficiently related to your injuries such that the law considers the person to have caused your injuries in a legal sense.
- If someone's actions are a remote cause of your injury, they are not a proximate cause.

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“But For” Causation

- What is meant by **But For Causation**?
- The **but-for** test is a test commonly used in both tort law and criminal law to determine actual causation.
- The test asks, "but for the existence of X, would Y have occurred?"
- In tort law, **but-for** causation is a prerequisite to liability in combination with proximate cause.

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Two Nebraska Cases

- Cornhusker Casualty Co. v. Farmers Mutual Insurance
- 680 N.W.2d. 595 (2004) – Supreme Court of Nebraska
- Amanda Latzel et al v. Ronald Bartek et al
- 846 N.W.2d. 153 (2014 (Nebraska Supreme Court)

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Three Criteria to Establish Proximate Cause in Nebraska (2014)

- 1. Without the negligent action, the injury would not have occurred (essentially the “but for” rule.
- 2. The injury was a natural and probable result of the negligence.
- 3. There was no efficient intervening cause
- Of course, these rules will be applied on an individual case by case basis

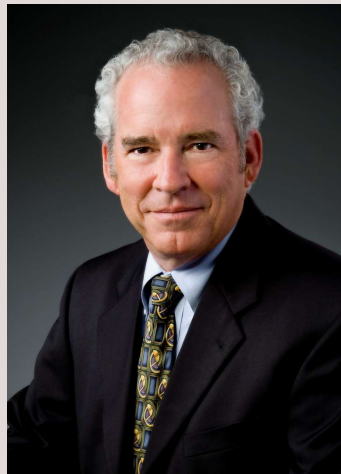
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Efficient Intervening Cause (2014)

- "Is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury"
- If the 3rd party's negligence is reasonably foreseeable, then the 3rd party's negligence is not an efficient intervening cause as matter of law.

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THANK YOU



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